REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

28-12-2022
DATE SIGNATURE

CASE NUMBER: 17090/2018

In the matter between:

FRANCIS TRANSPORT AND PLANT HIRE CC Plaintiff

and

SMART CIVILS CONSTRUCTION (PTY) LTD First Defendant
RADON PROJECTS (PTY) LTD Second Defendant

JUDGMENT

DOSIO J:

INTRODUCTION

[1] This is an action whereby the plaintiff prays for judgment against the defendants, jointly and severally, the one paying the other to be absolved, for payment of the amount of R1 150 500.82 together with interest and costs.

[2] The defendants were contracted by the employer, namely, Johannesburg Development Agency ('JDA') to construct the Cosmos fire station. This is the principal contract. The principal contract was recorded as the JBCC Principal Building Agreement ('the JBCC agreement').

[3] The plaintiff, represented by Mr Francis Gomes ('Mr Gomes') entered into a written subcontract on 8 December 2015 with the second defendant, represented by Mr Johan Klingbiel ('Mr Klingbiel'), to execute three aspects of work, as the subcontractor, in relation to the Cosmos Fire Station, pertaining to (1) general site works, Roads and Paving; (2) sewer works; and (3) storm water drainage works.

[4] The crisp issue in respect to the first and second defendants is whether the subcontract was ceded and assigned by the second defendant to the first defendant in terms of an oral agreement of cession and assignment.

[5] The additional issues in dispute pertain to the following:

5.1 If the defendants establish that there was such a cession and assignment:

5.1.1 Whether the plaintiff consented in writing thereto as required by the subcontract;

5.1.2 Whether the parties complied with the non-variation clause of the subcontract in order to substitute the first defendant for the second defendant as a party to the subcontract.

5.2 Whether amounts due to the plaintiff in terms of the final account were subject to the defendants having received certification and payment in terms of the Principal Contract.

5.3 Whether the plaintiff's claim 8 constituted a final claim that was not capable of revision or supplementation and whether the certification of that claim was a final certificate.

5.4 The content of the final account, POC4:

5.4.1 How retention should be treated.

5.4.2 Whether items B and C should be as per the plaintiff's version or the defendants' version.

5.4.3 Whether the restricted work ought to be paid for.

5.4.4 Whether the additional work items ought to be paid for.

5.4.5 Whether the additional P&G's ought to be paid for.

BACKGROUND

[6] During May 2015 the second defendant and the first defendant entered into a written joint venture agreement, under the name RadonSmartJV, to submit a tender to the

JDA, for the construction of the new Cosmo City Fire Station. The tender was successful and in order to execute the works, the first and second defendants, decided to split the various trades amongst themselves and decided which trade each defendant would be responsible for. It was decided that each defendant would be responsible for the works/trades within their scope and that they would be responsible and liable towards their own respective suppliers and subcontractors. Every subcontractor would submit its payment claims for work done to either the first or second defendant, depending on who appointed the subcontractor.

[7] The subcontract originally provided for a construction period of fifteen working days between 8 December 2015 and 18 January 2016. Certain quantities of material forming part of the bill of quantities ('BOQ') increased significantly from what was agreed at the conclusion of the subcontract.

[8] It is common cause that the subcontracting work by the plaintiff commenced during December 2015 and was completed by the plaintiff on 24 May 2016, save for the dispute in respect to the restricted works.

[9] The second defendant maintains that the appointment of the plaintiff as a subcontractor to the second defendant was made in error, because the works which the plaintiff had to perform, fell under the trades for which the first defendant had accepted responsibility in terms of the agreement pertaining to the splitting of the trades. When the error was discovered, the defendants represented by Mr Mashudu Baloyi ('Mr Baloyi') and Mr Klingbiel, had a discussion, prior to the January/February 2016 meeting, to determine how to resolve the issue. During this discussion, the defendants decided that the best way to resolve the problem was to transfer all the second defendant's rights and obligations under the subcontract to the first defendant and that the plaintiff should be approached to obtain its consent to such transfer.

[10] The plaintiff called as witnesses, Mr Gomes and Mr Ivan Andrin ('Mr Andrin'). The first defendant called Mr Baloyi and the second defendant called Mr Klingbiel.

