THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 161/08

JOOB JOOB INVESTMENTS (PTY) LTD Appellant

and

STOCKS MAVUNDLA ZEK JOINT VENTURE Respondent

Neutral citation: *Joob Joob v Stocks* (161/08) [2009] ZASCA 23 (27 March 2009)

CORAM: Harms DP, Navsa, Brand, Mhlantla JJA and Bosielo AJA

HEARD: **16 March 2009**

DELIVERED: **27 March 2009**

CORRECTED:

SUMMARY: **Building contract – interpretation of – nature of interim certificates – validity of certification of damages – summary judgment proceedings discussed – summary judgment rightly granted.**

ORDER

On appeal from: High Court, Durban (Gorven AJ sitting as court of first instance).

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

JUDGMENT

NAVSA JA (Harms DP, Brand, Mhlantla JJA and Bosielo AJA concurring):

[1] This is an appeal against the grant of summary judgment in the Durban High Court (Gorven AJ). The background is set out hereafter.

[2] During 2004 the parties concluded a written agreement in terms of which the respondent, a partnership conducting the business of a building contractor, undertook to build a resort hotel at Ocean View site, Zimbali Coastal Forest Resort, Ballito for the appellant company. I shall hereafter refer to the appellant as JJ and to the respondent as Stocks. These parties are referred to in the agreement as the contractor and employer respectively.

[3] The terms of the agreement are embodied in a standard contract recommended by the Joint Building Contracts Committee (JBCC).[1] Clause 5.1 of

[1] The constituents of which are :
Association of South African Quantity Surveyors
Building Industries Federation South Africa
South African Association of Consulting Engineers
South African Institute of Architects
South African Property Owners Association
Specialist Engineering Contractors Committee
It was not contested that the standard contract under consideration was the third in a series of JBCC contracts. This is important because earlier editions of contracts have been the subject matter of decided cases the findings of which were made on the basis of provisions in those contracts.

the agreement provides that JJ shall appoint a principal agent[2] with full authority to act on its behalf in terms of the agreement.[3] Clause 5.3 goes further and states that only the agent has authority to bind JJ.

[4] The agreement provides for interim certificates to be issued by the principal agent as well as a final certificate in respect of work completed as per the schedule of works.[4] It is common cause that Stocks cancelled the contract on 26 September 2005. Stocks' entitlement to cancel the contract is not in issue.[5] In respect of work completed the principal agent issued four certificates. They are

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[2] It is worth noting that 'agent' is defined in the definitions and interpretations section of the agreement as follows:
'[T]he person or entity named in the schedule or appointed by the employer in terms of 5.0 to deal with specific aspects of the work.'
'Principal Agent' is defined:
'[T]he person or entity appointed in terms of 5.0 and named in the schedule'.

[3] In terms of clause 5.1 JJ 'warrants that the principal agent has full authority and obligation to act in terms of the agreement, and where appropriate, the associated nominated and selected subcontract agreements'.

[4] The material part of clause 31.1 of the agreement provides as follows:
'The principal agent shall issue an interim payment certificate every month on or before the date stated in the schedule until the issue of the final payment certificate.'
Importantly, clauses 31.4.1-31.4.3 provide:
'The value certified in an interim payment certificate shall separately include:
31.4.1 A reasonable estimate of the value of the work executed taken into account the information submitted by the contractor in terms of 31.2 and making due allowance for adjustments to the contract value in terms of 32.0.
31.4.2 A reasonable estimate of the value of materials and goods in terms of 31.6.
31.4.3 Amounts previously certified in terms of 31.4.1 and 31.4.2.'

[5] JJ's affidavit opposing summary judgment, relying on an arbitration clause in the agreement, initially stated that there was a dispute about Stocks' right to cancel the agreement which was subject to arbitration, without stipulating what that dispute entailed. Towards the end of the affidavit, JJ stated that on 24 January 2005 Stocks indicated that they had suspended the works and only returned to site by 1 March 2005. JJ contended that this constituted a breach by Stocks, which precluded it from cancelling the agreement. There is no challenge in the opposing affidavit to Stocks' assertion, in its particulars of claim, that JJ failed, in terms of the agreement: (i) to make an advance payment before noon on 31 March 2005; (ii) to provide a payment guarantee in the sum of R40 m before noon on 29 April 2005 and (iii) to provide by 29 April 2005 written evidence that it had secured adequate financing to enable it to comply with its obligations. Stocks asserted further that payment had not been made upon presentation of certificate 9. These, according to Stocks, were the bases on which the agreement was cancelled. Gorven AJ therefore correctly reflected in his judgment, that it was common cause before him that the contract was properly cancelled by Stocks arising from JJ's non-performance. Before us and the court below only the validity of the certification was in issue – not the other grounds for cancellation. The arbitration clause continued to be a live issue and is dealt with later.

as follows:

(a) 1 August 2005 (certificate 9) ─ in terms of which it was certified that the amount due to Stocks was R129 100.48;

(b) 7 September 2005 (certificate 10) ─ certifying an amount of R2 704 425.78;

(c) 4 August 2006 (certificate 11) ─ for an amount of R14 568 177.68 and

(d) 6 November 2006 (certificate 12) ─ reflecting an amount of R9 690 000.

