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

Case No:43891/2019

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

7 May 2024 **.....**
DATE

In the matter between:

GROUP FIVE CONSTRUCTION (PTY) LTD. Applicant
(In business Rescue)

And

DR SOMADODA PATRICK MAYIBONGWE FIKENI A.O. Respondents

_____.

JUDGMENT

_____

NOKO J

Introduction.

[1] The applicant launched an application for leave to appeal the judgment and order I granted on 2 February 2024 wherein I dismissed its claim for payment of the sum of R1 728 534.00. The said claim was predicated on the certificate of final completion issued by the principal agent appointed by Independent Development Trust (*IDT*), represented by the respondents.

Background.

[2] The background of this case has been comprehensively mosaicked in the judgment I penned and will not be regurgitated in this judgment. In brief, the applicant entered into a principal building agreement (*PBA*) with IDT for the construction of the Nelspruit High court building. Lombard Insurance Company Limited (*Lombard*) issued a construction guarantee in favour of IDT for the due fulfilment of the constructions work undertaken by the applicant. IDT appointed a principal agent to manage the construction work and to, *inter alia*, issue payment certificates.

[3] The principal agent issued a final payment certificate (FC) for the amount stipulated in paragraph 1 above and the applicant demanded payment. IDT refused to pay as the certificate identified defects which must be remedied by the applicant prior effecting the payment.

[4] The applicant instituted legal proceedings to claim the said amount which I dismissed. The applicant is aggrieved thereby and now seeks to appeal same hence launched this application for leave to appeal.

Submissions and contentions.

Applicant's contentions and submissions.

[5] The applicant's counsel contended that I erred in not finding that clauses 34.10 read with clause 41 of the PBA specifically enjoins IDT to pay amount certified in the final payment certificate within twenty-one (21) calendar days from the date of issue of the certificate. Further that such payment should have been effected irrespective of whether there were defects in the construction work done. Ordinarily, so the argument continued, the certificate issued in terms of clause 26 of the PBA is construed as a *prima facie* evidence as to the sufficiency of the works and that the works needed to be completed have been fulfilled.

[6] The obligation to pay is effective even if there could be patent defects to be remedied after final payment. IDT may still hold the applicant liable for the rectification of latent defects during the period of 10 years following the date of final completion. Now that the applicant disputes that it is liable to remedy the defects identified in the FC, IDT may have to launch a damages claim against its own principal agent.

[7] Such a certificate, so the argument continued, is akin to a signed acknowledgement of debt and it '… *gives rise to a new cause of action subject to the terms of the contract*.'[1] (underlining added). It was therefore incorrect for me, so it is

[1] Para 19 of the Applicant's Heads of Argument at 7-15.

argued, to introduce a term in the contract that IDT could withhold payment despite the final certificate being issued. To this end, it is argued, there are reasonable prospects of success.

[8] The importance of payment certificates in the construction space is generally intended to maintain cash flow. As such it has been construed as a liquid document and giving rise to a new cause of action.[2] Without giving effect to the final certificate the applicant would not have mechanism to obtain payment and the guarantee by the *Lombard* would not lapse. The lapsing of the guarantee is triggered by final payment and as such the applicant would therefore also not obtain a refund of the remainder of the guarantee.

[9] If the certificate is not given effect to as it is the norm or general practice it means that the employers would readily be allowed not to fulfil their contractual obligations and this would have negative implications for the whole construction industry. It would extend also to entities which provides guarantees in the construction space.

Respondents' contentions and submissions.

[10] On the other hand, the respondents contended that the certificate imposes obligations on both parties. Payment should be effected against the discharge of the reciprocal obligation by the applicant to remedy the defect. The remedying of defects would have been undertaken and completed within a period of 21 days failing which the applicant was not entitled to the payment.

[2] Para 25 of the Applicant's Heads of Argument at 7-16.

Legal principles and analysis.

[11] Section 17 of the Superior Court Act provides that leave to appeal would be granted where the court is, *inter alia*, of the opinion that the appeal would have a reasonable prospect of success and/or further that there is a compelling reason for the appeal to be heard.

[12] It is now trite[3] that the provisions of section 17 introduced a higher threshold to be met in the application for leave to appeal and the usage of the word '*would*' require the applicant to demonstrate that another court would come to a different conclusion.

