THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 20821/2014

In the matter between:

NURCHA FINANCE COMPANY (PTY) LTD **APPELLANT**

and

OUDTSHOORN MUNICIPALITY **RESPONDENT**

Neutral citation:	*Nurcha Finance Company (Pty) Ltd v Oudtshoorn Municipality* (20821/2014) [2016] ZASCA 28 (23 March 2016)
Coram:	Ponnan, Pillay and Petse JJA and Fourie and Tsoka AJJA
Heard:	1 March 2016
Delivered:	23 March 2016

Summary: Undertaking to pay amounts due in terms of a building contract to third party ─ failure to do so giving rise to claim for damages ─ claim not precluded by virtue of subsequent cancellation of building contract.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Griesel J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs consequent upon the employment of two counsel.

2 The order of the court below is set aside and substituted by the following order:

'Judgment is granted in favour of the plaintiff as follows:

(a) The defendant is ordered to pay the plaintiff the sum of R2 692 467.43, together with interest thereon at the rate of 15,5 per cent per annum calculated from date of service of summons to date of final payment.

(b) The defendant is ordered to pay the plaintiff's costs of suit, including all reserved costs save for those occasioned by the postponement of the matter on 12 March 2012 which are to be paid by the plaintiff, such costs, where applicable, to include the costs of two counsel.'

JUDGMENT

Fourie AJA (Ponnan, Pillay and Petse JJA and Tsoka AJA concurring):

[1] This appeal has its origin in an opposed application brought in the Western Cape Division of the High Court, Cape Town, which was subsequently referred to trial. After the exchange of pleadings the parties identified two questions of law which they agreed to place before the trial court by way of a stated case in terms of Uniform rule 33(4). The matter proceeded before Griesel J who ruled in favour of the respondent, but granted the appellant leave to appeal to this court.

[2] The factual background to the appeal appears from the following agreed facts forming part of the stated case.

[3] During 2007 the respondent, Oudtshoorn Municipality (the municipality), awarded a tender for the construction of 663 houses (the project) to Silver Buckle Trade (Pty) Ltd t/a Yethu Projects (Yethu).

[4] In November 2007 Yethu applied to the appellant, Nurcha Finance Company (Pty) Ltd (Nurcha), for bridging finance to enable it to complete the project. Consequently, during December 2007, Nurcha and Yethu concluded a bridging finance agreement (the finance agreement).

[5] Pursuant to the conclusion of the finance agreement, Yethu issued an irrevocable instruction to the municipality advising it that Yethu had concluded the finance agreement with Nurcha and had ceded to Nurcha all payments payable to Yethu by the municipality in respect of the project. Yethu further instructed the municipality that it should 'from this day forward as per the instructions of [Nurcha]' pay all moneys owing to Yethu in respect of the project into a nominated bank account in the name of Yethu (the project account). The project account was the only account into which the municipality was to pay moneys due to Yethu and this instruction could only be varied with Nurcha's written consent.

[6] Pursuant to the instruction, the municipality, duly represented by its municipal manager, gave a written undertaking in favour of Nurcha (the undertaking), in terms of which the municipality irrevocably and unconditionally consented to the cession of Yethu's rights arising out of the project to Nurcha. The municipality further consented irrevocably and unconditionally to Yethu pledging and ceding *in securitatem debiti* to Nurcha all of its rights to any moneys payable by the municipality, and it irrevocably and unconditionally undertook, in favour of Nurcha, to pay all moneys due and payable to Yethu into the project account exclusively.

[7] In giving the undertaking the municipality accepted the instruction and thereby concluded an agreement with Nurcha upon the terms set out in paragraphs 5 and 6 above.