I will refer to the certificates by the certificate numbers that appear above.

[5] Clause 31.9 of the agreement states:

'The employer shall pay to the contractor the amount certified within seven (7) calendar days of the date of issue of the payment certificate. Payment shall be subject to the contractor giving the employer a tax invoice for the amount due.'

[6] JJ refused to pay after the certificates referred to in para 4 had been presented. On 8 December 2006 Stocks instituted action against JJ in the Durban High Court in which it claimed payment of the four amounts reflected in those certificates.

[7] JJ entered an appearance to defend. On 29 January 2007, in terms of Uniform rule 32, Stocks brought an application for summary judgment which was opposed by JJ. The summary judgment application was heard on 6 September 2007 and, on 25 September 2007, judgment was granted in favour of Stocks in the amounts set out in certificates 10, 11 and 12, with interest thereon *a tempore morae*. JJ was ordered to pay the costs of the action and the application for summary judgment in respect of the three claims, on a scale as between attorney and own client, including the costs consequent upon the employment by Stocks of two counsel.

[8] Gorven AJ dealt, inter alia, with two of JJ's defences which are relevant to this appeal in some detail. They are set out below.

[9] First, in respect of certificate 10, that it was not due and payable as Stocks had failed to deliver a tax invoice as required by clause 31.9 of the agreement. It was pointed out on behalf of JJ that the date of valuation of the work done and the materials on site set out in the certificate (22 July 2005), differed from the date of valuation (15 August 2005) that appears in the tax invoice. Furthermore, the tax invoice (6 September 2005) predated the payment certificate (7 September 2005). Thus, it was submitted, clause 31.9 had not been complied with.

[10] Second, certificates 11 and 12 related to damages and on a proper construction of the agreement, the agent's mandate did not extend to certification of damages. It was contended that because the certificates were for damages, they were illiquid. Allied to this defence was the contention that value added tax (VAT) was included in the certificates and that such tax was not payable on damages. This latter contention was not, however, persisted in before us.

[11] Insofar as certificate 9 was concerned, counsel representing Stocks agreed before Gorven AJ, that summary judgment should be refused as the amount in the payment certificate differed from the amount reflected in the tax invoice. That certificate is not in issue in this appeal.

[12] In respect of certificate 10, Gorven AJ found that there was no requirement in the agreement that a tax invoice must include a date of valuation. He held that all that was required in terms of the agreement was a tax invoice for the amount due. The earlier date of the tax invoice was therefore no bar to recovering the amount set out in the certificate.

[13] In respect of the second defence, the court below held that JJ had not shown that the certification of damages was not in accordance with the agreement.

[14] On 19 October 2007 the court below refused JJ leave to appeal in respect of its order in relation to certificate 10. Gorven AJ granted leave in respect of the orders relating to certificates 11 and 12, but restricted it to the question of the validity of the inclusion of VAT in the amounts certified. On 11 March 2008 this court granted JJ leave to appeal to it against the whole of the judgment.

[15] In its affidavit resisting summary judgment, JJ contended that Stocks was precluded from instituting action because of an arbitration clause in the agreement. Gorven AJ dealt with this defence tangentially. It is necessary, at the outset, to note that it is very difficult to discern, from the affidavit opposing summary judgment, the essence of any sustainable defence to Stocks' claims. There are diverse references to clauses in the agreement, to the non-correlation between the dates of the tax certificates and the certification by the agent. What is conspicuously absent, is the substance of a triable defence.

[16] I proceed to deal first with JJ's defence that an action was precluded because of an arbitration clause in the agreement. Clause 40.1 of the agreement under the heading 'SETTLEMENT OF DISAGREEMENTS AND DISPUTES' provides:

'Should there be any disagreement between the employer or his agents on the one hand and the contractor on the other arising out of or concerning this agreement, *the contractor* may request the principal agent to determine such disagreement by a written decision to both parties. On submission of such a request a disagreement in respect of the issues detailed therein shall be deemed to exist.' (My emphasis).

The agreement provides that a decision by the principal agent shall be final and binding unless it is disputed, in which event, the dispute shall be submitted to arbitration or where the parties agree, to mediation.[6]

[17] As is apparent from clause 40.1, the primary problem for JJ is that it is only Stocks as the contractor ─ and not JJ as the employer ─ that is entitled to refer a dispute to the principal agent for resolution. Moreover, a dispute has to

[6] In this regard clauses 40.2 to 40.4 apply.

exist before it can be referred. Before litigation, JJ chose not to pay rather than to declare a dispute.

