



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case no. 20967/2021

Before: The Hon. Mr Justice Binns-Ward
Hearing: 7 June 2023
Judgment: 10 July 2023

In the matter between:

UMLAZI CIVILS (PTY) LTD

Applicant

and

**CONCOR CONSTRUCTION (PTY) LTD
t/a CONRADIE DEVELOPMENT**

First Respondent

**BVI CONSULTING ENGINEERS
WESTERN CAPE (PTY) LTD t/a BVI**

Second Respondent

**JUDGMENT
Delivered by email and listing on SAFLII**

BINNS-WARD J:

[1] In its notice of motion, the applicant seeks an order against the first respondent for payment of the sum of R6 725 255.71, together with interest thereon *a tempore morae*. The

claim is founded on an interim payment certificate issued in favour of the applicant, qua ‘Contractor’, by the second respondent in terms of a standard form building contract, Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (1999 edition, as amended) (commonly known as ‘FIDIC’¹), to which the applicant and the first respondent are party.² The second respondent is the ‘Engineer’ appointed by the first respondent, qua ‘Employer’, for the purposes of the contract. The Engineer is responsible in terms of the contract for issuing interim payment certificates during the execution of the construction work, which the Employer, subject to the provisions of the contract, is bound to honour.

[2] The pertinent provisions of the contract appear to be the following:

1. Clause 3.1, s.v. ‘*Engineer’s Duties and Authority*’: ‘*Except as otherwise stated in these Conditions:*
 - (a) ...
 - (b) ...
 - (c) *any approval ... certificate ...or similar act by the Engineer ... shall not relieve the Contractor from any responsibility he has incurred under the Contract, including responsibility for errors, omissions, discrepancies and non-compliances.*’
2. Clause 3.3, in which the parties inserted the following: ‘*In addition to the actions stipulated in the General Conditions whereby the Engineer shall first obtain the approval of the Employer, the Employer’s approval shall also be obtained before taking any action under sub-clauses 8.4, 11.9, 13.3, and 20.1 as amended in these Particular Conditions.*’

¹ After the Fédération Internationale des Ingénieurs-Conseils, under whose auspices it is published.

² Certain provisions of the standard form contract were amended in the deed of agreement concluded between the applicant and the first respondent, but none of the amendments is material for the purposes of determining the application.

3. Clause 13.3, s.v. *‘Variation Procedures’*, in which the parties inserted the following:
‘Each instruction to execute a Variation, unless the Variation is to be executed on a Daywork basis, shall be a written instruction presented in the form of a Variation Order. The Variation Order shall be presented to the Employer, who shall signify his approval before the order is signed by the Engineer and issued to the Contractor, who shall acknowledge his acceptance by signing the order. The Contractor shall not accept a Variation Order that is not approved and signed by the Employer.’

4. Clause 14.3, s.v. *‘Application for Interim Payment Certificates’*, which provides that the Contractor shall submit a statement to the Engineer after the end of each month during the execution of the contract setting out, with supporting documentation, the estimated contract value of the works executed up to the month-end in question and reflecting the deduction of amounts certified in all the preceding payment certificates.

5. Clause 14.6, s.v. *‘Issue of Interim Payment Certificates’*, which provides, in its amended form, that the Engineer shall within 14 days after receiving a statement and supporting documents in terms of clause 14.3 from the Contractor issue to the Employer an interim payment certificate which shall state, with supporting particulars, the amount which the Engineer fairly considers to be due. Insofar as applicable on the relevant facts, clause 14.6 further provides that an interim payment certificate shall not be withheld, although *‘if any thing supplied or work done by the Contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been effected’*, or if the Contractor has not carried out any work directed by the Engineer, the value of such work may be withheld until the work has been performed. The subclause also provides that *‘[t]he Engineer may in any Payment Certificate make any correction or*

modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent or satisfaction'.

6. Clause 14.7, as amended, provides s.v. 'Payment' that '[t]he Employer shall pay to the Contractor:

(a) ...

(b) *the amount certified in each Interim Payment Certificate within 35 days after the Engineer receives the Statement and supporting documents; and*

(c)'

7. Clause 20.1, s.v. 'Contractor's Claims', provides for the means whereby the Contractor is required to pursue any claims it might have for extensions of time and additional payments under any of the provisions of the contract. It provides that payment certificates will include provision for any such amounts '*as have been reasonably substantiated as due under the relevant provision of the Contract*'. The parties inserted a provision into the standard form clause as follows: '*If an extension of time is granted the Contractor shall be paid such time-related Preliminary and General allowances as are appropriate having regard to any other compensation which may already have been granted in respect of the circumstances concerned. Payment of costs additional to the above will only be considered if the costs derive from claims that fall within the terms of Clause 13 (Variations and Adjustments) and/or Sub-clause 17.3 (Employer's Risks)*'.

8. Clause 20.2, s.v. 'Appointment of the Dispute Adjudication Board' ('DAB'), which provides for disputes to be adjudicated by an adjudication board in accordance with clause 20.4. The standard terms contemplated the appointment of a board consisting

of either one or three persons. A single adjudicator was appointed in terms of the agreement currently under consideration.