[8] The municipality had appointed Arcus Gibb (Pty) Ltd (Arcus Gibb) as project managers for the project. Arcus Gibb, together with the municipality's building control officer, were responsible for assessing and certifying the work completed on the project by Yethu. Arcus Gibb and/or the municipality's building control officer would inspect all work completed by Yethu pertaining to the project and certify work completed during the course of the project, by issuing certified payment certificates upon which payment was to be made by the municipality into the project account in accordance with the undertaking.

[9] Nurcha relied upon the certified payment certificates in allowing further draw downs and loan advances to Yethu to enable it to complete the project for the municipality. During the period October 2007 to the end of August 2009, Arcus Gibb and/or the municipality's building control officer certified that Yethu had completed work in relation to 39 payment certificates. The municipality effected payment in respect of 36 of the certificates into the project account, but failed to make payment of three certificates, being certificates 7, 8 and 20, into the project account. Instead, the municipality made payment in respect of the three certificates into a different account held by Yethu. In particular, the municipality failed to pay the amounts of R1 493 638.90 (certificate 7), R2 086 204.10 (certificate 8) and R635 076.49 (certificate 20) into the project account.

[10] Yethu subsequently failed to complete the project and the municipality cancelled the contract with Yethu due to the latter's breach of contract. Yethu was then placed under final liquidation by the Western Cape High Court on 14 April 2010. The municipality appointed another contractor to complete the project. As at the date

of the stated case, Nurcha had not recovered any further payment from the insolvent estate of Yethu.

[11] Nurcha claimed damages from the municipality for breach of contract in the amount of R2 692 467.43, being the balance owing to Nurcha in terms of the finance agreement, by virtue of the non-payment of certified payment certificates 7, 8 and 20.

[12] Nurcha's submissions, as plaintiff, were recorded as follows in the stated case:

(a) In terms of the agreement between Nurcha and the municipality, and on a proper interpretation thereof, once payments had been certified, the money so certified became due, owing and payable and had to be paid into the project account;

(b) The parties' agreement prohibited the municipality from making any payments to Yethu into any account other than the project account, for the duration of the project in respect of work which had been certified for payment. The municipality breached the agreement and is liable to Nurcha for the payment of damages in the aforesaid amount.

(c) In any event, the municipality was aware of the cession of Yethu's right to payments under the project to Nurcha and was legally bound to give effect thereto by making payment of the amounts certified in terms of the payment certificates, to Nurcha into the project account.

[13] The submissions of the municipality, as defendant, were recorded as follows in the stated case:

(a) Nurcha's claim is founded on the non-payment of the payment certificates into the project account.

(b) The payment certificates constituted claims for pre-payments on payment of the contract sum.

(c) Due to the cancellation of the contract between Yethu and the municipality, Yethu could not and did not complete the project and did not fulfil its contractual obligations in terms thereof.

(d) Yethu accordingly lost its contractual standing to claim for payment of the contract sum as well as all pre-payments. The payment certificates are therefore no longer prima facie proof that amounts reflected therein are due and payable to Yethu; and

(e) Nurcha *ipso facto* lost its right to rely on non-payment of the certificates into the project account due to the breach of the agreement between Nurcha and the municipality, giving rise to a claim for damages.

[14] The legal issues arising from the stated case which the court a quo was required to determine, were the following:

(a) Is Nurcha entitled to rely on the non-payment of payment certificates 7, 8 and 20 into the project account, as a basis for its claim for damages?

(b) If so, whether it is open to the municipality as a matter of law to dispute its liability for payment of those payment certificates on the basis that they were not validly issued?

[15] Finally, the parties agreed that, if the court a quo were to find in favour of Nurcha in respect of both questions presented to it for determination, Nurcha was entitled to judgment in terms of prayers A, B and C of its particulars of claim.

[16] The trial court answered the first question posed in the negative and the second question accordingly fell away. In effect, the trial judge held that Nurcha was not entitled as a matter of law to rely on the municipality's failure to make payment of the amounts certified under certificates 7, 8 and 20 into the project account, as a basis to claim damages from the municipality.

