

MDA CONSULTING



FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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JBCC

Introduction

What remedies does a Contractor have when faced with an Employer that does not pay payment certificates on time? Other than the dispute resolution procedures provided for in most construction contracts

(which are not particularly helpful in this instance), the courts have continued to recognize, as evidenced by the Supreme Court of Appeal decision of *Joob Joob Investments (Pty) Ltd (“Joob Joob”) v Stocks Mavundla Zek Joint Venture (“Stocks”)*¹, that the Contractor may be successful in an application to Court for summary judgment, on an amount contained in a payment certificate. Contractors should, however, make sure that any procedural and administrative requirements in terms of the contract, relating to submission of payment certificates (for example the furnishing of a tax invoice) are understood and complied with.

In the Joob Joob case, the parties concluded a contract (based on the JBCC 2000 Principal Building Agreement (July 2000 edition)) whereby Stocks (the contractor), agreed to build a hotel for Joob Joob (the employer). The contract provided for interim certificates to be issued by a principal agent

Summary Judgement: Not an extraordinary method of claiming payments due in terms of payment certificates

appointed by Joob Joob), as well as a final certificate in respect of work completed as per the schedule of works. The principal agent issued certificates to Joob Joob, which Joob Joob failed to pay. Stocks cancelled the contract and instituted action against Joob Joob in the High Court for payment of the amounts reflected in four certificates (9 to 12) to the value of R 27 091 703.94. Stocks applied for summary judgment, which was opposed by Joob Joob². It should be noted that Stocks' claim for certificate 9 was withdrawn.

Procedural and Administrative Requirements of the Contract

Joob Joob raised the defence that Certificate 10 was not due and payable as Stocks had failed to deliver a tax invoice as required by clause 31.9 of the contract. Further, the date of valuation set out in the certificate differed from the date of valuation that appeared in the tax invoice and the tax invoice predated the payment certificate (thus clause 31.9 had not been complied with). Clause 31.9 of the contract stated:

“The employer shall pay to the contractor the amount certified within seven calendar days of the date of issue of the payment certificate. Payment shall be subject to the contractor giving the employer a tax invoice for the amount due.”

¹ 2009 (5) SA 1 (SCA)

² Summary judgement procedures have been used successfully in our courts for many years. The intention is to weed out the defendants that do not have a valid defence to a claim and to prevent them from dragging cases out unnecessarily, when at the end of the day, they have little hope of defending such claim. Uniform Rules of Court enable a plaintiff to apply to court for summary judgment in respect of four categories of claims, one of which is based on a liquid document.

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The High Court found that there was no requirement in the contract that a tax invoice had to include a date of valuation. All that was required in terms of the contract was a tax invoice for the amount due. The earlier date of the tax invoice was therefore no bar to recovering the amount set out in the certificate.

On appeal, the Supreme Court of Appeal (“SCA”) held that the contract did not provide for the tax invoice to follow any particular format nor did it prescribe what information it had to contain. There was a direct correlation between certificate 10 and the tax invoice in question. Clause 31.9 had been complied with and the trial court was correct in its conclusion.³

Damages

Certificates 11 and 12 related to damages and were submitted after the cancellation of the contract by Stocks. Joob Joob’s defence was that on a proper construction of the contract, the principal agent’s mandate did not extend to certification of damages, and because the certificates were for damages, they were not liquid documents.

Clause 33 of the contract was entitled 'Recovery of Expense and Loss' and provided for monthly 'recovery' statements by the principal agent on which expense and loss was to be shown and amounts due to the contractor for 'damages in terms of 38.5.6', if any. In turn, sub clause 38.5.6 of the contract provided that '(t)he employer shall be liable to the contractor for damages resulting from such cancellation'.

The interim certificates envisaged in clause 31.1 could be adjusted, inter alia, by amounts due to the employer or contractor in a recovery statement issued in terms of the contract. It was submitted, on behalf of Joob Joob, that since Stocks did not refer to or attach recovery statements in relation to certificates 11 and 12 in its summons, summary judgment should not have been granted. The court found that this submission was without merit. In any event, the basis of the valuation or damages was not substantively challenged.

The High Court held that Joob Joob had not shown that the certification of damages was not in accordance with the contract and that Joob Joob had agreed specifically to damages being provided for in payment certificates. The High Court dismissed Joob Joob's defences and granted summary judgment on all three certificates.

On appeal, the SCA agreed with the trial court and held that with regards to both certificates 11 and 12, that Joob Joob's submission was without foundation. On a proper construction of the contract, it was clear that the principal agent was not only entitled but was obliged, in appropriate circumstances, to certify damages.

Payment Certificate a Liquid Document

On appeal, the SCA held that “a final payment certificate had to be treated as a liquid document because it was issued by the employer’s agent, with the consequence that the employer was in the same position it would have been in if it had itself signed an acknowledgment of debt in favour of the contractor.”

Further, similar reasoning applied to interim certificates. Certificates place an obligation on the employer to pay the amount contained therein. They are regarded as the equivalent of cash. The SCA was of the opinion that the certificates in question all fell within this ambit. Stocks therefore held three liquid documents, the equivalent of acknowledgments of debt. It was noted that Stocks could have proceeded to obtain provisional sentence on Joob Joob, but chose to apply for summary judgment instead.

³ Paragraph [20] at 8B - C

No Sustainable Defence

In order for an application for summary judgement to be dismissed, the defendant has to show that it has a sustainable defence to the plaintiff's claim. In addition to the SCA agreeing with the decision of the trial court, the SCA went on further to state that no sustainable defence had been put up by Joob Joob. The SCA quoted that case of Maharaj v Barclays National Bank Ltd⁴ stating that one should:

“ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule.”

Conclusion

It is apparent that in recent times, more and more that contractors feel the need to rely on termination of the contract due to a default by the employer. It is comforting to note that the courts support the certification process. So too, will the courts recognize the entitlement of the contractor to sue for damages (that can be proven) as a result of such cancellation. The grounds upon which a certificate may be challenged are extremely narrow. In addition, case law suggests that an employer would find it difficult to raise a defence against a certificate validly issued (procedurally and administratively) under the contract. Finally, non-payment of certificates can be enforced by the courts, and do not necessarily have to be referred to dispute resolution in terms of the contract.

Author: Natalie Reyneke

⁴1976 (1) SA 418 (A)

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