

**IN THE HIGH
FREE STATE**



**THE REPUBLIC OF SOUTH AFRICA
CAPE TOWN**

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|------------------------------|--------|
| Portable: | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |

Case No.: 5009/2021

In the matter between:

PHETHOGO CONSULTING (PTY) LTD

First

Applicant

DIKOPO CONSTRUCTION (PTY) LTD

Second

Applicant

RAZZMATAZZ CIVIL (PTY) LTD

Third

Applicant

SVP QUANTITY SURVEYORS AND

PROJECTS MANAGERS (PTY) LTD

Fourth Applicant

CONSTRUCTION SAFETY SERVICES CC

Fifth

Applicant

and

THE MEC: FREE STATE PROVINCIAL GOVERNMENT:

DEPARTMENT OF PUBLIC WORKS AND INFRASTRUCTURE

Respondent

CORAM:

VAN RHYN, J

HEARD ON: 13 OCTOBER 2022

DELIVERED ON: 7 DECEMBER 2022

- [1] The applicants claim payment of an amount of R 7 442 219 .82 and interest on the said amount based on an interim payment certificate issued in terms of a construction contract. The respondent acknowledges its indebtedness to the applicant, however disputes the correctness of the amount claimed and furthermore contends that the parties are in the process of resolving the matter which renders the application premature.
- [2] The first to fifth applicants are known as Dikopo JV (“Dikopo JV”), a joint venture consortium that came into being pursuant to a written agreement concluded between them on 13 August 2014 and amended on 22 April 2016. The respondent is the Member of the Executive Council: Free State Provincial Government: Department of Public Works and Infrastructure.
- [3] Dikopo JV operates in the construction industry and specializes in all forms of civil and building construction. During 2015 the respondent invited tenders for the development and construction on a new school, the G M Polori Primary School, at Hoopstad. On 14 January 2016 Dikopo JV was awarded the tender. The employment letter and the conditions of contract as contained in the tender documents, submitted by Dikopo JV, formed the basis of the agreement between the respondent and Dikopo JV. The agreement between the parties was further governed by the JBCC Series 2000 Principle Building Agreement.
- [4] The terms of the agreement, whether express, implied or tacit were the following:
- 4.1 The contract price was determined at R52 990 555.96 (Fifty Two Million Nine Hundred and Ninety Thousand Five Hundred and Fifty Five Rand and Ninety Six Cent), inclusive of Value Added Tax together with any adjustments using the contract price adjustment provisions (“CPAP”). CPAP is used for the adjustment of fluctuations in the cost of labour, plant, materials and goods as stated in the schedule.

- 4.2 The anticipated completion of the works was cast at 18 months, thus at 15 August 2017 but an extension of the time was approved until 25 September 2019.
- 4.3 The works set out in the Bill of Quantities were the estimated quantities of the works and therefore not to be taken as the actual and final quantities of work to be completed.
- 4.4 In terms of the provisions of Clause 31.1 of the principal building agreement, the principal agent shall issue an interim payment certificate every month until the issue of the final payment certificate. For purposes of payment, the respondent's appointed quantity surveyor and agent would ascertain and determine the value of the works after Dikopo JV had measured the work executed each month and the material on site together with supporting statements.
- 4.5 The principal agent shall issue each interim payment certificate by not later than an agreed date of the month. The interim payment certificate shall be issued to the contractor, Dikopo JV with a copy to the employer, being the respondent. The value certified in an interim payment certificate shall, *inter alia*, include the following: a reasonable estimate of the value of the work executed, a reasonable estimate of the value of the materials and goods and shall separately include the CPAP adjustment.
- 4.6 In terms of the provisions of clause 31.9 the respondent shall pay Dikopo JV the amount certified in the interim payment certificate within twenty- one (21) calendar days of the date of issue of the payment certificate.
- [5] The respondent appointed the first applicant, Phetogo Consulting (PTY) LTD as its appointed principal agent. On 7 February 2017 Dikopo JV started with the construction work. Since February 2017 Dikopo JV continued to submit interim payment certificates on a monthly basis to the principal agent. After measuring the work and determining the value, the principal agent would issue interim payment certificates supplemented by tax invoices which would be presented to the respondent for payment.

