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

CASE NO: 2020/15965
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
13 May 2022

In the matter between:
QUALELECT INVESTMENT HOLDINGS (PTY) LTD Applicant
and
AZRAPART (PTY) LTD Respondent

JUDGMENT

MOORCROFT AJ:
Order

[1] In this matter I made the following order on 11 May 2022:

"Having read the papers and having heard counsel for the parties, judgment is given for the applicant as follows:

1. Payment of R902 754.01 (Nine Hundred and Two Thousand, Seven Hundred and Fifty-Four Rand and One Cent);

2. Payment of R476 132,42 (Four Hundred and Seventy-Six Thousand, One Hundred and Thirty-Two Rand and Forty-Two Cents);

3. Interest a tempora morae at a rate of 7,25%

a. on the amount of R902 754,01 from 21 November 2019 to the final

date of payment;

b. on the amount of R476 132,42 from 25 January 2020 to the final date of payment;

4. Costs."

[2] The reasons for the order follow below.

Introduction

[3] This matter concerns the interpretation of a document styled a *'letter of appointment'* dated 12 August 2019 in terms of which the respondent, referred to as the Employer, appointed the applicant to do the electrical installation at the Fourways Mall Extensions Project[1] in Johannesburg. The applicant was appointed directly by the Employer and was not a subcontractor.

[4] The applicant contends that the letter of appointment constitutes the written agreement between the parties and that it provides for interim payment certificates to be issued and be submitted to the respondent for payment. The respondent disputes the right to interim payments.

[5] It is common cause that -

5.1 three such interim payment certificates, numbered 1, 3, and 5 were issued and presented;

5.2 all three were signed electronically[2] by and on behalf of CKR Consulting Engineers and are headed *"progress evaluation certificate"*;

5.3 CKR Consulting Engineers were the respondent's engineers and agents;

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1 I.e., a construction project.

2 The respondent initially opposed the application also on the basis that the certificates were not signed but this defence was abandoned when the consulting engineer deposed to an affidavit in reply that confirmed his signature and with copies signed in the traditional fashion also attached.

5.4 the first certificate was issued in September and paid in November 2019;

5.5 the second and third certificates were issued in November 2019 and January 2020 respectively and the respondent denies an obligation to pay these certificates.

[6] In this application the applicant seeks payment of the second and third certificates. The respondent denies liability and argue that the letter of appointment does not provide for interim payment certificates, and that variations were not approved. It also alleges that motion proceedings are inappropriate as there are disputes of fact.

The legal status of a payment certificate

[7] The legal status of a payment certificate was dealt with in a number of cases and the principles are not contentious.[3]

7.1 A payment certificate is a liquid document and when it is signed by the employer's agent it is as if the employer itself had given an acknowledgement of debt in favour of the contractor;

7.2 The certificate creates a distinct cause of action;

7.3 The underlying contract does not form part of the cause of action;

7.4 The employer is bound to and by the certificate, subject to the principles of the law of agency;

7.5 The employer is not entitled to dispute the validity of the certificate on

[3] See *Randcon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd* 1973 (4) SA 181 (D); *Smith v Mouton* 1977 (3) SA 9 (W); *Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) 514 – 515; *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* 1993 (3) SA 331 (A); *Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA); *Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd* [2010] ZAGPJHC 75.*Group Five Construction (Pty) Ltd v Minister of Water Affairs and Forestry* [2010] ZAGPPHC 36, 2010 JDR 0512 (GNP) para 13.

the basis that the certificate was given negligently or that the discretion of the agent (usually an engineer or architect) was not exercised properly;

7.6 The certificate can be attacked on a limited number of grounds, such as fraud;

7.7 The fact that provision is made for a payment certificate does not by itself imply that provision is also made for interim payment certificates.

Interpretation of the letter of appointment

[8] The dispute in this matter is centred on the question whether the letter of appointment provides for interim payment certificates, in other words, the interpretation of the letter of appointment which constitutes the contract.

