THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 496/08

ROADS AGENCY LIMPOPO (PTY) LTD Appellant

and

MURRAY AND ROBERTS CONSTRUCTION (PTY) LTD First Respondent
MULTILAYER TRADING 370 CC Second Respondent
THAMAFA PROJECTS CC Third Respondent

Neutral citation: Roads Agency Limpopo (Pty) Ltd v Murray & Roberts Construction Ltd and others (496/08) [2009] ZASCA 128 (29 September 2009).

Coram: STREICHER, NUGENT, LEWIS, BOSIELO JJA *et* HURT AJA
Heard: 11 SEPTEMBER 2009
Delivered: 29 SEPTEMBER 2009
Summary: Construction contract ─ standard form ─ interpretation of ─ employer's power to reject interim certificate ─ contractor not entitled to claim payment on rejected certificate ─ certificate issued after agreement to cancel ─ such not a certificate contemplated in the contract ─ contractor not entitled to rely on cancellation provisions in contract to claim on such 'certificate'.

ORDER

On appeal from: High Court, Pretoria (Southwood J sitting as a judge of first instance).

1 The appeal succeeds with costs, such costs to include the costs of two counsel.

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

'The application is dismissed with costs, such costs to include the costs of two counsel.'

JUDGMENT

HURT AJA (STREICHER, NUGENT, LEWIS *et* BOSIELO JJA concurring):

[1] The appellant appeals with the leave of this court against a judgment of the High Court, Pretoria (Southwood J) in terms of which the appellant was ordered to pay the respondent the total amount of R16 852 965,28, interest and costs. The *causa* for the respondent's claim was a 'standard form' of engineering contract (referred to in the papers as 'the COLTO contract' and in this judgment simply as 'the contract') for the construction of roadworks in the Phiphidi area. In terms of the contract, the respondent, as the successful tenderer, was retained by the appellant to carry out the road works as defined. It will be convenient to refer to the appellant as 'RAL' and to the respondent as 'the contractor'. A firm of engineers, Munyai Malaka Engineers, the engineers appointed in terms of the contract to administer its performance, was originally cited in the proceedings before the lower court, but as no relief was sought against it and as it has indicated that it will abide the decision of the court, it is not participating in this appeal. I shall refer to it as 'the engineer'.

[2] The contract was concluded during July 2005 when the contractor was notified that its tender to perform the work had been accepted. From its inception, however, the contract was beset with difficulties arising from a challenge by one of the unsuccessful tenderers (a company called Raubex (Pty) Ltd) to the validity of the tender procedure. Raubex applied to the high court for an interim interdict against RAL and the contractor, pending an application for the review of the award of the contract. An interim interdict was granted and work on the contract came to a compulsory standstill for a period of about five months from October 2005 to April 2006. Raubex gave an undertaking, prior to the grant of the interim interdict, that in the event of its application being dismissed, it would 'be liable to the (contractor) for the payment of such loss as they can prove to have suffered as a result of the delay'. The court which dealt with the review application dismissed it. However, Raubex noted an application for leave to appeal against this order and the enforceability of its indemnity undertaking was accordingly deferred. The contractor claimed additional remuneration in terms of the contract,[1] arising out of the extra expenses which it had incurred as a result of and during the period of work stoppage. It is not clear from the papers how, or when, this claim was lodged with the engineer, but it is to be inferred from the evidence that the engineer made an award in favour of the contractor. The deponent to the answering affidavit on behalf of RAL states, however, that RAL took the view that Raubex, and not RAL, should, in terms of the indemnity undertaking, satisfy the contractor's claim for remuneration arising out of the work stoppage. In a letter dated 4 October 2006 from RAL to the engineer, RAL suggested that the question whether it or Raubex should be required to pay the stoppage expenses should be left over until the review proceedings had been finally determined.

[3] On 13 October, the Engineer issued interim payment certificate No 10 certifying that an amount of R19 947 475,70 was due to the contractor. RAL rejected this certificate on the ground that it included the amount claimed by the contractor for work stoppage, and instructed the Engineer to issue a fresh

[1] Clause 51(1) makes provision for such a claim. This aspect will be dealt with more fully later in this judgment.

certificate omitting this amount. Before that certificate was issued, the Engineer issued certificate No 11 (on 20 November 2006) for payment to the contractor of the amount of R4 981 650.80. Once again this certificate was rejected by RAL. The reason for this rejection was that the amounts allowed for contract price adjustment and VAT in certificate 10 had been calculated on the wrong basis and that an amount of R175 529.22 should be deducted from the figure certified in certificate 11. In the meantime, the contractor had, on 15 November 2006, given RAL notice, in terms of the contract, to pay certificate 10 (the due date for payment having been 11 November 2006) within 14 days (ie before 29 November) on pain of cancellation of the contract. RAL responded to this demand by letter dated 29 November, stating that it was not liable to pay the amount claimed because the original certificate 10 had been rejected.