9. Clause 20.4, s.v. '*Obtaining Dispute Adjudication Board's Decision*' provides for how a decision is to be obtained from the adjudicator(s). It further provides that if either party is dissatisfied with the adjudicator's determination, it may give notice thereof within a stipulated period, whereupon the dispute may be referred to arbitration. Failing the giving of such notice of dissatisfaction, the adjudicator's decision becomes final and binding on both parties.

10. Clause 20.6, s.v. '*Arbitration*' provides for the 'final settlement'³ (unless otherwise agreed by the parties) of any unresolved dispute by arbitration. It gives the arbitrator(s) '*full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute*'.

[3] The current proceedings concern the applicant's claim for payment in terms of (interim) payment certificate no.17, signed by the Engineer on 2 November 2021, which purports to be '*[f]or the Period 26/10/2021 to 26.10.2021*'. The payment part of the certificate provided as follows:

³ The wording used in the contract is '*the dispute shall be finally settled*'.

SUMMARY OF PAYMENTS TO DATE					
DETAILS OF PAYMENT	General & Roadworks		Structures		TOTAL
	From page	Total	From page	Total	
Total of Scheduled Work done to date	P3	46 859 347.12	P3	0.00	46 859 347.12
Total of Variations to date	P4	3 267 485.64	P4	2 379 108.03	5 646 593.67
SUBTOTAL		50 126 832.76		2 379 108.03	52 505 940.79
Deduct Total of Reduced Payment to date	P5	0.00	P5	0.00	0.00
Add Total Adjustment in Value of Special Materials	P6	0.00			0.00
TOTAL VALUE OF WORK DONE TO DATE		50 126 832.76		2 379 108.03	52 505 940.79
Add 80% of Materials on Site	P7	0.00	P7	0.00	0.00
SUBTOTAL		50 126 832.76		2 379 108.03	52 505 940.79
Deduct retention of 0% of Total Value of Work to Date (Unlimited).					0.00
Penalties Reversed to ZERO days as per Adjudication Ruling 26.10.2021					0.00
TOTAL AMOUNT DUE TO DATE					52 505 940.79
Deduct total of previous payments (excluding VAT)					(46 695 355.87)
NET AMOUNT DUE FOR PAYMENT IN THIS CERTIFICATE (EXCLUDING VAT)					5 810 584.92
ADD 15% VAT					871 587.74
AMOUNT NOW DUE (INCLUDING VAT) excluding interest in Penalties					6 682 172.66
Interest on Penalties Levied as per Calculation supplied					43 083.05
AMOUNT NOW DUE FOR PAYMENT (INCLUDING VAT & NO VAT on Interest)					6 725 255.71

The certificate document makes provision on its face for signature by the Engineer (or the ‘Engineer’s Representative’), the ‘Contractor’s Representative’ and the Employer. The copy of the certificate attached to the founding papers bears what purport to be the signatures of the Engineer and the Contractor’s Representative. There is no indication that it was signed by or on behalf of the Employer.

[4] It is evident from the certificate and the applicant’s invoice submitted to the second respondent under cover of a letter by the applicant’s attorney, dated 27 October 2021, (annexures UC 6 and UC 7, respectively, to the founding affidavit) that it is related to an ‘Adjudication Ruling’ of 26 October 2021. The uncontested evidence is to the effect that the adjudication concerned six claims by the applicant for extensions of time and associated additional costs. Five of those claims were advanced individually and the sixth, brought in the alternative to the forementioned, was a global claim incorporating the five individual claims as a single claim predicated on the Engineer’s alleged previously given approval of those claims. The applicant alleged that the Engineer’s approval of its claims had been implicit in its approval of a revised timetable for the execution and completion of the contract works in terms of what the parties referred to as ‘the REV 3 Combined Programme’.

[5] The adjudicator ruled in the applicant's favour on the global claim, and consequently found it unnecessary to pronounce on the five individually advanced claims. It is apparent from the adjudicator's ruling that he had not investigated the merits of the individual claims that had informed the global one. The basis for the determination was set out in the adjudicator's 'Summary of Ruling'. In relevant parts (I have altered the order of the paragraphs to improve the coherence of the summary for present purposes), it went as follows:

'Admissible delays beyond the control of the Contractor:

On the balance of probabilities in respect of the different interpretations as well as documentary evidence submitted, I accept the viewpoint that the REV3 combined programme should form the basis of the determination of "extra over time" allowed as a result of the various delays in the five separate, sometimes concurrent claims being disputed. Taking into account the "often dichotomous" submissions made to me by the parties concerned the Contractor is entitled to compensation for time delays to the extent of 135 calendar days, minus 20 calendar days already awarded for claim number 1 which is not the subject of this Dispute, that is a total of 115 calendar days compensation.

The REV3 Combined Programme

The REV3 combined programme is valid and forms the basis of the determination of overall admissible time delays beyond the control of the Contractor and also the Date of Completion of the Contract.

Time for 'Completion' Date

In line with the views of both parties the Date of Completion of the Contract is accepted as 25th February 2021. Should the Contractor failed to comply with this Date for the Time for Completion date the Contractor shall pay delay damages to the Employer to the extent specified in the contract documents. However should delay damages (penalties) have already been imposed on the Contractor for any other Date for the Time of Completion date, these penalties should be reversed together with interest as prescribed below.