[9] Any document must be interpreted in its context and on the basis of the words used.[4] A useful starting point in interpretation is the following *dictum* by Innes CJ in *Glenn Brothers v Commercial Agency Co Ltd*[5]*:*

> *"In reading a document like this,*[6] *we are justified in looking at the circumstances under which the guarantee was given, and the position of the various parties concerned. That is necessary in order to enable us rightly to understand and to place ourselves in the position of the parties at the time. But, having done that, I do not think we should gather from the circumstances what the parties meant, or what it is fair and equitable to think they meant, and then see whether we can ingeniously so read the document as to deduce that meaning from its language. The right method is first to have regard to the words of the document, and if they are definite and clear we must give effect to them. In every case where a document has to be construed so as to arrive at the intention of the parties, if a meaning is apparent upon the face of the document, that is the meaning which should be given to it. The tendency of the older authorities, Roman-Dutch and*

4 See Christie *The Law of Contract in South Africa*, 5th Edition, 2006, pp 210 to 215.
5 1905 TS 737 at pp 740 – 741.
6 The document was a written order for the supply of flour.

English, was to place a strict and adverse construction upon a document of suretyship. On the other hand, later cases --- in England at any rate --- rather tend in the opposite direction. I think the proper rule is that without bias --- without prejudice one way or the other --- we should ascertain from the words of the document the intention of the parties, and if the words have a clear and definite meaning we should give effect to it."

[10] A century later, Wallis JA said in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[7] that:

"[18] ….The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.[8] *The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract*

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7 [2012] 2 All SA 262 (SCA), 2012 (4) SA 593 (SCA para 18. See also *Bastian Financial Services* (*Pty*) *Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA), [2008] 4 All SA 117 (SCA) paras 16–19; *KPMG Chartered Accountants* (*SA*) *v Securefin Ltd & Another* 2009 (4) SA 399 (SCA), [2009] 2 All SA 523 (SCA) para 39.

8 Footnote 15 in the judgment refers to *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98; *Re Sigma Finance Corp* (*in administrative receivership*) *Re the Insolvency Act 1986* [2010] 1 All ER 571 (SC) para 12; *Rainy Sky SA & Others v Kookmin Bank* [2011] UKSC 50, [2012] Lloyds Rep 34 (SC) para 28, and an article by Lord Grabiner QC *"The Iterative Process of Contractual Interpretation"* (2012) 128 *LQR* 41.

for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself",[9] read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[11] Because it is the purpose of interpretation to determine the intention of the parties as expressed in their written agreement, it might be permissible to evaluate how the parties themselves saw their contract and how they acted out its terms. This should however be done with some circumspection. It may very well happen that a party to a contract may change its mind about the contract after it came into being and then started to act in a way subtly or materially, consciously or unconsciously different from the original intention. Because the terms of the contract are cast in stone when it is entered into, such a subsequent change of mind, whether substantial or negligible, cannot cast its shadow back on the contract. It is after all not for the witness to tell the Court what the contract means whether by words or by conduct.

[12] In the present matter the respondent paid the first interim certificate. There is no explanation to the effect that it did so in error. The inference must be that when it paid the first certificate it believed that it was obliged to do so. I attach little weight to this fact however as, if the amount was in fact not due and the respondent misunderstood its own obligations at the time, such misunderstanding on its part cannot possibly influence the interpretation of the contract. One would however then have expected this to be clarified in the answering affidavit.

Analysis of the letter of appointment

[13] The letter of appointment[10] provided for a scope of work reflected in an attached document[11] that originated with the applicant, namely an application for progress payment dated 8 August 2019.

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9 Footnote 16 refers to *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98 and *South African Airways* (*Pty*) *Ltd v Aviation Union of South Africa & Others* 2011 (3) SA 148 (SCA) paras 25–30 [also reported at [2011] 3 All SA 72].

10 Annexure MK5 to founding affidavit (Caselines 001-22).

11 Annexure MK6 (Caselines 001-25).

13.1 The price is quoted as R1 266 415.68, exclusive of value added tax and the *"unit costs shall be fixed and firm and not subject to any adjustment whatsoever".*

13.2 Any variation to the price *"shall immediately be brought to the attention of CKR Consulting Engineers ("CKR"), Quanticost Quantity Surveyors and SIP Project Managers ("SIP)"*.

13.3 A detailed working programme was to be submitted by the applicant for review and approval by the project managers.

13.4 The applicant was obliged to provide welfare facilities for its staff and to comply with the construction drawings and specifications issued by CKR Consulting Engineers.