[4] On 13 December 2006, the contractor purported to cancel the contract for failure by RAL to comply with its demand for payment and, two days later, RAL responded, accepting the contractor's purported cancellation. This response was couched in the following terms:

'1 Your letter . . . dated 13 December 2006 refers.

2 Roads Agency Limpopo (Pty) Limited has noted the content of your letter and its references. RAL would also like to draw your attention to our correspondence dated 29 November 2006 and specially the undertaking made by Raubex in the matter between Raubex and RAL, which undertaking became order number 2 of the High Court of Case No. 24470/01, as attached.

3 However, RAL accepts your cancellation and deems the contract to have been cancelled on 15 December 2006, end of business, 17h00.'

I intend to deal with the significance of this letter later. Amended certificates 10 and 11 were subsequently issued by the engineer for the lesser amounts during February 2007 and these amounts were paid by RAL on 2 March 2007. On 24 May 2007, the engineer issued payment certificate 12/13 for an amount of R12 454 062.97. RAL queried this certificate with the engineer and it transpired that the certified amount had been computed on wrong data. The engineer himself, in a letter addressed to the contractor, conceded that he had perpetrated a 'grave error' by failing to check the figures of his

subordinates who had assisted in compiling the certificate. He confirmed that the amount certified had been found to be incorrect. An amended certificate for R8 346 774.75 was issued. RAL tendered to pay this amount against an invoice from the contractor.

[5] The application which has culminated in this appeal was lodged in July 2007. The contractor applied for judgment on certificates 10, 11 and 12/13 in the form in which they were first presented to RAL. The contractor's contention in the founding affidavit was that RAL was obliged to pay the amounts originally certified but that it had unlawfully refused to do so.

[6] RAL disputed the contractor's assertions that it was entitled to payment of the amounts claimed. It contended that it had rejected certificates 10 and 11 because they had been wrongly compiled by the engineer. In taking this action, RAL purported to have acted under the provisions of clause 2(8) of the contract which reads:

'Notwithstanding any provisions to the contrary in the Contract, the Employer shall have the right to reverse and, should he deem it necessary, to amend any certificate, direction, decision or valuation of the Engineer and to issue a new one, and such certificate, direction, decision or valuation shall for the purposes of the Contract be deemed to be issued by the Engineer, provided that the Contractor shall be remunerated in the normal manner for work executed in good faith in terms of an instruction by the Engineer and which has subsequently been rescinded.'

(It is common cause that the proviso at the end of this clause plays no part in the dispute between the contractor and RAL in this case.)

[7] Southwood J, after stating certain well-established propositions relating to interim payment certificates went on to say that the fact that a certificate creates a self-sufficient debt:

'. . . does not mean that the employer cannot raise a defence to a claim based on such a certificate. For present purposes it will be accepted that the employer . . . is entitled to raise a defence of any kind to the (contractor's) claims. The question which arises is what defence (RAL) has made out.'

The learned judge then went on to summarise the grounds on which RAL had purported to reject the certificates and stated:

'The first respondent's contention that it did amend the payment certificates and did so by instructing the engineer to amend them cannot be upheld. It flies in the face of the clear wording of clause 2 (8). A clear distinction is drawn in the clause between the engineer and the employer and in the event of the employer reversing any certificate or decision of the engineer the employer must issue a new certificate.[2] The first respondent did not refer to any authority to support its contention that it had acted in terms of clause 2(8) when it instructed the second respondent to amend the payment certificates. Although the applicants did not incorporate in their founding affidavit their claim for additional payment or compensation it is clear that they submitted a claim and that this was accepted by the (engineer) and certified to be owing in payment certificate no 10.'

[8] Mr Gautschi, who argued the appeal, assisted by Mr Girdwood, for the contractor, endeavoured to support this finding. Whether RAL, or some delegate other than the engineer, or the engineer himself, amends a certificate can surely make no practical difference. The fact that the amended certificate was compiled by the engineer in response to RAL's instructions, as opposed to being compiled by another person delegated thereto by RAL, cannot be construed as a failure by RAL properly to exercise its rights under clause 2(8). All that the engineer did in this regard was to recalculate the amount excluding the award which he had made in respect of compensation arising from the work stoppage. In performing this arithmetical exercise, he was plainly not acting in the capacity contemplated under the contract for the compilation of certificates.