[17] In arriving at this finding the trial judge, firstly, held that the municipality and Yethu had not agreed that the issuing of a payment certificate would be regarded as

proof of what was due and payable to Yethu under their contract. Secondly, the trial court held that, as Nurcha derived its claim from Yethu in circumstances where Yethu, by virtue of the cancellation of the building contract, can no longer enforce a claim against the municipality on the basis of interim payment certificates, Nurcha is left without a claim against the municipality.

[18] In the latter regard the court a quo relied on the decision in *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) (confirmed on appeal at 1988 (2) SA 546 (A)), in which it was held that payment certified in an interim payment certificate is not (subject to any contrary provision in the underlying contract between the employer and the contractor) regarded as compensation for a completed segment of the work. It is treated as provisional and subject to adjustment and re-adjustment in subsequent certificates. This stems from the principle that payment ultimately depends on the delivery of a finished product of work. Therefore, the employer who makes payment in advance on a contract sum that is dependent upon completion of the work, does so in the expectation that the contractor will finish the work; and the contractor who claims an interim payment thereby confirms that he or she is ready, willing and able to do so. From this it follows that, upon the cancellation of the underlying contract, the employer's legitimate expectation of the continued performance of the work by the contractor, is disrupted. The contractor is no longer able to complete the work and should therefore be disqualified from insisting on payment to be made by the employer in terms of interim payment certificates. This is so as the claim on the interim payment certificate remains in essence a claim on the contract. Cancellation of the contract strikes at the very foundation of the claim and therefore debars a claim based upon the interim payment certificate. The contractor then has to look at remedies other than the payment certificate to exact compensation for work actually done in terms of the contract (cf *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) in which a claim for a reduced contract price for incomplete performance under a bilateral contract was allowed on considerations of fairness).

[19] Counsel for the municipality, whilst contending that the trial court had correctly answered the first question for determination in the negative, disavowed reliance on the trial judge's reasoning in support of that conclusion. There is no merit in the first ground upon which the trial court found in favour of the municipality, namely that the parties had not agreed that the issuing of a payment certificate would be proof of what was due and payable to Yethu under the building contract. It is trite that interim payment certificates of the kind in question provided Yethu with a self-standing and distinct cause of action which could be enforced without any need for Yethu to go beyond the certificates or to rely on the underlying building contract. See *Mouton v Smith* 1977 (3) SA 1 (A) at 5C-E; *Thomas Construction* (A) at 562E-F. See also the analogous status of 'on demand' guarantees, as discussed in *State Bank of India v Denel SOC Limited* [2014] ZASCA 212 (3 December 2014); [2015] 2 All SA 152 (SCA).

[20] Turning to the second ground upon which the trial judge found in favour of the municipality, counsel for the municipality, as I understood him, pinned his colours to the mast of an adapted version of the trial judge's second ground. His submission proceeded along the following lines: In claiming as it did, Nurcha implied that the amounts certified in the payment certificates constituted moneys due and payable to Yethu in terms of the building contract. However, by reason of the cancellation of the building contract prior to the issue of summons, the payment certificates, at the time of summons being issued, no longer constituted proof of indebtedness to Yethu in terms of the building contract. Therefore, the submission continued, after the cancellation of the building contract prior to the completion of the work, Nurcha's cause of action became one based on enrichment. As Nurcha's particulars of claim do not incorporate an alternative claim based on enrichment, it is not entitled to rely on the non-payment of the payment certificates into the project account, as a basis for its claim for damages against the municipality. In support of this submission counsel for the municipality, as was the case with the trial court, set considerable store by the decisions in *Thomas Construction*.