[13] The mere possibility of success, an arguable case or one that is not hopeless is not enough.[4] There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal[5].

[14] Ordinarily possible defences which may be raised against demand for payment as per final certificate include *'… 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'.*[6] If the architect as an agent has exceeded his mandate; "*where the engineer issued a certificate that were not drawn up in accordance with the terms of the written contract between the parties but in terms of an oral variation made by the engineer, which he was not authorised to make. The relevant certificate were therefore held to be invalid'.*[7] *In the Portuguese Plastering case certificates had been issued prematurely*

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[3] *Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325. *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016), *Acting National Director of Public Prosecutions and Others v Democratic Alliance: In Re Democratic Alliance v Acting Director of Public Prosecutions and Others* 2016 ZAGPPHC 489.
[4] *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016) at para 17.
[5] *S v Smith* 2012 (1) SACR 527.
[6] *Smith v Mouton* 1977(3) 9 (WLD), para A-B at p13.
[7] *ibid* at para A – C. p13.

before the time specified in the contract and were declared invalid.[8] From the aforegoing it follows that the assertion that the final certificate is irrevocable and unequivocal acknowledgement is overly optimistic.

[15] It is trite that the effect of the final certificate of payment is usually intended to be conclusive evidence of the value of the works, that the works are in accordance with the contract and the contractor has performed all his obligations under the contract. The certificate issued in this instance categorically state that the construction work is not in accordance with the contract or is defective. The certificate identified the work which is defective and require same to be rectified. The assertion that the work is not completed is not disputed by the applicant who stated that same may be rectified after the payment. That notwithstanding the applicant still disputes that such work need be completed by itself.

[16] The arguments advanced by the applicant are not sustainable. First, the applicant's submission seems to suggest that the *'form'* must be considered and not the *'substance'*. The applicant's contends that once a certificate is labelled final then *cadit questio* and it does not matter what is being certified. Second, the certificate states that there are defects which were identified before the final certificate. The contract states in clause 27.1 of the PBA that '*Defects that appear up to date of final completion shall be addressed in terms of 24.0 and 26.0,'* which process has not been complied with.

[17] Third, payment as per final certificate would release *Lombard* from its obligations predicated on the guarantee as such payment would compel IDT to return the guarantee. It would follow that *Lombard* would be exempted to guarantee the defects which were identified before the final certificate was issued. This would leave IDT in a

[8] *Ibid* at para D p 13.

precarious position especially because the applicant dispute that it is responsible to remedy the defects.

[18] Fourth, the certificate provides that the applicant is required to rectify some defects but the applicant denies its obligation to rectify the said defects. This is a challenge to the certificate and the applicant cannot be allowed to be selective (to approbate and reprobate) regarding the binding effect of the certificate.

[19] Fifth, the certificate does not indicate which amount outstanding to the applicant is in respect of the outstanding defective work identified in the FC which implies that the applicant would be paid as if the constructions work has been completed.

[20] It is axiomatic that though the final certificate signify that construction work is completed the certificate in this *lis* clearly certified that construction work is not completed. As such the argument that this should be ignored cannot be countenanced at any level.

[21] To this end the contention that my judgment is bringing about crisis and calamity in the construction industry/space is without legal basis and gratuitous. There is no magic in the certificate issued in this *lis* to which one would contend that the interpretation I attached thereto is mind-boggling.

[22] In the premises the applicant has failed to demonstrate that the requirements set out in the Superior Court Act were satisfied and the application for leave to appeal is bound to be dismissed. Therefore, I find that no other court would come to a different conclusion.

Costs

[23] The general principle is that the issue of costs is within the discretion of the court. In addition, it is also a general principle that the costs should follow the results. There is no basis to uproot the said principle and I therefore hold that the application is bound to be dismissed with costs.

Order

[24] In the premises I grant the following order:

That the application for leave to appeal is dismissed with costs

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M V Noko
Judge of the High Court

This judgement was handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **7 May 2024** at 16:00**.**

Date of hearing:	8 April 2024
Date of judgment:	7 May 2024

Appearances

For the Applicants:	Adv Willis SC.
Attorneys for the Applicants:	Stephen g May Attorney.
For the Respondents:	Adv N Riley
Attorneys for the Respondents	Darryl Furman & Associates