Mandate

Despite the suggestion by the Employer that I should do so, I do not consider it necessary to "open up and correctly determine" the validity of the claims forming this Dispute, since the Engineer on behalf of the Employer has already ruled that the claims are valid, and only the quantum of the relief sought is in the subject of the notice of Disputes.

Monetary award

In respect of the cumulative total of "time delays" for all the claims forming the subject of this Dispute the Contractor is entitled to compensation in the extent of R33 661.06 per day, a total of R3 871 021.90 (Excluding VAT). In addition he is entitled to compensation in the extent of R374 563 (Excluding VAT) In respect of additional costs for the Covid-19 claim.'

[6] The adjudicator's ruling is dated 25 October 2021. I infer that the aforementioned date of 26 October 2021 must have been the date on which the ruling was delivered to the parties.

[7] The first respondent was dissatisfied with the adjudicator's ruling. Within the period stipulated in the contract, it gave notice of its dissatisfaction and required the disputes to be

referred to arbitration.⁴ The applicant advanced the same claims at the arbitration, save that what had been its sixth, or global, claim in the adjudication proceedings was now cast as its principal claim, with the five aforementioned individually advanced claims being advanced in the alternative thereto.

[8] The arbitration hearing commenced in January 2023, and the proceedings were still in progress when the current application was argued. The arbitration hearing on 25-26 January 2023 was concerned only with what was described by the first respondent in its supplementary answering affidavit as ‘certain points *in limine*’ but characterised by the arbitrator as ‘interlocutory proceedings’. Of relevance to the current matter, however, is the fact that at that hearing the applicant abandoned what had been its sixth claim before the adjudicator.

[9] The abandonment gave rise to the making of an interim award by the arbitrator on 26 January 2023. The award, insofar as relevant to the current matter, directed the applicant (i.e. the respondent in the arbitration) to pay the costs of ‘the interlocutory proceedings’ on 25-26 January 2023 and the costs incurred up to that date ‘*incurred in the arbitration insofar as they relate to (the withdrawal of) counterclaim 1*’. (‘Counterclaim 1’ being what had been the applicant’s sixth claim in the adjudication proceedings.) The arbitrator also set aside the costs order made by the adjudicator and reserved the issue of costs undetermined in the interim award for determination at the end of the arbitration proceedings. As the applicant’s counsel stressed, however, the arbitrator acknowledged in the written reasons given for the interim award that the applicant’s abandonment of its first counterclaim in the arbitration did not exclude the possibility that the applicant ‘*may be successful in terms of the remainder of*

⁴ The contract in the current matter did not contain a provision like those described in *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd & Another* [2013] ZASCA 83 (31 May 2013); [2013] 3 All SA 615 (SCA); 2013 (6) SA 345 (SCA) at para 3-5 and *Framatome v Eskom Holdings SOC Ltd* [2021] ZASCA 132 (1 October 2021); 2022 (2) SA 395 (SCA) at para 22, which rendered the adjudicator’s decision binding and enforceable unless and until it was set aside or altered in subsequent arbitration proceedings.

the counterclaims [i.e. those which had been claims 1 to 5 before the adjudicator] which may justify the award made by the adjudicator, but on a different basis’.

[10] The first respondent has pointed out in its supplementary answering affidavit that the set aside adjudicator’s award makes up R3 871 021.90 of the amount certified in the interim payment certificate that the applicant seeks to enforce in the current proceedings. Moreover, according to the first respondent’s uncontroverted evidence, an amount of R105 000.00 of the certified amount comprised the sum of the adjudicator’s fees and those of the adjudicator nominating body that formed part of the costs award made by the adjudicator. (The said sum of R105 000.00 was the subject of Variation Order 27 and included in payment certificate 17 under that description.) The first respondent contends that it must follow, in the context of the interim award made by the arbitrator, that the applicant *‘is not entitled to payment of the amount of R3 976 021.90, forming part of payment certificate 17’.*

[11] In its supplementary answering affidavit, the first respondent also detailed the reasons for its contention that it was not liable to the applicant in respect of Variation Orders 13, 19 and 20, which had also been included in payment certificate 17. It contended that these variation orders had been non-compliant with the provision of the building contract that prescribed that instructions to execute a variation required presentation to the Employer for its signified approval before being signed by the Engineer and presented to the Contractor. The first respondent maintains that the variation orders were not approved by it.

[12] With reference to the interim award by the arbitrator and the allegedly misdirected inclusion of the aforementioned variation orders in the amount certified for payment in certificate no. 17, the first respondent contended that the Engineer was authorised by the building contract (see the summary of clause 14.6 of the agreement in paragraph above) *‘to revise payment certificate 17 and consequently the Variation Orders relating to the*

Applicant's claims by correcting the incorrectly certified amounts'. It referred in this connection to a document identifying itself as payment certificate 18 that it alleges was issued by the Engineer to the applicant on 5 May 2023.

[13] A copy of the payment certificate no. 18 and the voluminous substantiating documentation that accompanied it was attached to the first respondent's supplementary answering affidavit. The certificate document makes provision for signature by the Engineer on 5 May 2023, but, in contrast with the position with regard to certificate 17 (see paragraph above), appears not to have been signed by any of the parties at the places provided.