[18] In any event, counsel for JJ, understandably, encountered difficulty in elucidating the arbitral dispute. In muted fashion counsel contended that the principal agent exceeded his mandate by completing the certificates in question. This is a dispute between the employer and his agent and is not a dispute envisaged by the arbitration clause referred to above, namely, between the employer or his agents on the one hand and the contractor on the other, ie between JJ and its agents on the one hand and Stocks on the other.

[19] Counsel on behalf of Stocks rightly pointed out that there was, in any event, no prohibition in the agreement against the institution of action. There is accordingly no merit to this defence.

[20] In respect of certificate 10, JJ's main contentions as set out in para 9 above are without merit. The agreement does not provide for the tax invoice to follow any particular format nor does it prescribe what information it has to contain. Certificate 10 shows that the amount due is R2 704 425.78. The tax invoice is in the same amount and refers to certificate 10. The previous gross amount certified is the same and so too the nett amount. There can be no doubt that there is a direct correlation between certificate 10 and the tax invoice in question. Clause 31.9 was complied with and the court below cannot be faulted in this conclusion.

[21] It was submitted on behalf of JJ that, after cancellation, the principal agent was limited to preparing a final account and final payment certificate and there was thus no room for an interim certificate such as certificate 11.[7] This is

[7] Certificate 11, in addition to certifying an amount in respect of damages, also includes certification by the principal agent of the value of work executed and materials on site in an amount of R2 369 383.08. The opposing affidavit does not contest the valuation of work done and materials on site in relation to certificates 10 and 11. There are vague references to para 31.6 of

fallacious. In the relevant parts of para 38, which appear under the title 'CANCELLATION BY CONTRACTOR – EMPLOYERS DEFAULT' the following appears:

'. . .

38.5 Where the contractor cancels this agreement in terms of 38.0 the following shall apply:

. . .

38.5.3 The principal agent shall forthwith compile a report on the status of the portion of the works executed by the contractor and shall issue such a report to the employer and the contractor

38.5.4 The principal agent shall forthwith commence and complete the final account within ninety (90) working days of completion of such a report

. . .

38.5.7 The principal agent shall continue to certify the value of the work executed by the contractor and the value of materials and goods for payment by the employer.'

Certificate 11 is in accordance with clause 38.5.7.

[22] I turn to deal with certificates 11 and 12 and the question of the certification of damages. It was submitted that the principal agent had no authority in terms of the agreement to certify damages. This submission is without foundation. Clause 33 is entitled 'RECOVERY OF EXPENSE AND LOSS' and provides for monthly 'recovery' statements by the principal agent on which expense and loss shall be shown and amounts due to the contractor for 'damages in terms of 38.5.6', if any.[8] Sub-clause 38.5.6 provides:

'The employer shall be liable to the contractor for damages resulting from such cancellation.'

The interim certificates envisaged in clause 31.1 (recorded above[9]) may be adjusted, inter alia, by amounts due to the employer or contractor in a recovery statement issued in terms of clause 33.1.[10] It was submitted, on behalf of JJ, that since Stocks did not, in its particulars of claim, refer to or attach recovery statements in relation to certificates 11 and 12, summary judgment ought not to have been granted. This is a submission entirely without merit. It was never

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the agreement which states that the value of materials and goods shall only be included in a certificate if they are to the satisfaction of the principal agent on the bases set out in that clause. Nowhere is the valuation per se challenged.

[8] Clauses 33.1.3 and 33.1.6.

[9] Note 4.

[10] Clauses 31.5 and 31.5.4.

alleged by JJ that no recovery statements had been issued or that adjustments had not been properly made. It is necessary to repeat that the basis of the valuation or damages was not substantively challenged.

[23] To sum up: on a proper construction of the agreement it is clear that the principal agent is not only entitled but is obliged, in appropriate circumstances, to certify damages.

[24] In support of his contention that Gorven AJ ought nevertheless to have exercised his discretion against granting summary judgment, counsel on behalf of JJ urged us to bear in mind that summary judgment is a remedy of an 'extraordinary and drastic nature', based on 'the supposition that the plaintiff's case is unimpeachable and the defendant's defence is bogus or bad in law.'[11] It is necessary to place this characterisation of the summary judgment procedure in a proper perspective.

[25] Uniform rule 32 enables a plaintiff to apply to court for summary judgment in respect of four categories of claims:

(a) on a liquid document;

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[11] See *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 275H referring to *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423F-G. In the last mentioned case Corbett AJ (at 426A-E) said the following:

'[O]ne of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: *(a)* whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and *(b)* whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. *It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.* … At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading.' (My emphasis).

