

ENFORCING CERTIFIED PAYMENTS— SUMMARY JUDGMENT UNSHACKLED.



TIEFENTHALER
ATTORNEYS

Tel: (031) 266 1185 / (011) 807 7544

www.constructionlaw.co.za

1. We recently successfully represented a contractor in the Supreme Court of Appeal (“SCA”) in enforcing payment under payment certificates using the “Summary Judgment” procedure, a process that has traditionally been considered as somewhat difficult to succeed with. In a very lucid Judgment, the SCA provided clarity on the use of Summary Judgment processes to enforce payment of certified amounts. Its a very important judgment for parties engaged in construction contracts in South Africa. In this newsletter, we provide a history of the case and explain the judgment and its impact:
2. Stocks Mavundla ZEK Joint Venture (“Stocks”) as the contractor and Joob Joob Investments (Pty) Ltd (“Joob Joob”) as the employer entered into a contract for the construction of a luxury hotel at Zimbali near Durban in KwaZulu-Natal. The contract was let under the JBCC 2000 Principal Building Agreement (July 2000 edition) (“the PBA”).
3. The contract ran into difficulties quite early on and eventually Stocks cancelled the contract under the provisions of clause 38 of the PBA. Joob Joob’s principal agent had issued 2 interim payment certificates before the date of cancellation and issued two further certificates, (the last being a final payment certificate) after cancellation.
4. Stocks issued summons in the High Court of South Africa, KwaZulu-Natal, Durban for a total amount of R 27 091 703.94 being in respect of three interim payment certificates numbered 9, 10 and 11 and a final payment certificate 12.
5. After Joob Joob notified Stocks of its intention to defend the matter, Stocks brought an application before the Court to award it summary judgment for the amounts claimed, arguing that Joob Joob had no *bona fide* defence against making payment.
6. Joob Joob opposed the granting of the summary judgment on 3 specific grounds:
 - a. Firstly, it was submitted on behalf of Joob Joob that the payment clause in the PBA (clause 31.9) had been amended with reference to previous standard building contracts and this amendment meant that certificates issued by the principal agent could be challenged by the employer as to both form and substance because there was no longer a mechanism for disputes between employer and principal agent as was previously provided for (the “dispute” defence).
 - b. Secondly, Joob Joob submitted that the liquidity of the certificates was affected by the dates appearing on Stocks’ invoices when compared to the dates of the certificates and the due date for payment (the “invoice date” defence)
 - c. The third attack was on the liquidity of payment certificates number 11 and 12 only and was twofold. It was alleged that:
 - (i) Since these certificates contained amounts of damages it rendered the payment certificates illiquid and not susceptible to summary judgment (the “certification of damages” defence);
 - (ii) Since VAT appeared to have been calculated on the damages it rendered the certificates inaccurate and accordingly illiquid. (the “VAT on damages” defence)

7. The court dealt with the specific defences as follows:
 - a. As to the “dispute” defence, the court doubted whether Joob Joob’s reasoning was correct, particularly (as Stocks’ counsel had pointed out), considering that clauses 40.1 and 40.2 of the PBA dealing with settlement of disagreements and disputes had not been substantially amended insofar as the issues were concerned.
 - b. Regarding the “invoice date” defence, the court held that all that is required was a tax invoice in the amount reflected in the payment certificate (which tax invoice relates to the payment certificate) in order to make the amount payable.
 - c. As to the “certification of damages” defence, the Court, referring to clauses 33.1.6 and 38.5.6 of the PBA, stated as follows: *“The defendant agreed specifically to damages being provided for in payment certificate. The court went on to state that “a debt is liquid if it is admitted or its money value has been ascertained, or in the sense that it is capable of prompt ascertainment. On the reasoning set out above, this debt is both agreed and capable of speedy ascertainment under the mechanisms of the contract. The inclusion of damages does not adversely affect the liquidity of the certificates in question”.*
 - d. Regarding the “VAT on damages” defence, the Court was not persuaded that Joob Joob had raised a defence that the amount for VAT ought not to have been included or rendered the certificate illiquid.
8. The only further basis on which Joob Joob sought to oppose summary judgment was an assertion that it had a counterclaim. It was, however, conceded by counsel for Joob Joob that the counterclaim was not properly formulated.
9. In finding in favour of Joob Joob on its application for summary judgment, the Court reiterated the position of certificates in our law as follows:
 - a. The grounds upon which a certificate may be challenged are “extremely narrow”.
 - b. Both interim and final payment certificates are liquid documents since they are issued by the employer’s agent and the employer is in the same position it would have been if it had itself signed an acknowledgment of debt in favour of the contractor. Put otherwise, *“A certificate embodies a binding obligation on the part of the employer to pay the amount and gives rise to a new cause of action subject to the terms of the contract. A certificate is regarded as the equivalent of cash”.*
10. The Court *a quo* was satisfied that Joob Joob had not set out any triable issue in respect of claims 2, 3 and 4 (Stocks did not pursue its claim in respect of payment certificate 9 in the amount of R129 100.48.).
11. The Court, in holding that it could not find any basis for exercising its discretion against summary judgment accordingly granted summary judgment in favour of Stocks in the sum of R26 962 603.46 together with interest and costs.
12. Joob Joob sought leave to appeal against the decision of Acting Judge Gorven in the Durban High Court and leave was refused other than on the defence of “VAT on damages” in respect of certificates 11 and 12 upon which leave to appeal was granted.
13. Joob Joob, unhappy with being refused leave to appeal on the bulk of the claims thereafter petitioned the Judge President of the SCA who granted Joob Joob leave to appeal against the whole of the decision of the court *a quo*.
14. The appeal was argued before 5 Justices of the SCA on 16 March 2009 and

judgment was delivered on 27 March 2009, once again in favour of Stocks.

15. Justice Navsa, with all other Justices concurring, delivered the Judgment of the Supreme Court of Appeal and in doing so restated, with lucid clarity, the law regarding the enforcement of payment via the process of summary judgment as follows: *"...the rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or sustainable defence of her/his day in court..."* In referring to the judgment of Corbett JA in **Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)**, Justice Navsa went on to state: *"...However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor...Having regard to its purpose and proper application, summary judgment proceedings only hold terror 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."*

16. This case is of importance to both contractors and employers as it deals very clearly with the nature of payment certificates – both interim and final and the fact that damages certified by an agent on a payment certificate (where allowed for in the agreement) are no bar to enforcing payment of a certificate via summary judgment proceedings. It also serves as an important reminder to contractors that non-payment of payment certificates is not necessarily a matter for arbitration, but an issue to be enforced by a court of law.