[9] The real thrust of the argument was directed at the proper interpretation of clause 2(8) and the scope of the power conferred by it on RAL. It must immediately be said that this is a novel clause in the field of building and engineering contracts. The earlier forms of the standard contracts bound the employer to pay interim certificates while the contract remained in force and disagreements concerning the amount certified were

[2] This is not consistent with the wording of clause 2(8), which clearly stipulates that the employer has the option to issue a new certificate 'should he deem it necessary'.

deferred for resolution when the contract work had been completed or, in some cases, became the subject of amendment in a subsequently issued certificate.[3] But it is trite that each contract must be construed according to its own terms (and not those of other 'standard contracts') and it is necessary, for the purposes of this appeal, to consider the scope of the right conferred on RAL by clause 2(8).

[10] Various semantic analyses of the clause were suggested by counsel. However, I consider that, in its context, it should be interpreted by simply giving the words their ordinary meaning. The most compatible of the various meanings of the word 'reverse' given in the Concise Oxford English Dictionary[4] is 'to revoke or annul'. The clause therefore means that RAL has the power to revoke or annul any certificate, and, if RAL considers it necessary, it can amend the certificate. Where the certificate is amended, it will, in terms of the clause, be 'deemed to be issued by the Engineer'.

[11] RAL has set out, in its opposing affidavit, its reasons for reversing each of the certificates 10 and 11. They have been stated in para 3, above. The contractor did not challenged the decision on any basis other than that it did not constitute a 'reversal' as contemplated in clause 2(8).

[12] It is necessary, however, to deal with an argument submitted to us by counsel for the contractor relating to the reversal by RAL of certificate 10. His contentions are as follows. The relevant provision is clause 51(1), the relevant part of which provides:

'51(1) The following provisions shall apply to any claim by the Contractor in terms of the contract for an extension of time for the completion of the Permanent Works, or for additional payment or compensation . . .'

and the clause goes on to describe the procedure which the contractor has to adopt to present his claim for consideration by the engineer. Clause 51(5)

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[3] See the discussion of these principles by Nienaber J in *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 516 to 517. This judgment was confirmed on appeal; See *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A).

[4] 10th Ed (revised) p1225.

then provides for the manner in which the engineer is required to adjudicate on the claim.

'(5) Unless otherwise provided in the Contract, the Engineer shall, within 56 days after the Contractor has complied with his obligations in terms of Subclause (1) read with Subclause (2) and paragraphs (a), (b) and (c) of Subclause (3), deliver to the Contractor and the Employer his written ruling on the claim (referring specifically to this Clause), and the amount, if any, thereof allowed by the Engineer shall be included to the credit of the Contractor in the next payment certificate . . .'

(and there follows a proviso which is not relevant to the question under consideration).

[13] Counsel emphasized the circumstance that the only clause dealing with disputes in relation to a ruling by the engineer under clause 51 is clause 61(1)(a) which reads:

'The Contractor shall have the right to dispute any ruling given or deemed to have been given by the Engineer in terms of Clause 51 or Clause 60;

Provided that, unless the contractor shall, within 42 days after his receipt of a ruling or after a ruling show have been deemed to have been given, give written notice (hereinafter referred to as a "Dispute Notice") to the Engineer, referring to this Clause, disputing the validity or correctness of the whole or a specified part of the ruling, he shall have no further right to dispute that ruling or the part thereof not disputed in the said notice.'

[14] He argued that the contract makes no provision for the employer to dispute such a ruling except after a 'Dispute Notice' has been given by the contractor in respect of such ruling. Since the word 'ruling' is not included with the words 'certificate, direction, decision or valuation of the Engineer' in clause 2(8), a ruling, so the argument ran, stands on a different footing from these. The conclusion, counsel submitted, must be that a ruling made under clause 51 is not open to challenge by the employer save in the instance mentioned above. Because certificate 10, in keeping with the prescription of clause 51(5), included, in the amount certified, the amount thus *ruled on* by the engineer, counsel submitted, RAL was precluded from purporting to reverse certificate 10, at least in respect of the 'ruled amount'.

[15] In my view the argument is unsound. Clause 51(5) requires the engineer to include, in his next certificate, the amount payable to the contractor consequent upon his ruling. Clause 2(8) commences with the words 'Notwithstanding any provisions to the contrary in the Contract . . .'. There is nothing in clause 2(8) or, indeed, elsewhere in the contract, to limit the meaning of the words 'any certificate' so as to exclude a certificate, or part of a certificate, which embodies the result of a ruling. But counsel's argument necessarily depends upon such a limitation being implied.

