REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2024-146005

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

_____ [redacted]
DATE SIGNATURE

In the matter between:

GARETH JOHN PETERS t/a PETER'S CONSTRUCTION Applicant

and

MAHESHWERA GONASEELAN NAIDU Respondent

JUDGMENT

ROBERTSON, AJ

Introduction

1 This is an application for an order giving effect to a determination handed down by an independent quantity surveyor in respect of building works executed by the applicant for the respondent. The applicant seeks an order directing the respondent to pay him R 2 547 912.44, being the difference between the value of the works as determined by the expert and the amount that is common cause to have been paid to date, together with *mora* interest and costs.

2 The application is brought as one of contractual enforcement. The applicant does not ask this Court to revisit, review or reconsider the merits of the expert's determination. He asks that the contractual mechanism agreed between the parties in clause 3 of the Memorandum of Agreement ("the MOA") dated 30 March 2017 be enforced.

3 The respondent opposes the application on the principal ground that the expert failed to properly discharge the mandate conferred upon him. He says the expert was required not only to determine the value of the works, but to also determine the indebtedness of one party to the other. On the respondent's interpretation of the MOA, the expert failed to make the determination contemplated by the agreement, and the application is accordingly bad in law.

4 The respondent further contends that there is a genuine dispute of fact between the parties on the underlying indebtedness, including alleged latent and patent defects and direct payments made by him to the applicant's suppliers.

Background

5 During or about July 2012, the parties concluded an agreement under which the applicant was engaged to perform certain building works. A dispute arose between them concerning the amount owing to the applicant in respect of the works performed. The applicant exercised a builder's lien over the property and refused the respondent access.

6 On 30 March 2017, the parties concluded the MOA for the purpose of resolving that dispute. In terms of the MOA, the applicant agreed to relinquish the lien, and

the parties agreed that an independent professionally registered quantity surveyor would be appointed to determine the extent of the works and the value thereof.

The MOA

7 The terms of the MOA which are central to this application are those contained in clause 3, headed “Determination of extent of the Works and value thereof”. The relevant subclauses provide as follows.

8 Clause 3.1 provides that the parties “will approach the Association to nominate and appoint an independent professionally registered quantity surveyor (PRQS) (“the quantity surveyor”) for purposes of determining the extent of the works and the value in respect thereof (“the determination”)”. The Association is defined as the Association of South African Quantity Surveyors.

9 Clause 3.4 provides that the quantity surveyor “shall act as an expert and shall determine the process for purposes of arriving at the determination, including but not limited to meetings with the Parties, calling for documentation from the Parties etc”.

10 Clause 3.6 provides that the determination “shall expressly set out the methodology, and basis upon which the quantity surveyor arrives at his evaluation of the value of the Works, as effected by Peters, and shall be published in writing to both Parties”.

11 Clause 3.8 is decisive of much of what is in issue and merits citation in full. It reads:

> “The determination shall be binding on the Parties, as a matter of contractual entitlement, and the Parties shall, with 5 (five) business days of receipt of the written determination, give effect thereto i.e. should it be determined that Naidu is indebted to Peters in respect of the Works, Naidu will with 5 (five) business days of receipt of the written determination, pay such amount to Peters. Similarly, should it be determined that Naidu has overpaid Peters, Peters shall with 5 (five) business days of receipt of the written determination, pay such overpaid amount to Naidu.”

12 Clause 3.10 provides that any party may challenge the determination by giving notice of an intention to refer the challenge to an arbitrator to be appointed by the Association of Arbitrators.

13 Clause 3.11 imposes two preconditions on the right of challenge.

13.1. First, the referral must be made within ten business days of receipt of the determination (clause 3.11.1).

13.2. Second, the challenging party must have "first satisfied the payment as reflected in the determination i.e. should it be determined that any Party should pay the other a certain amount, the Party being obliged to pay can only refer the challenge to the Arbitration if payment is made in accordance with the determination" (clause 3.11.2).

14 Clause 3.12 provides that, failing compliance with clause 3.11, "the determination shall become final and binding on both Parties, and shall be capable of being made an order of a competent Court". Clause 3.13 confirms that the determination may only be set aside by an order emanating from an arbitration challenge.

The Appointment of the Expert and the Determination

15 A professional quantity surveyor was duly appointed in accordance with the MOA.

16 The expert signed his determination on 22 August 2023 and published it to the parties by e-mail on 29 September 2023. He set out at paragraph 22 of the determination a summary of his findings (material cost; mark-up on materials; labour; mark-up on labour; preliminaries and general; and attendance on direct contractors and suppliers). Those figures totalled R 22 780 247.86, rounded to R 22 780 250.00.

17 Two notes were added immediately after the assessment table:

"Notes:

1. Owing to the effluxion of time, in preparing this assessment, no cognisance has

been taken of any patent defects that may have been evident at the time the works were handed over in March 2017, or for any latent defects which may have manifested thereafter.