(b) for a liquidated amount in money;

(c) for delivery of specified immovable property; or

(d) for ejectment

[26] Uniform rule 8 provides for provisional sentence where a claim is founded upon a liquid document. The theory behind provisional sentence is that:

'it is granted on the presumption of the genuineness and the legal validity of the documents produced to the court. The court is provisionally satisfied that the creditor will succeed in the principal suit. The debt disclosed in the document must therefore be unconditional and liquid (zuiwer en klaar of liquid)'.[12]

If a document 'upon a proper construction thereof, evidences by its terms, and without resort to evidence extrinsic thereto…an unconditional acknowledgment of indebtedness in an ascertained amount of money the payment of which is due to the creditor' it is one upon which provisional sentence may properly be granted.[13]

[27] Gorven AJ pointed out, with reference to *Randcon (Natal) (Pty) Ltd v Florida Twin Estates Ltd* 1973 (4) SA 181 (D & CLD) 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.[14] It is regarded as the equivalent of cash.[15] The certificates in question all fall within this ambit.

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[12] *Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T) at 728C; *Van der Walt v Eiendomsreg (Edms) Bpk* 1986 (2) SA 461 (T) at 465D-H. See also PBJ Farlam & DE Van Loggerenberg *Erasmus Superior Court Practice* B1–63 (service issue 25, 2006).

[13] *Rich v Lagerwey* 1974 (4) SA 748 (A) at 754H followed in numerous subsequent cases. See *Erasmus Superior Court Practice* B1–63.

[14] *Ocean Divers (Pty) Ltd v Golden Hill Construction CC* 1993 (3) SA 331 (A) at 340E.

[15] *Randcon* case at 184C-G.

[28] Stocks held three liquid documents, the equivalent of acknowledgements of debt. It could have proceeded to obtain provisional sentence on them but chose to apply for summary judgment.

[29] A summary judgment procedure was first introduced into our practice by the Magistrate's Court Act of 1917. It was based upon a procedure introduced in England by Order XIV under the Judicature Acts whereby a plaintiff was able, by means of a summary proceeding, to obtain a final judgment when there was no *bona fide* defence to an action.[16]

[30] In *John Wallingford v The Directors &c. of The Mutual Society* (1880) 5 AC 685 (HL) at 699-700, Lord Hatherley referred to the objects of the new English procedure as follows:

'I apprehend that from the first the objects of these short methods of procedure has been to prevent unreasonable delay, a delay which was very prejudicial to the creditors, and never, I am afraid, or rather, I am pleased to say, can have been very beneficial to the debtor himself. Simply allowing legal proceedings to take place, in order that delay may be applied to the administration of justice as much as possible, is not an end for which we can conceive the Legislature to have framed the provisions which now exist under the several Judicature Acts. If a man really has no defence, it is better for him as well as his creditors, and for all the parties concerned, that the matter should be brought to an issue as speedily as possible; and therefore there was a power given in cases in which plaintiffs might think they were entitled to use the power by which, if it was a matter of account, an account might be immediately obtained upon the filing of a bill, or, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a Judge that there was no real defence to the action, recourse might be had to an immediate judgment and to an immediate execution.'

[31] So too in South Africa, the summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham

[16] See *Schoeman v Newmark Ltd* 1919 CPD 55.

defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.[17]

[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors 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, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G-426E.

[34] In the present case, as demonstrated above, there is no discernable sustainable defence put up by JJ. In respect of the valuation of work done and

[17] See *Meek v Kruger* 1958 (3) SA 154 (T) at 156F-157A. In *Jones v Stone* 1894 AC 122 Lord Halsbury, in the Privy Council, in relation to summary judgment proceedings in Western Australia, similarly stated that the procedure was intended only to apply to cases where there could be no reasonable doubt that a plaintiff was entitled to judgment and where it was inexpedient to allow a defendant to defend for mere purposes of delay. The procedure is employed in Canada ─ see *Progressive Construction Ltd v Newton* 117 DLR (3d) 591 and is known in the United States of America ─ see *Sartor v Arkansas Natural Gas Corp* 321 US 620.

materials on site, JJ did not take issue with the principal agent's valuation per se. As shown, the references to various provisions of the agreement do not assist JJ in establishing a defence. In respect of the certification of damages the merits of the calculation were not challenged. There are vague references in the opposing affidavit to clause 31.6 and a possible counterclaim (without quantification) in respect of an alleged failure by Stocks to protect goods and materials on site. Such 'defences' as were proffered are cast in the most dubious terms. Judgment for Stocks in the court below was fully justified and Gorven AJ correctly refused to exercise his discretion in favour of JJ.

[35] For all the reasons set out above the appeal must fail. The following order is made:

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	P M M Lane SC
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