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CONSTRUCTION LAW BULLETIN

IS A FINAL PAYMENT CERTIFICATE REQUIRED FOR FINAL PAYMENT?

Maykent (Pty) Ltd ("the Employer") contracted with Trackstar Trading 20 (Pty) Ltd ("the Contractor") to carry out alterations and additions to the Employer's Kentucky Fried Chicken store in Newtown, Johannesburg. Tertius Rabe Property Services CC was appointed as the Principal Agent.

The agreed contract price was approximately R1,3m.

The contract period was three months which was later extended to six months due to additional work having been instructed.

The contract between the parties was not concluded in the conventional manner. It was ultimately found to have been concluded partly orally, partly by conduct and partly on the basis of the standard form JBCC Principal Building Agreement.

The Employer made a few small interim payments to the Contractor but by the time that the works had been completed, more than three-quarters of the amount payable was unpaid.

The Contractor instituted action against the Employer in the Gauteng High Court in September 2008 for payment of the outstanding amount of R985 423,00. The Contractor also sued the Principal Agent for a final account.

The Employer defended the action on the basis that no final completion certificate and no final payment certificate had been issued by the Principal Agent and as such nothing was payable to the Contractor. The Employer also counterclaimed for approximately R2,1m in respect of damages allegedly suffered due to late completion and the cost of remedial work executed by others.

The case took five years to get to court!

Shortly before the action commenced, the Principal Agent issued a final payment certificate for an amount of R963 475,00.

The Employer's defence in the trial was that because the action had been instituted before the issue of the final payment certificate, being a prerequisite to an entitlement to payment in terms of the JBCC Contract, the action was premature. In other words the Contractor did not have a valid cause of action at the time the summons was issued.

It was common cause that no final completion certificate had ever been issued and the final payment certificate of course had only arrived five years after the action had been instituted.

The Principal Agent testified that the contract had not been implemented in conformity with the JBCC Contract and that it was in fact unaware that the parties considered it to be applicable to their contract.

The High Court took the view that in the circumstances strict adherence to the requirements of the JBCC Contract was not required.

However, in passing, it commented that a claim by a contractor for a final payment certificate and then payment would be in order and was akin to a claim for a statement and debatement of account followed by payment and that the summons was in any event therefore not premature.

The court ordered the Employer to pay the amount certified in the final payment certificate together with interest from the commencement of the action five years earlier.

The Employer appealed the decision to the Supreme Court of Appeal ("SCA")¹. One of the Employer's arguments was that interest should only have been ordered to run from when the final payment certificate was issued and not from a date five years earlier when the action had been started.

The SCA disagreed. It held that the Contractor had submitted its final account claim well prior to having instituted action. As such the Employer was fully aware of the claim and the final payment certificate ought to have been issued and paid then. The Contractor's interest claim was accordingly upheld.

Conclusion

A contractor will not be precluded from suing an employer for final payment in the absence of the principal agent having issued a final payment certificate.

Even if the JBCC Contract provisions apply, leaving the arbitration clause aside, the contractor could in the first instance claim a final payment certificate and secondly an order for payment of the amount to which it is entitled pursuant to such certificate.

It would seem that even if there is no final **completion** certificate, meaning that certain defects have not been completed, inter alia because of the employer's breach in not paying amounts that it ought to have paid, the contractor is not non-suited. The contractor however in such a case would have to concede some deduction off the amount payable to it to cover the cost to remedy outstanding defects.

¹ [Maykent v Trackstar 106/2013 \[2015\] ZASCA 14 \(17 March 2015\)](#).

Both the Employer and the Contractor were represented by senior counsel and the Contractor also had a junior counsel in the SCA.

All in all the case took seven years to bring to finality by which time no doubt the tail was wagging the dog in the sense that the legal costs likely overshadowed the amount in issue by a significant margin. Even the Contractor, who was successful, would have only recovered a meagre amount after its attorney client costs were deducted from the clam awarded to it.

The case is a testament to the folly of litigating over comparatively moderate amounts which is often fuelled by acrimony between the litigants.

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