[21] In my view the approach of the court below, as well as the approach of the municipality on appeal, failed to take proper account of the true nature of Nurcha's cause of action. Its cause of action is not that of a contractor claiming payment for work done under a building contract. As rightly conceded by the municipality, Nurcha's cause of action is founded on the undertaking of the municipality to pay all moneys due and payable by it to Yethu, as and when they fell due, into the project account. Therefore Nurcha's claim is not based on any payment certificate as such ─ its claim is made in terms of the municipality's undertaking to make all payments due and payable in terms of the building contract with Yethu, to Nurcha and not to anyone else. Furthermore, the municipality's obligation to make the payments to Nurcha arose from the acts of payment under the payment certificates (which payments were made by the municipality prior to the cancellation of the building contract with Yethu), and was not dependent upon the validity or ultimate status of the payment certificates. Put differently, upon the amounts being certified as due and payable in terms of the relevant payment certificates, the municipality was contractually obliged to pay the amounts into the project account, and its failure to do so, by paying same into another account, constituted a breach of contract. As submitted on behalf of Nurcha, any claims that the municipality and Yethu may have against each other in terms of the building contract between them, or on any other ground, are *res inter alios acta* as regards the municipality's obligations under its agreement with Nurcha.

[22] From the above it is immediately apparent that the facts in *Thomas Construction* differ markedly from those in the instant case. In the former the court had to consider whether a claim in terms of a (as yet unpaid) payment certificate issued to a contractor under a building contract, survived the subsequent cancellation of the building contract. In the instant matter there is no relationship of contractor and employer under a building contract between Nurcha and the municipality. As explained earlier, Nurcha's claim is based on an independent agreement concluded with the municipality in terms of which the municipality contractually undertook to pay all moneys due and payable by it to Yethu, into the project account for the benefit of Nurcha. Payment certifcates 7, 8 and 20 certified amounts due for payment, which were paid by the municipality prior to the

cancellation of the building contract, but payment was not made into the project account and therefore the municipality acted in breach of the contractual undertaking made to Nurcha.

[23] I fail to comprehend why (as submitted on behalf of the municipality) the cancellation of the building contract between the municipality and Yethu, prior to the issue of summons by Nurcha, resulted in the demise of Nurcha's claim for contractual damages. What makes this submission even more startling, is the concession by the municipality that, prior to the cancellation of the building contract, it would have had no defence against Nurcha's claim for damages. To my mind, the subsequent cancellation of the building contract cannot legally impact upon the nature and extent of the obligation of the municipality vis-à-vis Nurcha and somehow transform Nurcha's claim for damages to one which 'has become determinable only on the basis of enrichment'.

[24] I understood counsel for the municipality's submission to be that, subsequent to the cancellation of the building contract, any indebtedness of the municipality to Nurcha was to be determined only on the basis of the municipality's indebtedness to Yethu. Differently put, the submission is that the parties intended that, upon the cancellation of the building contract, the municipality would only be liable to Nurcha to the extent that the municipality may have been unjustly enriched at the expense of Yethu.

[25] This submission, once again, fails to take proper account of the fact that Nurcha's cause of action is based on the municipality's breach of contract vis-à-vis Nurcha, by failing to make the payments in respect of certificates 7, 8 and 20 into the project account, giving rise to a claim for damages arising from the breach of contract. This cause of action arose, at the latest, upon the municipality's failure to make payment thereof into the project account, before the cancellation of the building contract between Yethu and the municipality. Whether or not the municipality is liable to Yethu for unjustified enrichment due to the premature

cancellation of the building contract (on the *BK Tooling* basis or on the basis of any of the other *condictiones* recognised in our law), is legally irrelevant for the determination of Nurcha's claim for damages arising from the breach of a separate contract concluded between the municipality and Nurcha.

[26] In the result I find that Nurcha is entitled to rely on the municipality's breach of the agreement (ie the non-payment of the amounts certified in terms of payment certificates 7, 8 and 20 into the project account) as a basis for its claim for damages against the municipality. I therefore conclude that the first question of law ought to have been answered in the affirmative.