[14] The first respondent describes that payment certificate 18 reversed variation order 27 and revised variation orders 13, 19 and 20 to reflect different amounts. It also explained that the revised certificate reflected what it alleged was the applicant's liability for 73 days' worth of delay damages due in terms of clause 8.7 of the contract in the total sum of R1 460 000.00, settlement of which, it had been advised in a letter from the Engineer to the applicant, dated 18 March 2021, would be effected by way of a deduction to be reflected in the next payment certificate. The nett effect of the aforementioned revisions was that payment certificate 18, which, according to its tenor, purports to be '[f]or the Period 26/10/21 to 25.02.2023' reflects an amount due by the first respondent to the applicant in the sum of R613 924.07.

[15] The first respondent admits liability to the applicant in the aforementioned sum of R613 924.07 and tenders payment thereof.

[16] In its supplementary answering affidavit, the first respondent points out that the amounts in payment certificate 17 that are in dispute stand to be determined in the pending arbitration proceedings. A hearing on the substantive issues was scheduled to take place before the arbitrator at the end of May and the beginning of June 2023 and the court was advised by the first respondent's counsel that there was a possibility that the arbitrator might

make a final award before the delivery of judgment in this application. The first respondent had suggested to the applicant in the circumstances that the application should stand over or be withdrawn. The hearing proceeded before me on 7 June 2023 because the first respondent's suggestion did not find favour with the applicant.

[17] The first respondent, reiterating its tender to pay the amount of R613 924.07 to the applicant, seeks the dismissal of the application with costs on the scale as between attorney and client. At the hearing, Mr *Mahon*, who appeared for the first respondent together with Ms *Hammick*, conceded, however, that he could not resist an order awarding the applicant its costs (save for those already determined against the applicant when the application was previously struck from the roll by Erasmus J for lack of urgency) incurred up to the date of the delivery of the first respondent's supplementary answering affidavit. The reasons for that concession will become apparent shortly.

[18] It will be apparent from what has been said thus far that the bases for the first respondent's opposition to the application have been described entirely with reference to its *supplementary* answering affidavit. The affidavit was delivered on 26 May 2023. That date needs to be contextualised. The application had originally been scheduled for hearing on the semi-urgent roll on 24 May 2022 pursuant to an order by the duty judge in the unopposed motion court on 23 February 2022. It duly came up before Erasmus J on the opposed motion roll. After hearing argument, Erasmus J made an order on 25 May 2022 striking the application from the roll with costs on the scale as between attorney and client. The registrar thereafter issued a notice of set down, dated 19 January 2023, fixing a hearing date for 17 August 2023. For reasons that are not apparent on the record that notice of set down was supplanted by a second notice, dated 16 March 2023, fixing 7 June 2023 as the hearing date.

[19] The first respondent applied at the hearing on 7 June 2023 for the admission of its supplementary answering affidavit. It urged in support of the application that the affidavit contained evidence that was relevant to the determination of the principal case that had not been available when the answering papers were delivered. The applicant opposed the admission of the supplementary answering affidavit. Mr *Sievers* SC, the applicant's counsel, pointed out that much of the evidence contained in the supplementary affidavit had been available to the first respondent when its answering affidavit was deposed to. It seems to me that the only evidence that was not available when the answering affidavit was made was that related to the arbitration hearing in January 2023 and the subsequent issue of payment certificate 18. Those were critical developments, however, and it would be unrealistic, and contrary to the interests of justice, for the court to decide the application without reference to them.

[20] It is also evident, as candidly acknowledged in the first respondent's counsel's heads of argument, that the first respondent does not persist in advancing the substantive grounds of opposition set out in its answering affidavit and relies instead on those argued on its behalf based on the content of the supplementary answering affidavit. Indeed, the concession by the first respondent's counsel concerning costs mentioned earlier was predicated, quite realistically, on that acknowledgment. It also bears mention that the first respondent jettisoned its originally filed heads of argument (drafted by different counsel) and relied on substituted heads that were delivered out of time, only two days before the hearing.

[21] The court exercises a true discretion when it decides in opposed motion proceedings whether to admit an affidavit outside the three sets provided for in Uniform Rule 6. As noted in what is probably the leading authority in point, *James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons*, NO 1963 (4) SA 656 (A), '[i]t is in

the interests of the administration of justice that the wellknown and well established general rules regarding the number of sets and proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily be permitted'.⁵ To similar effect, in *Bader and Another v Weston and Another* 1967 (1) SA 134 (C), Corbett J remarked, '*While I fully agree that litigants on motion ... should not be encouraged to present their cases in a piecemeal fashion, at the same time I consider that the Court should not allow an adjudication of the real issues in a case to be partially frustrated by too rigid an adherence to what is essentially a rule of practice.*'⁶ It is the latter consideration that has weighed most heavily with me in my decision that the supplementary answering affidavit should be admitted. I am satisfied that there is no attendant prejudice to the applicant that could be addressed adequately through an appropriate order as to costs, and leave to reply to the additional affidavit if such were sought.

[22] As it happened, the applicant did not seek an opportunity to reply if the supplementary answering affidavit were admitted.

