Stenographer

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: A532/09

In the matter between:

IAN D SOUTER **Appellant**

And

T & T BUILDING CONTRACTORS CC **Respondent**

JUDGMENT DELIVERED ON 11 MAY 2011

HENNEY, J:

INTRODUCTION AND BACKGROUND

[1] On 31 May 2004 and at Knysna, the Respondent ("Plaintiff") and the Appellant ("Defendant") entered into a written building contract also known as the Joint Building Contracts Committee Levies 2000 ("JBCC").

[2] In terms of this JBCC, Mark Bell Architects was appointed as the agent of the Defendant and one, P Morkel was employed by the agent as Quantity Surveyors. On completion of the building works by the Plaintiff a final payment certificate was issued by the Plaintiff. The Plaintiff instituted a claim against the Defendant which was based on an alleged final payment certificate in terms of the JBCC contract for the sum of R62 733,31.

[3] The Defendant denies the allegations of the Plaintiff and in particular, pleaded that he denied that the payment certificate was a validly certificate issued by the Defendant agent, Mark Bell Architects, in terms of the agreement.

Furthermore, he denies that the Plaintiff is entitled to payment from the Defendant in terms of the alleged payment certificate.

[4] The Defendant also raised a Special Plea in terms of Clause 18 of the JBCC contract, which provided that any dispute between the parties shall be referred to arbitration conducted by an arbitrator, appointed by the Chairman of the Association of Arbitrators (Southern Africa).

[5] Whilst the Defendant disputed the Plaintiff's claim, the Defendant requested the court *a quo* that the Plaintiff's action be stayed, pending the final determination of the dispute by an arbitrator in terms of the agreement.

[6] The court *a quo* was requested to adjudicate on the Special Plea, after hearing evidence in terms of Rule 29(4) of the Magistrate's Rules.

[7] After hearing the evidence dealing essentially with the validity of the final payment certificate, the court found that the dispute was not a dispute between the Plaintiff and the Defendant, for the purposes of invoking the Arbitration clause, but a dispute between the agent of the Defendant, Mark Bell Architects and the Defendant.

[8] The court found that the certificate issued by the quantity surveyor was in fact issued by the agent (Mark Bell) through the quantity surveyor.

A further issue that was also dealt with by the court *a quo*, and that related to the wasted costs occasioned by a postponement on 22 July 2008, the court *a quo* granted an award for wasted costs on an attorney and client basis in respect of the abovementioned postponement, due to the fact that the Defendant merely stated that they are not available and no reasons were given by the Defendants why they were not available.

The appeal in this matter turns on these issues:

[9] **THE FACTS UNDERPINNING THIS APPEAL**

It is common cause that the parties entered into this JBCC contract, whereby they

agreed that the Plaintiff would build a house for the Defendant. The duly appointed agent, Mark Bell, an architect acted as an agent for the Defendant. SBDS Morkel was appointed as quantity surveyor by the Defendant. In terms of Clause 6.1.1, the agent shall administer the contract and monitor the progress of the works and carry out the duties assigned to him in terms of the agreement.

[10] A further duty of the agent was to issue payment certificates and completion certificates in terms of the agreement. It is common cause that 12 interim payment certificates were issued by the quantity surveyors and payments were made in accordance with such certificates by the Defendant. The Defendant refused to pay the Plaintiff the amount due after the same quantity surveyors issued a final payment certificate in the amount of R62 733,31.

[11] The Defendant contends that the final payment certificate was not a valid certificate in terms of the JBCC contract, due to the fact that the contract as per clause 6.1.5 only empowered the agent (Mark Bell Architects) to issue payment certificates, or completion certificates, in terms of the agreement. For anyone else to have issued a payment certificate, the JBCC contract required an amendment in terms of clause 1.5 of the JBCC contract.

[12] **ISSUES FOR DETERMINATION**

12.1 Whether the acceptance of the previous payment certificates by the Plaintiff as issued by the quantity surveyor, constitute a variation to the agreement by means of estoppel, that only the agent is authorised to issue payment

certificates, and if so;

12.2 Whether the agent could have "delegated" his authority to SBDS Morkel Quantity Surveyors, to issue the payment certificate in terms of the agreement.

12.3 Whether the claim is based on a valid payment certificate that can be regarded as a liquid document for obtaining a court order in terms of Clause 13.17.2 of the JBCC agreement.

If there is no valid payment certificate, whether this is a dispute that can be settled by arbitration in terms of Clause 18 of the agreement.

[13] **EVALUATION OF ISSUES**

Clause 1.5 of the JBCC agreement provides that:

> ***"No agreement or addendum varying, adding to deleting from, or cancelling this agreement shall be effective unless reduced to writing by the parties."***

It is common cause that no such variation was agreed to after the JBCC agreement was entered into between the Plaintiff (contractor) and the Defendant (employer).

In terms of this agreement, the only person that could issue payment certificates was the agent or Mark Bell & Associates. In order for someone other than Mark Bell and Associates, the agent, to have done this, there had to be a variation or amendment to the contract.

[14] When the 12 previous payments certificates were issued, by the Quantity Surveyors, this did not amount to a variation of the contract as required in terms of Clause 1.5, because this was not a variation reduced to writing by the parties.