[16] The contractor is not left without a remedy in the face of a reversal by the employer of a certificate in terms of clause 2(8). Clauses 60 and 61 provide a procedure for resolution of disputes by reference first to the engineer, then to mediation and finally, depending on the provisions of the contract to arbitration or court proceedings. There is accordingly no need, even on an equitable approach, to construe clause 2(8) as conferring limited power on the employer as suggested by counsel. The argument must be rejected.

[17] The claim based on certificate 12/13 falls to be dealt with on a different footing because the certificate was issued after the cancellation of the contract. The contract provides for cancellation in three different situations. The first, dealt with in clause 57, applies where there is an outbreak of war or a state of emergency is declared. It has no relevance here. The second, in clause 58, provides for cancellation by the employer. It defines a number of acts of default by the contractor, such as being sequestrated or getting into financial difficulties. It further makes provision for the engineer to certify in writing that the contractor is defaulting on his obligations in one or more respects. In any of these events, the employer is entitled to give the contractor 14 days' notice of termination and ejectment of the contractor from the site. It is clear, on the facts stated earlier, that this clause was not invoked by RAL.

[18] The third 'cancellation provision' (clause 59) provides for cancellation by the contractor in the event of the employer's default. This was the clause on which the contractor purported to rely when it gave the notices dated 15

November and 13 December 2006 and referred to in paras 3 and 4, above. This clause contains the specific stipulation that:

'Upon such cancellation,

(a) all the provisions of the Contract, including this Clause, shall continue to apply for the purpose of

(i) resolving any dispute, and

(ii) determining the amounts payable by either the Employer or the Contractor to the other of them;

(b) . . .

(c) the Employer shall be under the same obligations to the Contractor with regard to payment as if the Contract had been cancelled under the provisions of Clause 57 but, in addition to the payment specified in Clause 57(5),[5] the Employer shall pay to the Contractor the amount of any additional loss or damage to the Contractor arising out of or in connection with or in consequence of such cancellation.'

It seems that certificate 12/13 was compiled with this clause in mind. It purports to be 'payment certificate no. 12/13 for period 6/11/2006 to 13/12/2006' ie the period between the issue of certificate 11 and the date on which the contractor purported to cancel the contract. The contractor's claim was on the basis of this certificate coupled with the provisions of clause 59.

[19] The question is whether the contention that the contractor was entitled to rely on the provisions of clause 59 at all, is correct The notice dated 14 November, putting RAL on terms to pay the amount reflected in rejected certificate 10 was plainly unjustified and, in its reply of 29 November, RAL expressly denied that it was in default and reserved its rights. Its response to the contractor's letter of cancellation of 13 December (which response is set out in para 4, above) cannot, in my view, be interpreted as a submission to the contractor's claim to have cancelled the contract under the provisions of clause 59. In the first place, RAL reiterated, in para 2 of its letter, its contention that the work stoppage claim could not be properly assessed until the fate of the review application by Raubex had been finally determined.

[5] This provided for the work to be finally measured and for the employer to pay the contractor all amounts then due as if the contract work had been duly completed at that stage.

Secondly, it is significant, in this connection, that the writer stipulated that the effective date of the cancellation was to be 15 December (the date of acceptance by RAL of the contractor's purported cancellation), and not 13 December as claimed by the contractor. This is consistent only with RAL having regarded the proper date of purported cancellation to be the date on which the repudiation by the contractor was accepted.

[20] Accordingly, although it is beyond question that the contract was cancelled, the contention that it was cancelled in terms of clause 59 and that, consequently, the contractor's claim on certificate 12/13 survived the cancellation[6], cannot be supported.

[21] Accordingly the order is as follows:

1 The appeal succeeds with costs, such costs to include the costs of two counsel.

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

'The application is dismissed with costs, such costs to include the costs of two counsel.'

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N V HURT

ACTING JUDGE OF APPEAL

[6] In *Thomas Construction* Nienaber J said, of a similar clause in the contract with which he was dealing: 'This clause does not *ipso facto* bar the contractor from advancing a claim on the contract upon its cancellation. Unpaid certificates are superseded by the cancellation of the contract but the contractor is not non-suited by the cancellation. The clause, indeed, extends the contractual reign beyond the contract's own termination in the sense that it provides for an eventual reconciliation of the claims of the employer and contractor respectively . . .'

Appearances:

Counsel for Appellant:	S J Maritz SC J R Minnaar
	Instructed by De Bruin & Oberholzer Inc c/o Du Plessis & Eksteen Inc, Pretoria Schoeman Maree Inc, Bloemfontein
Counsel for Respondent:	J R Gautschi SC G W Girdwood
	Instructed by Bowman Gilfillan Inc c/o Savage Jooste & Adams Inc, Pretoria McIntyre & Van der Post, Bloemfontein