[23] Mr *Sievers* argued that an interim certificate constitutes a binding admission of indebtedness by the employer, similar to an acknowledgement of debt. He submitted that, in the absence of a contractual provision to the contrary, a payment certificate cannot be withdrawn to correct mistakes of fact, or a value in it. The applicant's counsel argued further that the certificate is not open to attack because it was based on erroneous reports or the agent's negligence. He contended that even if it were known that the certificate is not 'entirely accurate' in relation to either the valuation reflected therein or the amount due to the

⁵ At p. 660E.

⁶ At p. 138D.

contractor, it would still not be contrary to public policy to enforce it. He asserted that where the employer has suffered damages through the negligent failure on the part of its agent to draft the certificate correctly, its remedy lay in an action for damages against the agent, not in resisting liability to the contractor by virtue of the erroneously framed certificate.

[24] Mr *Sievers* advanced the foregoing arguments as if they were generally applicable propositions of law. He called *Randcon (Natal) (Pty) Ltd v Florida Twin Ests (Pty) Ltd* 1973 (4) SA 181 (D) (which he described as ‘the *locus classicus* on payment certificates’), *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* [1993] ZASCA 41 (26 March 1993); 1993 (3) SA 331 (AD); [1993] 2 All SA 260 (A) and *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23 (27 March 2009); [2009] 3 All SA 407 (SCA); 2009 (5) SA 1 (SCA) in aid in support of them. Consideration of those authorities shows that the cases were decided on their own facts and with regard to the contractual provisions that were individually peculiar to them. Whether the judicial pronouncements relied on by the applicant’s counsel could apply in this case depends on the correspondence between the pertinent provisions of the contract in the current matter and those involved in the other matters. One must also be mindful of what was actually in issue in those cases.

[25] It is evident that what might be understood to have been the intended statement of a general proposition of law in *Randcon* that an interim certificate under a building contract has to be treated as absolute in effect because its rationale is to financially sustain the contractor’s or sub-contractor’s ability to continue with and complete the work was predicated on the learned judge’s apprehension of the law as stated by Lord Denning MR in *Dawnays Ltd v FG Minter Ltd and Another* [1971] 2 All ER 1389 (CA), [1971] 1 WLR. 1205. (The same can be

said of the points subsequently made by McEwan J in *Smith v Mouton* 1977 (3) SA 9 (W) in numbered paragraphs 2 and 4 at p.13.^{7 8})

[26] In *Dawnays*, which involved a claim by a sub-contractor against the main contractor, Lord Denning rejected a contention by the contractor that payment of the sub-contractor's certified claim could be resisted because it was the subject of a dispute that had been referred to arbitration proceedings to be conducted after the final completion or abandonment of the contract works. The Master of the Rolls rejected the argument, saying –

‘That seems to me to run counter to the very purpose of interim certificates. Every businessman knows the reason why interim certificates are issued and why they have to be honoured. It is so that that the sub-contractor can have the money in hand to get on with his work and the further work he has to do. Take this very case. The sub-contractor has had to expend his money on steel work and labour. He is out of pocket. He probably has an overdraft at the bank. He cannot go on unless he is paid for what he does as he does it. An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims, whether good or bad - except so far as the contract specifically provides. Otherwise any main contractor could always get out of payment by making all sorts of unfounded cross-claims.’

⁷ McEwan J acknowledged that the judgment in *Dawnays* case had been disapproved by the House of Lords in *Gilbert-Ash* (see paragraph 28 below), and referred in that connection (at pp.14E-15F) to what he called ‘*the more difficult question ... whether or not the employer is entitled to resist a claim for payment of the sum shown in an interim certificate on the grounds that, by reason of defective work or delay in completion of the works, the employer has a claim for damages against the contractor which will extinguish or reduce the amount of the claim on the certificate.*’ The learned judge refrained from deciding the question because it had not been argued before him but, later in the judgment (at p.17A-B), nevertheless expressed himself in a way that implied that he would have been inclined, if so required, to answer it in accordance with the House of Lords decision. On appeal, in *Mouton v Smith* 1977 (3) SA 1 (A), the court (at p.5F) found it ‘*unnecessary, in the present case, to decide what defences the employer can and cannot raise if the contractor sues him on an interim certificate.*’

⁸ In *Nucon Construction Thaba Nchu (Edms) v Scholtz NO* [2010] ZAFSHC 141 (8 November 2010), the full court of the Free State Division, with reference to the said numbered paragraphs in *Smith v Mouton* (W) supra, applied the reasoning in *Dawnays* case without giving any consideration to the subsequent jurisprudential treatment of that judgment in England and in this country described later in this judgment, or to the fact that the Appellate Division, in its judgments in *Smith v Mouton* (A) supra, and *Thomas Construction* (see note 10 below), had expressly left open the question of what defences an employer can raise when sued on an interim certificate.

The position described by Lord Denning would give a quality of what has been called ‘temporary finality’⁹ to interim payment certificates. They would, unless the contract expressly provided otherwise, have to be honoured pro tem, subject only to a final settlement of accounts *at the end of the contract*.