13.5 Material and workmanship warranties were to be provided on certified completion of the works by CKR Consulting Engineers and the applicant was to provide an undertaking that current resources would not be used by the applicant for direct works and therefore the applicant would not prejudice a third party, Mota-Engil Construction South Africa, from fulfilling its obligations in terms of the principal billing agreement.

13.6 Payment terms are dealt with in clause 11 and in terms of clause 12 the *"VAT invoice and statement shall be addressed to"* the postal address of the respondent.

13.7 Clause 11 reads as follows:

> *"11 Payment terms:*
>
> *11.1 Application for payment – on completion of the works and by no later than the 20th day of the month.*
>
> *11.2 Certificate for payment, Issue date – 25th day of the month.*

11.3 Certificate for payment, payment due date – 24 (twenty four) calendar days from the Certificate for Payment issue date. ”

13.8 Application for payment had to be made on completion of the works and by no later than the 20th day of the month.

13.9 A certificate for payment must then be issued by the 25th day and payment was due 24 calendar days from the certificate for payment issue date.

13.10 All previous correspondence shall be regarded as null and void, i.e. does not influence the interpretation of this document.

[14] The agreement therefore provided for a sequence of events, namely

14.1 an application for payment,

14.2 then approval by means of a certificate for payment,

14.3 then a VAT invoice and statement.

[15] These words all have their usual meanings, a certificate being a document attesting to a fact and a statement in this context being a summary of debits and credits. An invoice records a demand for payment.

[16] The applicant argues that the agreement provides for periodic payments and thus for progress payments certified in respect of works completed by the 20th day of the month, for an interim payment certificate to be issued by the 25th, and payment to take place 24 days later.

[17] Clause 11 does not expressly refer to interim payment certificates but the fact that it provides for a payment certificate issued on the 25th day of the month on the basis of the completion of works by not later than the 20th, and then also provides for an invoice and a statement, makes it clear that the agreement does provide for payment certificates to be issued on a monthly basis and not only, as the respondent contends, at the very end of the contract.

[18] On the respondent's interpretation all the work would have to be completed and the applicant would then have to apply for payment by the 20th of the month. The respondent argues that the certificate of payment referred to is nothing but an invoice.

[19] On this interpretation the certificate would be an invoice but there would not only be a further invoice but also a statement. This would be an inexplicable, three-fold duplication (or triplication) and on the respondent's interpretation of the document there would be no need for a statement or indeed a separate invoice. The statement would merely duplicate the invoice that would already be a duplication of the certificate.

[20] I conclude that the letter of appointment provides for interim payment certificates to be issued and that the respondent's engineers (Mr Hobson and Mr Bruzzone) did issue and sign three such certificates. There are no disputes of fact that make motion court proceedings inappropriate.

[21] It is worth noting, though it is of no relevance to the interpretation of the contract, that the engineer who signed the disputed certificates stood by his signatures and provided the applicant with an affidavit to confirm his signature and the fact that he issued the certificates. He signed as the agent of the Employer.

Variations

[22] The respondent also argued that variations were not approved. In terms of clause 5 of the letter of appointment, the employer's agents had to be apprised of any variations in the price.

[23] These were approved when the respondent's engineers certified the payments.

Conclusion

[24] I therefore conclude that the agreement provided for interim payment certificates to be issued by the respondent's engineer, and that he did so. The

respondent is bound by the certificates issued by their engineer.

Interest

[25] The applicant claims interest on the outstanding amounts at the rate of 10% per annum. No case is made out on the papers for this interest rate and the applicant is entitled only to *mora* interest in terms of the Prescribed Rate of Interest Act, 55 of 1975; in other words 7.25% per annum when the application was brought.

Costs

[26] The applicant seeks a punitive cost award. In my view a punitive cost award is not justified. The respondent was entitled to argue its interpretation of the agreement in Court and was not dishonest or in bad faith in doing so.

[27] For all these reasons I made the order quoted in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is 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 **13 MAY 2022**.

COUNSEL FOR THE APPLICANT: A J GLENDINNING

INSTRUCTED BY: E TAYLOR ATTORNEYS

COUNSEL FOR RESPONDENT:	S GROBLER SC
INSTRUCTED BY:	E G COOPER MAJIEDT INC
DATE OF THE HEARING:	3 MAY 2022
DATE OF ORDER:	11 MAY 2022
DATE OF JUDGMENT:	13 MAY 2022