[15] In **Brisley v Drotsky 2002 (4) SA 1 (SCA),** it was held:

> ***"This principle laid down in SA Sentrale Ko-Op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 that a term (an entrenchment clause) in a written contract providing that all amendments to the contract have to comply with specified formalities is binding and still remain in force. Furthermore, the principles of bona fides, namely that the entrenchment clause ought not to be enforced because it would under the circumstances be unreasonable, unfair and in conflict with principles of bona fides cannot be successfully invoked."***

Thus, even though the appellant had indulged the respondent by paying out on 12 previous times on the basis of interim payment certificates issued by the Quantity Surveyor, one, Morkel, this fact alone could not have been regarded as a variation to the JBCC contract which states that the agent, Mark Bell and Associates,

should have issued these payments certificates. The agent, Mark Bell, in terms of this agreement also had no authority to delegate his powers in terms of the contract to Morkel. He could only derive this authority from the contract. He was not the defendant or employers agent. See Randcon (Natal) (Pty) Ltd v Florida Twin Estates 1973 (4) SA 181 D.

[16] Morkel was not an agent of the defendant for the purposes of issuing a payment certificate, the agreement is clear on this. It is also clear as stated in **Shifren** and later in **Brisley**, that the appellant cannot be estopped to deny the existence of the clause in the contract that all payment certificates should be issued by the agent, Mark Bell and not by the quantity surveyor, Morkel.

It therefore cannot be accepted that the certificate was issued in terms of the contract. Only if there was a valid certificate issued in terms of the contract then the dispute is not subject to arbitration as set out in Clause 18.

[17] The agreement specifically states under Clause 13.17.2 that a payment certificate issued by the agent, shall be regarded as a liquid document for obtaining a court order. Therefore, only a valid payment certificate will constitute a liquid document in order to obtain a court order. In this regard counsel for the appellant made reference to **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Joint Venture 2009 (5) SA 1 SCA** and at:

> "[27] ***Gorven AJ*** *pointed out, with reference to* ***Randcon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd 1973 (4) SA 181 (D) at 183H – 184H,***

that a final payment certificate is treated as a liquid document since it is issued by the employer's agent, with the consequence that the employer is in the same position it would have been in if it had itself signed an acknowledgment of debt in favour of the contractor. Relying further on the ***Randcon*** *case (at 186G – 188G), the learned judge held that similar reasoning applied to interim certificates. The certificate thus embodies an obligation on the part of the employer to pay the amount contained therein and gives rise to a new cause of action subject to the terms of the contract. It is regarded as the equivalent of cash. The certificates in question all fall within this ambit."*

And only in that instance, if a dispute arises, it is not subject to the provisions of Clause 18. In all other instances, should a dispute arise, it should be settled by means of arbitration. The court *a quo*, was therefore in my view wrong to conclude that there was a dispute between the agent and the defendant and not a dispute in terms of the plaintiff and the defendant.

The court *a quo's* opinion was that, there being no dispute between the plaintiff and defendant, and the dispute was rather between, the defendant and the agent, Bell, the dispute is therefore not between the principal parties to the contract and therefore the provisions of Clause 18 is not applicable and therefore not an arbitrable dispute.

The court *a quo* lost sight of the fact that instead of it being a dispute between the agent and the defendant, at the heart of the dispute, was the validity of the

payment certificate. This had to be referred to arbitration.

I, am therefore of the view, that the court *a quo's* decision not to uphold the Special Plea was wrong.

[18] **COSTS FOR POSTPONEMENT ON 22 JULY 2008**

The defendant was ordered to pay the wasted costs on 22 July 2008 on an attorney and client scale.

The court *a quo* was clearly wrong when it stated in its judgment that in the Heads of Argument, the parties concentrated on the fact that the notice was not timeously done, but nowhere is any reason for the non-availability stated. The court *a quo* went further and stated that the defendant did not take the court into its confidence.

This is clearly not correct, it seems, because during his Heads of Argument, at page 570 of the record, the defendant refers to a letter on page 542 of the record it had sent to the plaintiff dated 21 July 2008, wherein the defendant had given his reasons why he was not available on such short notice to proceed on 22 July 2008.

This was not disputed and it seems accepted by the plaintiff. The defendants tendered to pay for the wasted costs on a party and party scale. The reasons afforded by the defendant that he was unavailable due to the fact that he was

notified by his employer only on 17 July 2008, that he had to report for duty and if he was unable to do so, he risked termination of his employment by his employer. This cannot be regarded as an unreasonable request for postponement and certainly in my view, did not justify a costs order against him on a punitive scale. See in this regard **Gamewest (Pty) Ltd v Regional Land Claims Commissioner Northern Province and Mpumalanga 2003 (1) SA 373 (SCA)** and also **Van Dyk v Conradie 1963 (2) SA 413**.

I therefore, find that there was no justification to order costs on an attorney and client basis.

[19] **ORDER**

I, propose that the appeal be upheld and that the order of the court *a quo*, that the Special Plea is dismissed with costs, be replaced with the following order:

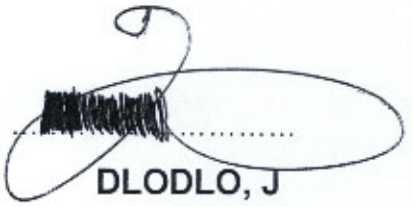
i) that the Special Plea of the Defendant is upheld with costs.

ii) that the wasted costs awarded to the plaintiff in respect of the postponement on 22 July 2008 on an attorney and client basis be replaced with the following:

"that the wasted costs is in respect of the postponement on 22 July 2008 be awarded on a party and party basis."

HENNEY, J

I agree. It is so ordered.



DLODLO, J