[27] On my reading of the judgment in *Randcon*, the learned judge’s apparent approbation of Lord Denning’s remarks was nothing more than a passing observation in support of his rejection of the argument by the defendant in that case that an interim payment certificate was not a liquid document for the purpose of provisional sentence proceedings. The issues before the judge did not require of him to consider whether Lord Denning’s pronouncement bore scrutiny as a general proposition concerning the legal effect of interim payment certificates. (The argument being addressed by the judge in *Randcon* was not of any relevance in the current matter because the first respondent, unsurprisingly, did not contest the applicant’s entitlement to base its cause of action on the certificate, and there is at this stage no doubt about the correctness of the finding in *Randcon* that an architect or engineer’s certificate in terms of the standard form building contracts will ordinarily be a liquid document susceptible for use in provisional sentence actions or applications for summary judgment. That much is now well-established.¹⁰ I am also anxious to make it clear that nothing in this judgment should be understood to call into question the correctness of the court’s decision in *Randcon*, based on the evidence in that case, to grant provisional sentence against the defendant.)

⁹ I.N. Duncan Wallace, *Hudson’s Building and Engineering Contracts* (11th ed.) vol. 1 at 6.004 and 6.204. The textbook is currently in its 14th edition, but, regrettably, and a sign of seemingly ever-diminishing judicial research resources, the 11th edition and the 2003 First Supplement thereto are the most recent versions of this important work in the Cape Town High Court library. *Hudson’s* use of the expression ‘*temporary finality*’ in that context has been referred to or adopted in judgments in Australia and Singapore; see *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159 at para 50 and *Vinod Kumar Ramgopal Didwania v Hauslab Design & Build Pte Ltd* [2017] SGCA 19; [2017] 1 SLR 890 at para 30.

¹⁰ Cf. *Mouton v Smith* 1977 (3) SA 1 (A) at 5D-E, *Thomas Construction (Pty) Ltd (in liq.) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 562E-F and *Shelgatha Property Investments CC v Kellywood Homes (Pty) Ltd*; *Shelfaerie Property Holdings CC v Midrand Shopping Centre (Pty) Ltd* 1995 (3) SA 187 (A) at 193A-C.

[28] One year and a day after Van Heerden J handed down judgment in *Randcon*, the House of Lords, in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* 1974 A.C. 689, unanimously disapproved of Lord Denning's statement in *Dawnay's* case. The learned law lords pointed out that it was inconsistent with unimpeachable Court of Appeal authority reaching back to *Robins v Goddard* (1905) 1 K.B. 294 (CA).¹¹

[29] The question before the House in *Gilbert-Ash* was described by Viscount Dilhorne as follows: '*...whether when under a contract in the R.I.B.A. form an architect has given an interim certificate the employer is bound to pay to the contractor the amount certified without deduction or set off save as permitted by the contract; and where the architect has told the contractor the amount forming part of the total certified attributable to work executed by a sub-contractor the contractor is bound to pay that amount to the sub-contractor without deduction save as permitted by the sub-contract*'. Unsurprisingly, in my respectful opinion, the unanimous view of the law lords was that the answer in every case would turn on the peculiar terms of the contract (or sub-contract) under consideration. Our jurisprudence is to the same effect. As McEwan J noted in *Smith v Mouton (W)* supra, '*... there is no special law different from the law relating generally to contracts and their interpretation that applies to building contracts and to architects' certificates issued under them. In each case the primary consideration ... is the proper interpretation of the particular contract before the Court*'.¹²

[30] In *Robins* supra, in the context of a building contract that provided - as in the current case - for the determination of disputed questions by arbitration, the Court of Appeal rejected the notion that the defendant was '*debarred by the certificates from setting up bad*

¹¹ In *Beaufort Developments (NI) Ltd v. Gilbert-Ash NI Ltd and Others* [1998] UKHL 19 (20 May 1998); [1999] AC 266; [1998] 2 All ER 778; [1998] 2 WLR 860, Lord Lloyd of Berwick described the judgment in *Dawnays* as having come '*as something of a surprise in the official referees' corridor*'. He held it out as an example of matters in which the courts had caused difficulty '*by treating building contracts as if they were subject to special rules of their own*'.

¹² At p. 12D.

workmanship on the building and the introduction of improper materials'. Sir Richard Collins MR said (at p.301), where the contract provided, as does the one in issue here, that the arbitrator could open up, review and revise any certificate, '*[i]f something which purports to be conclusive is made subject to revision, it loses its quality of finality.*' Referring to the contrary import of Lord Denning's remarks in *Dawnay*, Viscount Dilhorne said in *Gilbert-Ash* (at p. 705) '*... no scintilla of authority prior to the decision in Dawnays' case can be found for the proposition that the amount certified by the architect in an interim certificate as the value of work done and consequently payable to the contractor is in a special position in that the employer cannot lawfully counterclaim and set off against the liability amounts due to him from the contractor.*'

[31] As to what might, for want of a better term, be called 'the default position', *Hudson's Building Contracts* op. cit. supra, appears to endorse the following passages in Lord Diplock's speech in *Gilbert-Ash*:

'It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law ... [b]ut in construing such a contract *one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.* In the case of building contracts no question of usage arises to rebut the presumption'¹³ (Emphasis provided by the learned author of *Hudson's Building Contracts*.)

and

'So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of material supplied or work executed under the

¹³ At p. 717-718.

contract. To rebut that presumption one must be able to find in the contract *clear unequivocal words* in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract.’^{14 15} (Emphasis provided by the learned author of *Hudson’s Building Contracts*.)