[27] This brings me to the second question posed, namely whether it is open to the municipality to dispute its liability to Nurcha on the basis that the relevant payment certificates had not been validly issued. From the bar, in this court, counsel for the municipality accepted that, strictly speaking, this is not a question of law and, in view of the absence of a proper factual basis in the stated case, the question could not be answered in favour of the municipality. The question accordingly fell away.

[28] In view of the agreement of the parties, as recorded in paragraph 15 above, Nurcha is accordingly entitled to judgment in terms of prayers A, B and C of its particulars of claim. I should record that we have been advised by counsel that all reserved issues as to costs have been settled, as reflected in the order below.

[29] In the result the following order is made:

1 The appeal is upheld with costs, including the costs consequent upon the employment of two counsel.

2 The order of the court below is set aside and substituted by the following order:

'Judgment is granted in favour of the plaintiff as follows:

(a) The defendant is ordered to pay the plaintiff the sum of R2 692 467.43, together with interest thereon at the rate of 15,5 per cent per annum calculated from date of service of summons to date of final payment.
(b) The defendant is ordered to pay the plaintiff's costs of suit, including all reserved costs save for those occasioned by the postponement of the matter on 12 March 2012 which are to be paid by the plaintiff, such costs, where applicable, to include the costs of two counsel.'r

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P B FOURIE
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:	R G L Stelzner SC L C Kelly Instructed by: DMO Attorneys, Bryanston Honey Attorneys, Bloemfontein
For Respondent:	L J Joubert Instructed by: Coetzee & Van Der Bergh, Oudtshoorn Rossouws, Bloemfontein

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20821/2014

In the matter between:

NURCHA FINANCE COMPANY (PTY) LTD **APPELLANT**

and

OUDTSHOORN MUNICIPALITY **RESPONDENT**

Neutral Citation: *Nurcha Finance Company (Pty) Ltd v Oudtshoorn Municipality* (20821/2014) [2016] ZASCA 28 (23 March 2016)

Coram: Ponnan, Pillay and Petse JJA and Fourie AJA

Delivered: 22 July 2016

ORDER

The order granted in the above appeal on 23 March 2016 is varied by substituting sub-paragraph (a) of paragraph 2 thereof with the following:
'(a) The defendant is ordered to pay the plaintiff the sum of R2 692 467,43, together with interest thereon at the rate of 15,5 per cent per annum calculated from date of service of the application to date of final payment.'

JUDGMENT

Fourie AJA (Ponnan, Pillay and Petse JJA concurring):

[1] On 23 March 2016 this court handed down judgment in the above appeal from the Western Cape Division of the High Court, Cape Town (Griesel J sitting as court of first instance). The order made was the following:

'1. The appeal is upheld with costs, including the costs consequent upon the employment of two counsel.

2. The order of the court below is set aside and substituted by the following order:

"Judgment is granted in favour of the plaintiff as follows:
(a) The defendant is ordered to pay the plaintiff the sum of R2 692 467.43, together with interest thereon at the rate of 15,5 per cent per annum calculated from date of service of summons to date of final payment.
(b) The defendant is ordered to pay the plaintiff's costs of suit, including all reserved costs save for those occasioned by the postponement of the matter on 12 March 2012 which are to be paid by the plaintiff, such costs, where applicable, to include the costs of two counsel".'

[2] The appeal had its origin in an opposed application which was subsequently referred to trial and, after the exchange of pleadings, two questions of law were identified which the parties agreed to place before the trial court by way of a stated case in terms of Uniform Rule 33(4). It was not a trial action which had been commenced by the issuing of summons.

[3] The parties have drawn our attention to the fact that the order in sub-paragraph 2(a) thereof erroneously refers to the calculation of interest 'from date of service of summons'. The order should refer to the calculation of interest from the date of service of the application by means of which this matter had been commenced. This is a patent error which stands to be corrected in terms of Uniform Rule 42(1)(b).

[4] In the result the order above will issue.

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P B Fourie

Acting Judge of Appeal