- [6] On 22 September 2020 an interim payment certificate, Payment Certificate No 25, was issued by the principal agent in accordance with the agreement and the scope of works in the amount of R7 442 219.82 (Seven Million Four Hundred and Forty Two Thousand Two Hundred and Nineteen Rand and Eighty Two Cent), VAT included. The interim payment certificate had to be paid by no later than 14 October 2020.
- [7] Due to the respondent's failure to make payment in terms of the interim payment certificate, a letter of demand was sent to the respondent on 15 March 2021. Dikopo JV eventually launched the present application on 27 October 2021 after a number of interactions in an attempt to resolve the matter, proved unsuccessful.
- [8] The application is opposed by the respondent. The matter was enrolled for hearing on 25 August 2022. Due to the respondent's failure to append certain annexures to the answering affidavit, the application was postponed to 13 October 2022 with leave to the respondent to file a condonation application on or before 31 August 2022. The parties agreed as to the dates for the filing of further affidavits regarding the application for condonation and the respondent was ordered to pay the costs occasioned by the postponement on the scale as between attorney and client.
- [9] The respondent failed to file the application for condonation as ordered and filed same on 9 September 2022. However, the affidavit deposed to by the Head of the Department of the respondent failed to address the reasons for the delay in filing the application for condonation. Mr Grobler SC, counsel on behalf of Dikopo JV argued that Dikopo JV has been deprived of a hearing of this matter on the merits due to the failure of the respondent to abide by the order of this court. On behalf of Dikopo JV it was suggested that the application on the merits should proceed and that the application for condonation be granted. I was satisfied to grant such condonation in order to fully ventilate the dispute in the interest of justice.
- [10] Mr Grobler SC argued that, if issued on strength of a binding agreement, a certificate for payment issued by an engineer or quantity surveyor, final or interim, is treated as a liquid document with the result that it amounts to an

acknowledgment of debt. A certificate of payment constitutes a separate and self-supporting cause of action, which can only be challenged on limited grounds. On behalf of Dikopo JV it is submitted that the respondent has not shown a defence to the claim for payment in that the grounds upon which the application is opposed contradict the written wording of the agreement between the parties.

- [11] In his heads of argument, Mr Khokho, counsel on behalf of the respondent, contends that the effect of the relief sought by Dikopo JV would constitute condonation of an illegality which would offend against the principle of the separation of powers. The principle of the separation of powers dictates that the discretionary power is vested with the administrative body and should be exercised by it and not by the judiciary.
- [12] The respondent contends that the court does not have the power to interfere with the internal processes which includes the formulas, methods and calculations regarding the disputed payment due to Dikopo JV and therefore, so the argument goes, the court has no power to grant the order for payment of the interim certificate.
- [13] During February 2022 a meeting was held between the respondent and the legal representatives of Dikopo JV. The meeting was postponed to 7 March 2022. Due to the failure of the legal representatives of Dikopo JV to attend the postponed meeting and the subsequent enrolment of this matter for hearing, Mr Khokho argued that the application was brought pre-maturely as the parties were still in the process of discussing the issues and trying to resolve the dispute.
- [14] Mr Khokho submitted that it was incumbent upon Dikopo JV to present its final account in order for the respondent to reconcile previous payments made and therefore the interim payment cannot be made while the final invoice is still outstanding. furthermore, the court does not have the power to grant the application for payment on the basis that the amount claimed is disputed by the respondent. The respondent's understanding and proposal is that the base date to be used for the CPAP must be July 2017 on the basis that this was the anticipated date for the completion of the project.

[15] The award of the tender to Dikopo JV was constituted by a series of written documents, which also included the Principal Building Agreement (annexure “TPM8”). In terms of clause 42.4.6 of the Principal Building Agreement, the contract value is to be adjusted using CPAP indices. In terms of clause 32.13 where CPAP is to be used, it was agreed that the base month is August 2015. On 26 August 2020 a letter of notification was issued to the principal agent by S Pailman, a candidate quantity surveyor employed by the respondent, to confirm the approval of the CPAP to the project as per the signed contract of the project.