The learned author commented (in 1995) ‘... *there is now and unmistakeable and justifiable trend in more recent English judicial decisions against according binding force even to a final certificate, in the absence of the most explicit wording or indication in the contract itself (as eg. the use of contractual expressions that the certificate is to “final and binding” or “conclusive evidence”*’.¹⁶

[32] The judgment in *Ocean Diners* is of no assistance to the applicant. That case concerned a final, not an interim, certificate. The certificate was issued in terms of clause 25.5 of the contract in question. Clause 25.7 provided ‘*A final certificate issued in terms of clauses 25.5 and 25.6 ... shall be conclusive evidence as to the sufficiency of the said works and materials, and of the value thereof*’. Smalberger JA held that the employer was, subject only to a limited number of available defences such as fraud or collusion between the agent and the contractor to the detriment of the employer or non-compliance by the certificate with the prescribed requirements of the contract, bound by the agreed-upon conclusive effect of the certificate. If the employer had suffered any damages as a consequence of his agent having drawn the certificate negligently, its remedy lay in a claim against the negligent agent.

[33] The other authority on which Mr *Sievers* placed reliance, *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* supra, also affords no succour to the applicant. In that case, the defendant’s appeal from the summary judgment granted against it in the court

¹⁴ At p. 718.

¹⁵ *Hudson’s Building Contracts* op. cit. vol. 1 at 6.005 (p.730).

¹⁶ Id at 6.004 (p. 729). *Hudson’s Building Contracts* notes that in certain jurisdictions - Australia, New Zealand and Singapore are specified - standard contract forms and statutory provisions have been adopted to give interim certificates the quality of ‘temporary finality’, thereby more efficiently achieving the recognised cashflow related objects of any progress payment provisions.

of first instance was refused because its defences to the claims brought against it founded on a series of interim certificates issued by the defendant's principal agent were either incompatible with the express provisions of the building contract, or otherwise palpably bad. The judgment does refer approvingly to *Randcon* supra, but only for purpose of illustrating the trite proposition that a payment certificate gives rise to a separate cause of action.¹⁷ In *Thomas Construction* (supra, note 10), Botha JA pointed out that nothing more was meant by that '*than that a cause of action couched in such a form is in order from the point of view of pleading, practice and procedure*'.¹⁸ As mentioned earlier, that point is trite and not in dispute in the current matter.¹⁹

[34] Contrary to the thrust of Mr Sievers's argument, the indications are that our jurisprudence has also come to reject what Nienaber J, in *Thomas Construction (Pty) Ltd (in liq.) v Grafton Furniture Manufacturers (Pty) Ltd* [1986] 2 All SA 357 (N); 1986 (4) SA 510 (N), called '*the now discredited case of Dawnays*'. The learned judge described Lord Denning MR's reference to an interim certificate as the equivalent of cash or a bill of exchange as '*pure hyperbole*'. He proceeded (at 516B-E SALR), '*If that remark was intended to convey that the certificate is immune against attack or defence, the comparison is, with respect, misleading, notwithstanding the apparent deference with which the expression was quoted in Smith v Mouton [(W), supra] ... at 13H. Lord Denning's construction has certainly not been universally accepted in our case law The better view, with respect, is that all defences remain open to a claim based on an interim certificate, including set-off or a counterclaim for damages for breach of the very contract which spawned the certificate*'

¹⁷ *Joob Joob Investments* at para 27.

¹⁸ At p. 562G.

¹⁹ See paragraph 27 above and the authorities cited in fn. 10.

[35] It is arguable that what Nienaber J termed the ‘*better view*’ (a view obviously dependent on the provisions of the given contract) was implicitly endorsed by Botha JA in the judgment on appeal in that matter.²⁰ There, with reference to a contention by the appellant’s counsel (similar to that asserted by Mr *Sievers*) that the certificate was ‘*sacrosanct*’, Botha JA responded, ‘*That cannot be right. Counsel was elevating the recognition of a cause of action into a postulate that there can be no answer to it*’. Like Trollip JA in *Smith v Mouton (A)* supra, the learned judge found it unnecessary to decide whether there was any limitation on the type of answer that was permissible. It is noteworthy, however, that he did not embrace the appellant’s counsel’s argument ‘*that it would be limited to cases of fraud and the like*’, and refrained from expressing any doubt concerning Nienaber J’s statement of the ‘*better view*’.

[36] I described earlier in this judgment²¹ the various provisions of the contract between the applicant and the first respondent that appeared to be most relevant for the purposes of the case. None of them gives the interim certificate the character of something that vests an absolute or temporarily final right to payment of the amount certified thereby if there is a dispute. The adjudication and arbitration provisions point the other way. There is nothing in the contract that I have found or been referred to that indicates that the employer waived or abandoned the right to raise any contractual defence that might be available to it to resist a claim for payment in terms of an interim payment certificate.

[37] It was not entirely clear to me on the papers whether the issue of the first respondent’s alleged entitlement to delay damages is an issue in the pending arbitration proceedings between the parties. I was initially inclined to the view that it would be necessary for the first respondent to show clearly that it was if it sought to raise its claim in that regard in opposition

²⁰ Cited in fn 10 above.

