

THE SUPREME COURT OF
JUDGMENT



APPEAL OF SOUTH AFRICA

Not reportable

Case No: 1036/2013

In the matter between:

Maykent (Pty) Ltd

Appellant

and

Trackstar Trading 20 (Pty) Ltd

Respondent

Neutral Citation: *Maykent v Trackstar* (1036/2013) [2015] ZASCA 14 (17 March 2015)

Coram: Lewis, Maya, Bosielo, Majiedt and Pillay JJA

Heard: 27 February 2015

Delivered: 17 March 2015

Summary: Construction contract concluded partly orally, partly by conduct and partly on basis of standard terms used in industry did not oblige the principal agent to issue a certificate of completion before issuing final payment certificate: employer's failure to pay the contractor on this basis over a period of five years unjustified.

ORDER

On appeal from: High Court, Gauteng Division, Pretoria (Hiemstra AJ sitting as court of first instance)

The appeal is dismissed with costs.

JUDGMENT

Lewis JA (Maya, Bosielo, Majiedt and Pillay JJA concurring)

[1] The appellant, Maykent (Pty) Ltd (Maykent), is a franchisee in respect of Kentucky Fried Chicken fast food stores. It entered into a contract with the respondent, Trackstar Trading 20 (Pty) Ltd (Trackstar), a building contractor, in February 2006 for the alteration and addition to premises for a new store in New Town, Johannesburg. In concluding the contract, Maykent was represented by Tertius Rabe Property Services CC (TRE), a close corporation, appointed as the principal agent, which was the second defendant in the trial court.

[2] The agreed completion date was 30 June 2006 and the site was handed over to Trackstar on 30 March 2006. The completion date was extended to 15 September 2006 because of variation orders causing delay. Trackstar effected the works, and interim payments to it were made. The total agreed amount due in terms of the contract was some R1 282 922. Its final invoice was for R985 423. Payment was not made despite demand and Trackstar instituted action for payment of the amount it alleged was owing in the Gauteng Division of the High Court. The summons was served on 5 September 2008.

[3] TRE was cited as the second defendant, and as against it, Trackstar claimed a final account supported by vouchers. Maykent raised several defences, including one that amounted to a plea that nothing was yet due to Trackstar as a certificate of

final completion had not been issued by TRE, as was required by the contract on which it relied – the standard JBCC 2000 Principal Building Agreement used in the construction industry. There was thus no cause of action, it asserted. It also counterclaimed for damages in the amount of R2 122 206 for alleged loss of income arising from Trackstar's failure to complete the work timeously, and additional amounts it had had to pay TRE for completing the work.

[4] On 14 August 2013, shortly before the trial started, TRE issued a final payment certificate for the sum of R963 475. The action against it was withdrawn. The high court (Hiemstra AJ) found that Trackstar was entitled to payment of the amount in the final certificate, and dismissed the counterclaim on the basis that no evidence had been led to show that any loss suffered was caused by Trackstar's alleged breach of contract. The high court also ordered that Maykent pay interest at the prescribed rate of 15.5 per cent from the date of summons to date of payment. The appeal against these orders lies with its leave.

[5] The principal argument of Maykent in the high court was that TRE had not issued a certificate of completion or a final certificate of payment when summons was served: there was thus no cause of action, the summons being premature. It relied in this regard on the 2000 JBCC standard agreement which it claimed was the basis of the contract between it and Trackstar. Indeed, Trackstar had also alleged that this was the contract that they had concluded, and attached it to its particulars of claim. The contract consists of standard terms and a schedule headed 'Contract Variables'. The schedule reflected the parties' details as well as those of TRE. However, much of the schedule was not completed by the parties, and did not reflect dates of signature.

[6] The particular clause of the JBCC contract relied on by Maykent (34.5) provided that a final certificate of payment would be issued by the principal agent only after a certificate of final completion had been issued by it. No final certificate of final completion had ever been issued, and indeed, TRE had prepared snag lists for

remedial works to be done. These had not been attended to, Maykent contended, before Trackstar left the site on 8 November 2006.

[7] The evidence of TRE's representative, a Mr Stears, who had overseen the building work, and attended site meetings on behalf of TRE, was that he had not worked according to the standard terms of the JBCC contract and did not know that it formed the basis of the parties' agreement. The high court found that all the parties had proceeded as if the terms of the JBCC contract were not applicable, and thus that the provision in the JBCC contract requiring a certificate of completion, and then a final certificate of payment, was not required. The claim for a final payment certificate, and then payment, was akin to a claim for a statement and debatement of account, followed by payment, and that the summons was in the circumstances not premature.

[8] Although the heads of argument filed for Maykent on appeal continued to rely on this argument, and contended that the JBCC contract terms were binding, and that the high court had erred in this regard, at the hearing counsel did not persist with either argument. It was also conceded that no evidence had been led to establish that Maykent had suffered damages as a result of Trackstar's breach.

[9] However, counsel did argue that it was inappropriate that interest should run from the date of summons when the final payment certificate had been issued by TRE only five years after the litigation commenced. The summons was served, as I have said, on 5 September 2008, and the final payment certificate was issued on 14 August 2013. However, as argued by Trackstar, TRE was Maykent's agent, and it had known from the date when Trackstar issued its final account – 17 January 2007 – that the sum claimed was payable. TRE and Maykent were represented by the same attorneys throughout the litigation. There was no doubt that Maykent was aware of its liability to pay the amount due at the date of service of the summons.

[10] Trackstar was entitled to a final payment certificate and should have been paid on the submission of its final account. There is no reason to deny it interest on that sum at the prescribed rate from the date of summons.

[11] Accordingly the appeal is dismissed with costs.

C H Lewis
Judge of Appeal

APPEARANCES

For Appellant:

M P van der Merwe SC

Instructed by:

Saunders Venter Van der Watt c/o

Louis Benn Attorneys, Pretoria

Lovius Block, Bloemfontein

For Respondent:

N A D Maritz SC, A A Botha

Instructed by:

Van Heerden & Krugel, Pretoria

Kramer Weihmann & Joubert Inc

Bloemfontein