[16] Contractually and in the absence of any claim for rectification of the agreement, the respondent is bound by the terms of the agreement. The amount claimed by Dipkoko JV is founded upon the respondent’s own calculations and its application of the CPAP date. An email dated 21 September 2020 from the said S Pailman addressed to Wally Botha, an expert appointed by the Department of Public Works, confirms that the CPAP was “checked”. On 26 October 2020, as is evident from a further email appended to the replying affidavit, L Moeketsi of the respondent informed Dipkoko JV that:

“... the submission was approved and payment received, however Education send us a communique to say all contractual payments need to be 20% of the original contract amount and if more than that is required Provincial Treasury should approve. Mr Tokwe is engaging Treasury in this regard and I will provide your feedback as soon as the reply is received”.

[17] What is apparent from the contents hereof is that neither the application of the CPAP date nor the calculation of the amount claimed was disputed by the respondent during October 2020. A certificate of payment issued by an engineer or agent, final or interim, is treated as a liquid document with the result that it amounts to an acknowledgement of debt signed by the employer in favour of the contractor. In **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture**¹ the court held as follows:

“[27] Gorven AJ pointed out, with reference to *Randcon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd* 1973 (4) SA 181 (D) at 183H - 184H that a final payment

¹ 2009 (5) SA 1 (SCA) at [27].

certificate is treated as a liquid document since it is issued by the employer's agent, with the consequence that the employer is in the same position it would have been in if it had itself signed an acknowledgment of debt in favour of the contractor. Relying further on the Randcon case (at 186G - 188G), 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] Counsel for the respondent sought to persuade me that the application is replete with dispute of facts which goes to the root of Dipkoko JV's case. From the answering affidavit it appears as if the only issue in dispute is the calculation of the amount claimed on the basis that the CPAP used should be varied to read July 2017 and not August 2015.
- [19] The express words of clause 42. 4.6 make it abundantly clear that the contract value is to be adjusted using CPAP and where CPAP is to be used, the base month is August 2015. The founding papers were perfectly and validly based upon a claim for payment in terms of the duly issued interim payment certificate.
- [20] A certificate of payment, which in the matter at hand was clearly certified as correct, due and payable, could only be avoided if the engineer exceeded his authority and/or allegations of fraud, collusion or undue influence were made by the respondent.² Clause 31.1 of the Principle Building Agreement makes provision for the rendering of interim payment certificates supported by a tax invoice for the amount due. Mr Khokho's argument that payment of the amount claimed in terms of the interim payment certificate would amount to unjust enrichment is without substance.
- [21] The respondent's further argument that payment of the interim payment certificate may not be ordered by the court in circumstances where the final invoice has not yet been submitted, is in conflict with the terms of the agreement between the parties. I furthermore agree with the argument on behalf of the applicant that the respondent's budgetary issues as reflected in the email regarding the need to obtain approval from the Free State Provincial

² Smith v Mouton 1977 (3) SA 9 (W); Hoffman Meyer 1956 (2) SA 752 (C).

Treasury, is of no concern to Dokopo JV and does not amount to a defence against the claim for payment. The meeting scheduled for 7 March 2022 was agreed to with the view of settling the dispute. The said meeting was arranged subsequent to the issue of this application and therefore, the contention that the application is premature, is irrational.

[22] The respondent failed to advance any of the limited grounds upon which the liquidity of an interim payment certificate may be attacked.

ORDER:

[23] In the result the following order is granted:

1. The respondent shall pay to the applicants the amount of R 7442 219.82 (Seven Million Four Hundred and Forty Two Thousand Two Hundred and Nineteen Rand and Eighty Two Cent).
2. The respondent shall pay default interest on the amount of R 7442 219.82 (Seven Million Four Hundred and Forty Two Thousand Two Hundred and Nineteen Rand and Eighty Two Cent), at the rate of 7% per annum calculated from 14 October 2020 until date of final payment.
3. The respondent shall pay the applicants' costs of the application.

VAN RHYN, J

On behalf of the Applicants:
Instructed by:

ADV. S GROBLER SC
GRAHAM ATTORNEYS
BLOEMFONTEIN

On behalf of the Respondent:
Instructed by:

ADV. N D KHOKHO
STATE ATTORNEYS
BLOEMFONTEIN