2. The Value of the Works excludes any direct payments made by the Employer to any contractors and/or suppliers other than the Contractor."

18 At paragraph 23, under the heading "Determination", the expert concluded: "I have determined the Value of the Works to be R 22 780 250.00".

19 Neither party challenged the determination by referring the matter to arbitration in terms of clause 3.10 read with clause 3.11 of the MOA. Neither party has, to date, sought to review or set aside the determination. The respondent has not paid the difference between the determined value of the works and the amount that he has actually paid to the applicant. Hence the present application.

Common Cause Facts

20 Two matters are common cause on the papers.

21 First, the value of the Works as determined by the expert in paragraph 23 of the determination is R 22 780 250.00, and that figure is accepted by both parties. The respondent's answering affidavit, as well as the demand made by his attorneys on 3 October 2023 prior to litigation, treats the determined value as the starting point for any computation between the parties.

22 Second, the total amount paid by the respondent to the applicant in respect of the Works is R 20 232 337.56.

23 The difference between the determined value of the Works and the common-cause amount paid is R 2 547 912.44. That is the amount claimed by the applicant in this application.

The Issues for Determination

24 Three issues arise for determination:

24.1. what was the expert's mandate under the MOA, and was it discharged;

24.2. whether, on a proper construction of the MOA, payment of the determined amount follows as a matter of contractual entitlement from the determination, having regard to clauses 3.8, 3.11 and 3.12; and

24.3. whether there are genuine disputes of fact that preclude relief on motion.

The Expert's Mandate

25 The starting point is the language of the agreement, read in its context. The words must be interpreted in their textual, contextual and commercial setting.

26 Clause 3.1 in plain language identifies the task to be performed by the Quantity Surveyor: he is to determine "the extent of the Works and the value in respect thereof". The defined term "the determination" is given to that single exercise.

27 Clause 3.6 reinforces this by requiring the Quantity Surveyor to set out the methodology and the basis upon which he arrives at "his evaluation of the value of the Works". Nothing in clauses 3.1 to 3.6 confers on the expert a wider jurisdiction to determine the indebtedness of one party to the other.

28 Mr Tsheikila, who appeared for the respondent, submitted that clause 3.8 contemplates that the expert will determine indebtedness. According to that submission, the phrase "should it be determined that Naidu is indebted to Peters" would be rendered meaningless unless the expert's mandate were so understood. I am unable to agree.

29 On a coherent reading of clause 3, the words "should it be determined" in clause 3.8 do not enlarge the expert's mandate. They speak to what is to happen once the expert has performed the limited task assigned to him by clause 3.1.

30 Clause 3.8 regulates what is to happen once the determination is made. It tells the parties what to do after they receive the determination: if the determined value of the Works, read with what has already been paid, shows that Mr Naidu is indebted to Mr Peters in respect of the Works, Mr Naidu must pay within five business days; if the figures point the other way, Mr Peters must repay.

31 The resulting indebtedness flows from the contract read with the determination

and the common-cause payments already made. The expert was not required to make any further determination of indebtedness.

32 Three textual indicators support that reading:

32.1. First, the parties chose a Quantity Surveyor and not an arbitrator or an adjudicator to perform the task. A Quantity Surveyor is professionally equipped to value works; he or she is not (without an express mandate) appointed to adjudicate legal questions of indebtedness, set-off, latent or patent defects.

32.2. Second, clause 3.6 expressly directs the expert to explain how he arrives at his evaluation "of the value of the Works", and not at any wider determination.

32.3. Third, clause 3.11.2 expressly provides that the party obliged to pay must first satisfy the payment reflected in the determination before referring a challenge to arbitration. That is more consistent with a contractual mechanism in which the payment obligation flows from the determination itself than with a separate adjudication of indebtedness by the expert.

33 Mr Tsheikila's reliance on the fact that both parties pleaded indebtedness figures in their respective submissions to the expert cannot override the language of the agreement. The conduct of the parties pursuant to a contract may be a useful aid to interpretation, but it cannot override the express terms.

34 A party's mistaken assumption about the scope of an expert's jurisdiction does not enlarge that jurisdiction. If anything, the fact that the expert in his determination confined himself to a finding on the value of the Works and recorded explicitly in his two notes that he had taken no cognisance of defects or direct payments, confirms that he correctly understood the limits of his mandate.

35 I accordingly find that the expert's mandate was to determine the extent of the Works and the value thereof, and that he discharged that mandate.

Enforcement of the Determination

36 The next question is whether the applicant is, on the determination and the common-cause figures, contractually entitled to payment of R 2 547 912.44.

37 Clause 3.8 makes the determination "binding on the Parties, as a matter of contractual entitlement". It commands that the parties "give effect thereto" within five business days. It identifies the consequence: if it has been determined that Mr Naidu is indebted to Mr Peters in respect of the Works, Mr Naidu must pay.

