



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

Case number: 011751/17

REPORTABLE: <i>no</i>
OF INTEREST TO OTHERS JUDGES: <i>no</i>
REVISED
<i>2/2/18</i> <i>[Signature]</i>
SIGNATURE

In the matter between:

MAMLI PROJECTS CORPORATION

Applicant

And

THE EKURHULENI METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

Molahlehi J

- [1] The applicant in this application seeks an order compelling the respondent to pay the amount of R404 883.21 arising from their agreement. The claim is divided into Parts A and B.
- [2] The claim in Part A relates to the amount which has been certified in terms of the certificate number 19 issued on 14 April 2016 by the Principal Agent BMW Design Consulting Architects. The amount in Part B is R121 668.46 under certificate number 20 issued by the same agent on 14 May 2016.
- [3] The applicant further claims contractual interests also arising from the amounts claimed in terms of the agreement. In this respect clause 31.11 of the agreement provides:
- “31.11 Where the contractor does not receive payment of the amount due by the due date [31.9], the employer shall be liable for default interest on the amount without prejudice to any other rights the contractor may have. Such interest amount shall be compounded monthly from the due date for payment up to and including the date on which the contractor is to receive payment and included in the recovery statement [33.0]. The principal-agent shall calculate such default interest at the rate of hundred and sixty percent (60%) of the interest.”
- [4] About interest the agreement provides as follows:
- "**INTEREST**; The bank rate that is applicable from time to time to registered banks borrowing money from the Central or Reserve Bank of the country named in the contract data. The ruling bank rate on the first calendar day of each month shall be used in calculating the interest due for such month."
- [5] Clause 31.9 of the agreement provides:

“The employer shall pay to the contractor the amount certified in an interim payment certificate within seven (7) calendar days of date of issue of the payment certificate.”

Background facts

- [6] It is common cause that following the tender which the respondent awarded to the applicant for the construction of Standby Quarters and Ablution Facilities in Kempton Park the parties concluded a written agreement the terms and conditions of which are not in dispute.
- [7] The initial contract price was R727 6188.47. In terms, of clause 3.0 of the agreement, the principal agent would regularly issue an interim payment certificate every month until the final payment certificate was issued.
- [8] In response to the notice in terms s 3 read with s 4 (1) of the Institution of Legal Proceedings Against Certain Organs of the State Act, issued by the applicant on 1 July 2016 the respondent disputed the terms of certificates 19 and 20 and states in the founding affidavit that:

“23.1 That the respondent has effected payment of the amounts claimed underpayment certificates 19 and 20;

23.2 That the items that appear on the payment certificates are disputed *inter alia*, due to the appointed Principal Agent, BW Design Architects CC (“the Principal-Agent), not including the items of Community Liaison Officer and Security Adjustments, in the final variation list which was requested upon payment and certificates 17 and 18;

23.3 Payment certificate 20, which is in respect of the late payment was due to the conduct of the Principal-Agent; and

23.4 The practical completion of the project was achieved on 2 February 2015, and the Respondent did not expect to received payment certificates after

this date.”

[9] The payment of interest is based on the provisions of clause 25.4 of the agreement, which provides that the Principal Agent would calculate compensation at the interest rate, compounded on a monthly basis from the date of practical completion to and including the date of payment. The applicant was also in terms of the agreement entitled to default interest on the amount that the respondent may have defaulted on payment by due date.

[10] At the beginning of the hearing, counsel for the respondent conceded that the arbitration clause was not a bar to the institution of these proceedings and also that the certificate of indebtedness was equivalent to cash. He also indicated that the respondent accepted the validity and enforceability of the non-variation clause in the agreement.

[11] The only defence that the defendant persisted with was the allegation that the agent exceeded his mandate. Their defense is set out at in paragraph 4.2.5 of the answering affidavit which reads as follows:

“4.2.5 I further submit to the Honourable Court that the Respondent contends the valuation for payment certificate number 19 for the two (2) items namely: Community Liaison Officer and Security Adjustments in that the Principal Agent (BW Design) and the quantity surveyors never included these two (2) items for final variation list which was agreed between parties on the last and final meeting held at Kempton Park.”

[12] It was contended on behalf of the respondent that the agent exceeded his authority because he did not obtain the authority of the employer before issuing the certificate. In this respect reliance is based on clause 2.3 of the C 1.2 Conditions of the contract which requires the Principal Agent to obtain

the following specific approval from the employer before issuing the certificate:

- certified additional costs/ expenditure.
- Taking over of the works
- determining the extension of the time for completion.

[13] The argument went further to say that the Community Liaison Officer in terms of the certificate 19 the employer never gave the agent the authority to make the determination he did.

Evaluation

[14] It is important to note that the dispute between the parties does not involve the issue of the value of the work done by the applicant.

[15] The case of the respondent is that the agent exceeded its mandate because it did not seek the consent of the respondent before issuing the certificate about the evaluation of Community Liaison Officer and Security adjustments.

[16] It seems to me as a matter of principle the agreement required the agent to consult with the respondent before issuing the valuation for payment certificate in terms of clause 32.1 of the agreement.

[17] It is important to note that certificate 20 deals with the penalty for the late payment of the amount set out in certificate 19.

[18] The defence of the respondent that the agent exceeded its mandate is based on the provisions of clause 2.3 of the Conditions of Contract referred to earlier in this judgment. The contention in this regard is that the agent failed to obtain prior approval from the respondent before issuing the evaluation certificate. On the specific facts of the case, the agent ought to have obtained prior approval from the respondent in relation to the evaluation of

payment of the Community Liaison Officers.

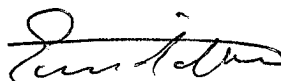
[19] While as stated earlier in this judgment the agent had to consult with the respondent before issuing an evaluation certificate, this was not the case about the present dispute. In my view there was no need to seek prior approval about the valuation made in certificate 19 as the amount allowed for was predetermined at R 38,500.

[20] In light of the above, I find that the agent did not exceed its mandate and accordingly the applicant's claim stands to succeed.

Order

[21] In the premises the following order is made:

1. Judgment is entered in favour of the applicant and the respondent is thus ordered to:
 - a. Pay the applicant the following amounts:
 - i. R283 214.75 in terms of the certificate number 19 issued on 4 April 2016; and
 - ii. R121 668.46 in terms of the certificate number 20 issued on 14 April 2016.
 - b. The respondent is to pay interest computed from 14 May 2016, at the rate of 1.6% as charged by the Reserve Bank.
2. The respondent is to pay the cost of the suit.



E Molahlehi

Judge of the High Court;
Johannesburg

Representation:

For the Applicant: Adv L Grobler

Instructed by: C De Villiers Attorneys

For the Respondent: Adv Matopo

Instructed by: Steven Maluleka Attorneys

Heard on: 23 November 2017

Delivered on: 02 February 2018