The alleged cession

[11] A meeting took place during January/February 2016 between Mr Germani (a director of the second defendant), Mr Klingbiel and Mr Gomes. The second defendant maintains that at this meeting it was explained to Mr Gomes that his appointment as a subcontractor to the second defendant was made in error and that the plaintiff should have been appointed as a subcontractor to the first defendant, with the result that there would be a transfer of all the

second defendant's rights and obligations under the subcontract to the first defendant. It is in dispute whether Mr Germani and Mr Klingbiel also represented the first defendant and what was exactly agreed at this meeting.

[12] Mr Gomes' version is somewhat different in that he maintains that he agreed to accept money from a third party, however, he was told that there was a problem with the second defendant's BEE partner and that this is why he agreed to be paid through a 'friend'. Mr Gomes believed that the subcontract would remain the same and no mention was made of the fact that it would be ceded. Mr. Gomes confirmed he had no objection to receiving payment from the third-party provided that he would be paid in full and on time. Mr Gomes contends that it remained contracted to the second defendant, even though the second defendant made payment to the plaintiff via a third party, namely, the first defendant. Mr Gomes stated that the second defendant remained intimately involved in the certification process and in managing the plaintiff on a daily basis and that the second defendant would still stand good for any payments that would be forthcoming from the first defendant. The plaintiff maintains that the first and second defendants are jointly and severally liable to the plaintiff in respect of the second defendant's payment obligations under the subcontract.

[13] The plaintiff alleges that it completed the subcontract works on 24 May 2016, however, despite numerous discussions with the defendants relating to payment issues, the final account POC4, has still not been paid. The plaintiff alleges that it performed its obligations in terms of the subcontract and rendered its invoices in terms of the subcontract to the defendants.

[14] The defendants on the other hand, allege that it was not simply an arrangement for purposes of a conduit payment, but that it was an outright cession from the second defendant to the first defendant, so much so, that the second defendant stepped out of the equation and the first defendant continued as the new main contractor and the plaintiff continued as the subcontractor. Due to this cession, the first defendant maintains that it was solely liable toward the plaintiff and that this liability was discharged.

[15] The second defendant maintains that the letter sent to the plaintiff dated 29 February 2016 ('POC3'), constitutes confirmation and acceptance of the cession and assignment. In the event that the subcontract between the plaintiff and second defendant remains extant, the second defendant maintains that all payments due to the plaintiff were in fact paid.

[16] It is the second defendant who has raised the special defence of a cession and assignment of the subcontract from the second defendant to the first defendant, accordingly, it is the second defendant who has the onus of proving same.[1]

[17] Mr Gomes testified that POC 1 is the subcontract which he signed and which was presented by Mr Klingbiel. He stated that the letter POC3 was never seen by him prior to the commencement of these proceedings and that he never had any discussions with Mr Baloyi in this regard. During cross-examination, Mr Gomes repeated that the first time he saw POC 3 was when the legal proceedings started in 2018.

[18] Mr Gomes was asked whether he concedes that he received the letter as far back as March 2016, to which Mr Gomes replied '*It may have been sent to me earlier, I am not denying it, but I was not aware of it*'. He was asked about an e-mail dated 4 March 2016 which was sent from his e-mail address to the e-mail address of his wife, which refers to the change of appointment, to which Mr Gomes replied '*It may have been my PA who sent it. I may have missed it in the rush. I did not see it until we started legal proceedings*'. He was asked how did he become aware of it and he replied '*When legal proceedings started I asked my PA to print all the letters and that is when I became aware of this letter*.' It was put to him that he did see this letter as far back as 4 March 2016, to which he replied '*I did not recall seeing this e-mail and I had no knowledge of it at the time*.' He was asked whether he saw it and maybe forgot about it to which he replied '*It is possible, I'm getting older'*.

[19] The letter POC3 is addressed to Mr Gomes and the heading states:

'CONSTRUCTION OF COSMO CITY FIRE STATION' and the subject states 'TRANSFER OF SUBCONTRACT ORDER'.