²¹ In paragraph 2.

to any obligation to pay the amount certified in certificate no. 17. Upon reflection, however, I have concluded that the question was, with respect, correctly disposed of by Viscount Dilhorne in *Gilbert-Ash* in response to a comparable argument by the contractor's counsel in that matter. Lord Dilhorne said (at p. 720) –

‘Counsel for the respondent felt compelled to concede, in my view rightly, that the employer if sued in an action for the amount stated as due in an interim certificate, would be entitled to challenge the certificate on the ground that the work included in the calculation of that amount was not properly executed; though counsel contended that in order to resist payment on this ground the employer would have to have already submitted to arbitration the dispute as to whether or not the certificate was in accordance with the conditions of the contract and then to apply for a stay of action under section 4 of the Arbitration Act 1950. The arbitration clause, however, does not make an award a condition precedent to a right of action, let alone a condition precedent to a right of defence; and I see no grounds in law to prevent the employer from defending the action by setting up the contractor's breach of warranty in doing defective work even though this involves challenging the architect's certificate that that work had been properly executed.’

[38] That all of the issues raised by the first respondent in opposition to the application are questions before the arbitrator in any event seems implicit in the submission by the first respondent's counsel that the need to determine the dispute between the parties concerning the applicant's entitlement to payment of the sum certified in payment certificate no. 17 would fall away once the pending arbitration proceedings were determined. The applicant's counsel did not take issue with the submission, and the applicant did not seek to respond to the averment in the supplementary answering affidavit that ‘[t]he outcome of [the] arbitration proceedings will be determinative of the present application’. That the pertinent disputes are all before the arbitrator is also supported by the first respondent's call upon the applicant on 9 May 2023 to agree to postpone or withdraw the application because of the pending arbitration.

[39] I appreciate that the cause of action in this application, predicated on certificate no. 17, is different from the causes of action in respect of the claims (and counterclaims) before the arbitrator, but it nevertheless seems obvious, in the context of the grounds of opposition relied on by the first respondent in these proceedings, that the result of the application necessarily depends on the arbitrator's award. In view of the parties' agreement that the arbitration will finally settle their disputes, the applicant cannot obtain enforcement of the disputed payment certificate, save in respect of the first respondent's admitted indebtedness, until the arbitrator has made his award. And once the arbitrator has made his award, the certificate will be enforceable only to the extent of its consistency with the award.

[40] The applicant would therefore have been well advised to have agreed to the first respondent's proposal that the application be postponed until after the completion of the arbitration proceedings. It was misdirected in pressing for judgment in the application at this stage. In the absence of an application for postponement by the applicant or one for a stay by the first respondent, the court has been forced into having to give a determinative judgment at an inopportune time.

[41] As the applicant is seeking final relief on motion, the matter falls to be decided applying the evidential principles rehearsed in *Plascon-Evans*.²² The court is not in a position to regard the factual premises for the first respondent's contestation of payment certificate 17 as so far-fetched or clearly untenable as to justify being rejected on the papers. The consequence is that the application for payment in the certified amount exceeding the first respondent's admitted indebtedness must be dismissed. The dismissal will have the effect of an order of absolution from the instance. Any right that the applicant might have to payment of the balance of the amount certified in terms of certificate 17 will be determined by the arbitrator's award.

²² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

[42] I have not found it necessary in the circumstances to decide the contention that certificate no. 18 superseded the certificate on which the applicant sued in the current proceedings. Nothing in the contract prescribes the form of certificate to be issued by the Engineer. It consequently does not seem to matter that the certificate was not signed. Suffice it to say, however, that I doubt that clause 14.6 of the contract invests the Engineer with the authority to issue a certificate purporting to correct an earlier contested certificate that is the subject of pending arbitration proceedings; *a fortiori*, if it purports to do so in accordance with the contentions of one of the parties to those proceedings. It strikes me that that would trench impermissibly on the arbitrator's function concerning the dispute. I would be reluctant to construe the contract as allowing that. I do not think that any such purported correction or modification could '*properly be made*' within the meaning of that phrase in clause 14.6.

[43] An order will issue in the following terms:

1. The first respondent's application for the admission of its supplementary answering affidavit is granted; the first respondent to be liable to the applicant for the costs of that application on an unopposed basis.
2. The first respondent is ordered to pay the applicant the sum of R613 924.07 pursuant to interim payment certificate no.17, together with interest thereon *a tempore morae* in terms of the contract calculated with reference to clause 14.7 (b) thereof (as amended).
3. Save as provided in paragraph 2, the application is otherwise dismissed.
4. Save as otherwise provided in the order made by Mr Justice Erasmus on 25 May 2022, the first respondent is ordered to pay the applicant's costs of suit incurred up to and including 26 May 2023, as well as the costs attendant upon the applicant's

consideration of the first respondent's heads of argument that were delivered out of time, on 5 June 2023, including the fees of two counsel where such were engaged.

5. The applicant shall pay the first respondent's costs of suit incurred after 26 May 2023, including the fees of two counsel where such were engaged.

A.G. BINNS-WARD
Judge of the High Court

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