38 On the determination, the value of the Works performed by the applicant is R 22 780 250.00. On the respondent's own version, he has paid R 20 232 337.56. There is, on the face of the determination and the common-cause figures, an indebtedness in respect of the Works in the sum of R2 547 912.44. Clause 3.8 obliges the respondent to pay that amount.

39 Clauses 3.11 and 3.12 govern the only contractual exit from that obligation. The respondent might have referred a challenge to arbitration within ten business days of receipt of the determination, but only on first satisfying the payment reflected in it. He did not do so.

40 By operation of clause 3.12, the determination has accordingly become final and binding and capable of being made an order of court.

41 The commercial purpose of clauses 3.8, 3.11 and 3.12 is clear. The determination is to be given effect to pending any challenge through the agreed arbitral process. A contrary interpretation would substantially undermine the contractual mechanism agreed between the parties.

42 The respondent's attorneys responded to the determination by letter dated 3 October 2023. Their computation of reciprocal amounts proceeded from the value of the Works as determined by the expert. That conduct sits uneasily with the contention now advanced that the determination is bad in law or incapable of enforcement.

43 The respondent further submitted that there is no reason why the burden of referring a matter to arbitration should fall on him alone. He observed that the applicant has equally not pursued arbitration and that, on his construction, both

parties would be equally unhappy with the determination. The submission proceeds from the assumption that the expert ought to have determined indebtedness. On the construction I have adopted, that assumption is wrong. The applicant has no quarrel with the determination as made. It is the respondent who, having received a determination materially lower than the amount originally claimed by the applicant, but which nonetheless required him to make further payment, has elected neither to pay nor to challenge.

44 The respondent's offer in his answering affidavit to waive the timing requirement in clause 3.11.1 does not assist him. It does not touch the central pre-condition in clause 3.11.2, which is payment. He cannot rewrite the bargain by selective waiver.

Alleged Dispute of Fact

45 The respondent contends that the disputes about defects, direct payments and overall indebtedness are real, genuine and bona fide, such that final relief cannot be granted on the papers. The submission misconceives the nature of the present application.

46 The applicant's claim is not for a money judgment based on a fresh enquiry into the parties' reciprocal indebtedness. It is for an order giving contractual effect to a determination which is, by force of clauses 3.8 and 3.12, binding upon the parties as between them.

47 The disputes concerning defects and direct payments do not alter the fact that the expert made the determination contemplated by clause 3.1. To the extent that the respondent contends that those matters were incorrectly dealt with, insufficiently considered, or ought to have affected the ultimate outcome, those complaints concern the correctness or completeness of the determination itself. They cannot defeat the contractual obligation to give effect to the determination in these proceedings.

48 In the result, there is no dispute of fact going to the merits of the present application. The relevant facts, namely the conclusion of the MOA, the appointment of the expert, the issuance and publication of the determination, the

determined value of the Works, the amount paid, and the absence of any challenge in terms of clause 3.11, are common cause or are placed beyond reasonable dispute on the papers.

Interest

49 Clause 3.8 required payment within five business days of receipt of the determination. The determination was published by e-mail on 29 September 2023. *Mora* accordingly arose on 4 October 2023. The applicant is entitled to *mora* interest on the amount of R 2 547 912.44 at the rate of 11.5% per annum from 4 October 2023 to date of payment.

Costs

50 Costs follow the result.

51 Counsel for the applicant pressed for costs on Scale C, including the costs of two counsel. Counsel for the respondent fairly indicated, with reference to the conduct of the matter on his side, that there was no opposition to costs on that scale should the application succeed.

52 The matter concerns the contractual enforcement of an expert determination arising from a multi-year construction dispute. The papers comprise approximately 456 pages. The issues raised, although ultimately unsuccessful, required careful consideration. In my view, the engagement of two counsel was reasonable and the appropriate scale is Scale C.

Order

53 In the result, I make the following order:

53.1. It is declared that the expert's determination dated 22 August 2023 and published on 29 September 2023 is binding upon the parties as a matter of contractual entitlement.

53.2. The respondent is ordered to give effect to the said determination by paying the applicant the sum of R 2 547 912.44 (two million five hundred and forty-seven thousand nine hundred and twelve rand and forty-four

cents) within five (5) days from the date of this order.

53.3. The respondent is ordered to pay mora interest on the amount of R 2 547 912.44 at the rate of 11.5% per annum, calculated from 4 October 2023 to the date of final payment, both days inclusive.

53.4. The respondent is ordered to pay the costs of the application on Scale C, such costs to include the costs of two counsel where so employed.

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CL ROBERTSON
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by upload to Caselines. The date for hand-down is deemed to be 2 June 2026.

APPEARANCES:

For Applicant:	A J Glendinning and A J Cronje
Instructed by:	Otto Krause Inc. Attorneys
For Respondent:	S Tsheikila
Instructed by:	Fairbridges Wertheim Becker

Date of hearing: 12 May 2026

Date of judgment: 2 June 2026