The contents of the letter states:

'further to our discussion, I hereby confirm that the subcontract order number 12821 issued by Radon projects has been transferred to Smart Civils construction and the conditions remain unchanged. All your invoices should be addressed to the following:-
Smart Civils Construction (Pty) Ltd
P.O. Box 2
Durbanville
7551'

[1] Pillay v Krishna 1946 AD 946 para 16.

[20] It is common cause that Mr Gomes never responded to this letter.

[21] During cross-examination it was put to Mr Gomes that it was part of the agreement that he would send his claims to Smart Civils to which he replied '*My agreement was would I mind accepting payments through a third party which I agreed and stipulated that I needed to be paid on time*.' Mr Gomes was asked whether he agreed that the first defendant would assess and certify his claims as the first defendant was the party who would issue him with payment certificates?', to which Mr Gomes replied '*I don't think so. It may have been accepted as a part of the contract, but I agreed to Smart Civils paying me but I don't agree Smart Civils assessing the claim*'.

[22] The first and second defendant's versions in relation to the agreement of cession and assignment are contradictory. Firstly, the first defendant's version is that the second defendant concluded an oral agreement of cession and assignment on an occasion that did not involve the plaintiff. Secondly, the second defendant alleges that itself, the first defendant and the plaintiff agreed to the oral agreement of cession and assignment at a meeting where the plaintiff alleges the second defendant represented the first defendant. The first defendant however denies knowledge of such a meeting or that the second defendant represented it.

[23] There is a factual dispute in regard to whether a cession and assignment occurred as a result of the letter POC3 being sent to the plaintiff. In the matter of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* [2] the Supreme Court of Appeal held:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b),

[2] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA)

a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.' [3]

[24] The alleged cession from the second to the first defendant is unsupported by any documentary evidence. In particular, there is no documents evidencing the alleged division of scope of works allocated to the first and second defendants.

[25] It is common cause that Mr Gomes submitted claims 1 to 12 to both defendants.

(a) As regards claim 1, an email was sent by Mr Gomes to Mr Klingbiel, Mr Baloyi, Mr Germani on 21 January 2016.

(b) As regards claim 2, Mr Gomes sent an e-mail dated 23 February 2016 to Mr Klingbiel and Mr Germani and the amount claimed on the spreadsheet was R2 555 625-90.

(c) As regards claim 3, there is an e-mail dated 1 April 2016 where Mr Klingbiel addressed an e-mail to Zubiswa Sobekwa and copied Mr Gomes and Mr Baloyi where he stated:

'Herewith claim nr, 3 of Francis.
Kindly deal with him directly, No need to involve me'

In respect to this e-mail Mr Gomes stated that he did not know why this e-mail was sent because he only dealt with Mr Klingbiel who was involved with every aspect of the tender and who approved the instructions and attended the site inspections. The e-mail in respect to claim 3, dated 1 April 2016, from Mr Klingbiel does not mention that there was a cession from the second defendant to first defendant. In addition, although Mr Klingbiel wrote that there was no longer need to involve him, Mr Baloyi subsequently wrote an e-mail to Mr Gomes, copying Mr Klingbiel, in respect to claim 3, dated 24 April 2016 where Mr Baloyi wrote:

'…I have attached the preliminary certification for our discussion. This is not final I still need to

[3] Ibid para 5

discuss this with Johan…'.

It is clear from this e-mail that Mr Klingbiel was still very much involved in the certification.

[26] Notwithstanding that Mr Klingbiel sent an e-mail dated 1 April 2016, indicating that he no longer needs to be involved, Mr Klingbiel had a change of thought, because he sent a further e-mail to Mr Gomes, dated 24 April 2016, whereby he stated:

'…You must remember, we are in this together…' and ends the e-mail by saying could they meet the following day at 15h00 on site. This once again confirms that Mr Klingbiel was still very much involved in the whole process.

[27] The above position is further supported by the answer given to the plaintiff's counsel during the cross-examination of Mr Baloyi, where he was asked '*In your letter it says it was transferred so there would be no reason for Radon to be involved at all?'*, to which Mr Baloyi replied '*Radon was still involved as Mr Gomes was working under Johan*.' During the cross-examination by the second defendants counsel, Mr Baloyi changed his evidence. He was asked '*Smart Civils in respect of that contract stepped into the shoes of Radon'*, to which Mr Baloyi replied '*Yes*'.

[28] Mr Gomes e-mailed his claim 4 to Mr Baloyi, Mr Klingbiel and thorne@mpa.co.za on 25 April 2016. The invoice dated 25 May 2016 in respect to claim 4 amounted to a total of R584 907-79. Claims 6 and 7 were submitted together on 13 June 2016. On 13 June 2016, Mr Gomes sent an e-mail to Mr Baloyi and Mr Klingbiel in respect to claim 7 and stated in the e mail that:

'…Note that all bulk earthworks Qty's have been agreed with the client, Engineer, and Radon at your site office at our previous meeting.'

This e-mail once again shows that Mr Gomes was copying Mr Klingbiel all along. At no stage in June 2016 did Mr Klingbiel state that Mr Gomes must stop sending him e-mails in regard to the claims which needed to be paid.

[29] On 18 July 2016 Mr Gomes wrote an e-mail to Mr Klingbiel and Mr Baloyi in respect to claim 8, once again copying both the first and second defendant.

[30] During the evidence in chief of Mr Baloyi he was asked '*Why was the claim for breaking of the rocks not paid?'* to which Mr Baloyi replied, '*Smart Civils' relationship with Mr Baloyi at this stage was sour and before 19 July Mr Gomes kept telling me he has a contract with Radon and he wanted Radon to pay them*.' This is clear corroboration of Mr Gomes' version that he still believed a contract existed between the plaintiff and the second defendant.

[31] There is a further e-mail from Mr Baloyi addressed to Mr Gomes dated 20 July 2016 at 12:23, in which Mr Klingbiel was copied. The e-mail states the following:

'Mr Gomes
no problem Radon can pay you it does not really matter for Smart Civils. Johan please help Mr. Gomes with his payment because Smart Civils is failing Francis Transport as a small Black owed Contractor her does not know what they are doing, obviously Radon is white and Contractor who knows what they are doing surely they will not fail Francis Transport and the good thing is they have been around the block for a while.' [my emphasis]

Once again, it is clear from this e-mail that Mr Baloyi was including Mr Klingbiel and wanted Mr Klingbiel to help with the payment. The plaintiff's counsel asked Mr Klingbiel during cross-examination:
'*There is no response from Radon to explain the correct position'* to which Mr Klingbiel replied '*The position is the contract was with Smart Civils, but yes, I never responded'*.

[32] In the e-mail dated 20 July 2016 sent by Mr Gomes to Mr Baloyi and Mr Klingbiel on the second page it states:

'I also need to remind you that seeing as Radon Projects are in default of the contract, I now request that we be paid directly from Radon Projects. As you other alternative is not working out…'

It was put to Mr Klingbiel during cross-examination by the plaintiff's counsel that:
'*You did not respond to this'*, to which Mr Klingbiel replied '*I can't recall but I accept it*'.

[33] On 5 August 2016, at 09:41 Mr Gomes sent an e-mail to Mr Klingbiel, Mr Germani, and Mr Andrin in respect to claim 9. It is important to note that Mr Baloyi was not copied on this e-mail. The e-mail states:

'Good morning Johan

Herewith please find my claim no 9 for work done, to date…'

Once again, the e-mail demonstrates that Mr Klingbiel in the eyes of Mr Gomes was still very much part of the certification and payment.

[34] The e-mail dated 8 August 2016 sent at 05:13 PM from Mr Gomes to Mr Klingbiel, Mr Gomes explains that:

'…Please note that when I refer to you, I mean "Radon Projects or its servants". The reason that I have not included Mashudu in the previous e-mail is that I do not have a contract with Smart Civils, or Mashudu, hence I have not included him.
Please go and read the letter of appointment. It clearly states Francis Transport and Radon projects, no mention of Mashudu or Smart Civils!!'

From this e-mail it is once again clear that Mr Gomes was not aware of any cession by the second defendant to the first defendant at this date. Mr Klingbiel during cross-examination by the plaintiff's council conceded that after receiving this e-mail he never corrected the position or referred Mr Gomes to the cession arranged in January/February.

[35] In respect to claim 10, Mr Gomes sent an e-mail dated 8 September 2016 at 11:14 for the attention of Mr Germani and Mr Klingbiel. In respect to claim 11, Mr Gomes sent an e-mail to Mr Klingbiel and Mr Germani on 21 November at 08:38. Once again, the e-mails demonstrate that Mr Gomes was unaware of this alleged cession as at the date of 8 September 2016.

[36] The spreadsheets attached to the claims submitted by Mr Gomes were always addressed to 'Johan', who is Mr Klingbiel. Accordingly, this Court accepts that Mr Gomes was still dealing with Mr Klingbiel in respect to the claims submitted. Up to the date of 21 November when claim 11 was submitted, Mr Klingbiel had still not corrected Mr Gomes as to the fact that he must only deal with the first defendant.

[37] In the matter of *Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd* [4], the Supreme Court of Appeal that:

'Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity,

[4] *Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd* (759/2011) [2012] ZASCA 126 (21 September 2012)

there is no reason not to look at the conduct of the parties in implementing the agreement.' [5]

[38] The plaintiff impressed the court, his version during cross-examination was that he did not see POC3 or at most he saw it but did nothing about it. Mr. Gomes was honest in this regard. His conduct and the documentary evidence shows that he was e-mailing Mr Klingbiel in respect to all claims and spreadsheets. This court accepts that by him not responding to POC3, he did not agree to a cession in writing. Mr Klingbiel did not impress this Court. He had numerous opportunities to correct Mr Gomes via e-mail or to refer him to Mr Baloyi as to the correct position regarding the alleged cession but he never did. Mr Baloyi eually did not impress the court as he changed his version regarding this alleged cession.

[39] Neither Mr Klingbiel or Mr Baloyi could recall exactly when and where this discussion of theirs pertaining to this alleged cession occurred, apart from it being in January or February 2016. The argument raised by the counsel for the second defendant that neither can be faulted for remembering the exact date because it was more than five years ago, is problematic. This date is crucial and this Court would have expected the first and second defendants to have documented same.

[40] The fact that Mr Gomes instructed his attorneys to state in the particulars of claim that there was indeed a cession, does not mean that he was aware or agreed to this cession in March 2016. Furthermore, the fact that it was later discovered, does not mean that he ratified such a cession or assignment retrospectively. If he became aware of it later, by implication it needed to be included in the particulars of claim as a basis for his claim. In the matter of *Shill v Milner* [6], the Supreme Court of Appeal held that:

'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been.' [7]

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[5] Ibid para 5
[6] *Shill v Milner* 1937 AD 101
[7] Ibid page 105

[41] *Shill* [8] has been affirmed by the Supreme Court of Appeal in the recent decision of *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service*.[9]

[42] The fact that in the pleadings, the plaintiff's attorney did not challenge the alleged error committed by Mr Klingbiel in allocating the subcontract to the plaintiff, cannot be a fault of the plaintiff, as the plaintiff was not privy to such an error at the time the subcontract was entered into between the plaintiff and the second defendant.

[43] The lack of any reference to POC3 in the first letter of demand, addressed to the second defendant, is much more consistent with the version of Mr Gomes, that he only came to know of POC3 when the legal process began. There would be no purpose to send the letter of demand to the second defendant if the plaintiff was aware that he should have addressed it to the first defendant in the first place. It is far more probable that the second defendant's response to the letter of demand prompted Mr Gomes to look through his historical emails to find POC3, which then elicited the instruction to his attorney to send the second letter of demand to the first defendant.

[44] This Court accepts the version of Mr Gomes as being correct, that he was not aware at the stage that the letter of demand was sent to the second defendant, that the second defendant had in fact ceded his rights to the first defendant. Even if this Court is wrong in this regard, this Court is still faced with the issue raised by the plaintiff that the requirements of the subcontract, in relation to the non-variation clause, were not adhered to.

[45] In the matter of *Natal Joint Municipality Pension Fund v Endumeni Municipality* [10] the Supreme Court of Appeal held that:

'…Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence…' [11]

[46] Two clauses of the JBCC agreement which are of importance are clause 1.8 and 13.1

[47] Clause 1.8 states:

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[8] *Shill* (note 6 above)
[9] *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service* 2020 (2) SA 19 SCA para 53
[10] *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)
[11] Ibid para 18

‘this agreement is the entire contract between the parties regarding the matter addressed in this agreement. No representations, terms, conditions or warranties not contained in this agreement shall be binding on the parties. No agreement or addendum varying, adding to, deleting or terminating this agreement including this clause shall be effective unless reduced to writing and signed by the parties.’

[48] Clause 13.1 states:

‘neither party shall assign or cede his rights or obligations without the written consent of the other party, which consent shall not be withheld without good reason.’

[49] In the matter of *Bentel Associates International (Pty) Ltd and another v Bradford Corner (Pty) Ltd and another* [12] the Court was called upon to consider the following clauses in a building agreement, namely:

‘neither the employer nor contractor shall assign or cede his rights or obligations without the written consent of the other party, which consent shall not be withheld without good reason.’ [13]

and

‘this agreement is the entire contract between the parties regarding the matters addressed in this agreement. No representations, terms, conditions of warranties not contained in this agreement shall be binding on the parties. No agreement or addendum varying, adding to, deleting or cancelling this agreement shall be effective unless reduced to writing and signed by the parties.’ [14]

[50] The clauses mentioned in paragraph [49] *supra*, are almost identical to clause 1.8 and 13.1 of the JBCC agreement and the conditions in the matter *in casu*. The court in *Bentel* [15] did not only deal with the issue of waiver, it expressly held that cession and assignment would require compliance with the non-variation clause in order to amend the identity of the parties. The Court held at that the alleged waiver is prevented by clause 1.8 of the agreement which operates as a non-waiver clause [16]. Due to the near identical wording of the provisions in this matter to those in *Bentel* [17], the same reasoning ought to apply in the matter *in casu*.

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[12] *Bentel Associates International (Pty) Ltd and another v Bradford Corner (Pty) Ltd and another* [2013] JOL 30165 (GSJ)
[13] Ibid para 55
[14] Ibid para 55
[15] *Bentel* (note 12 above)
[16] *Bentel* (note 12 above) para 65.3
[17] *Bentel* (note 12 above)

[51] In the matter of *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* [18], the Supreme Court of Appeal held that where contractual parties insert a non-variation clause in their contract, as appears in the matter *in casu*, there is no good reason not to hold the parties bound to the non-variation clause to which they both agreed. The whole purpose to insert such a clause has been to prevent disputes arising and the difficulties associated with oral agreements as occurred in the matter *in casu*. In the matter of *Bentel* [19] the Supreme Court of Appeal stated that:

'It is clear from the *Shifren* case that where there is a non-variation clause, a requirement of written consent to a cession cannot or should not even be avoided by means of an actual agreement between the parties, let alone a waiver by one of them.' [20]

[52] I am accordingly not convinced that the second defendant has proven on a balance of probabilities that it has complied with the provisions of the non-variation clause and accordingly, even if there was an alleged cession in the mind of Mr Klingbiel, which he believes was agreed to verbally by Mr Gomes, it still needed to be reduced to writing, which was not done.

[53] Accordingly, this court finds that the plaintiff was correct in claiming against the second defendant jointly and severally with the first defendant. This Court does not find that the relevant rule of interpretation should be the maxim *generalia specialibus non derogant*, but rather the rule of interpretation as expressed in the matter of *Endumeni* [21]. Furthermore, in light of the judgments of *Bentel* [22] and *Shifren* [23], there is a need to comply with the provisions of the non-variation clause.

The status of claim 8 and its certification

[54] The plaintiff's version is that claim 8 could not be a final account and nor could the certification thereof be a final certificate. Counsel argued that the procedure adopted by the defendants in certifying claim 8 was more aligned to the certification of a progress claim and not a final certificate in that it comprised the submission by the plaintiff of a claim for payment and the assessment thereof by the defendants.

[55] The plaintiff contends that claim 8 was intended as a settlement proposal and not a final account as contemplated by the subcontract, because Mr Gomes attached conditions to

[18] SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren 1964 (4) SA 760 (A)
[19] *Bentel* (note 12 above)
[20] *Bentel* (note 12 above) para 70
[21] *Endumeni* (note 10 above)
[22] *Bentel* (Note 12 above)
[23] *Shifren* (note 18 above)

claim 8. These conditions were that claim 8 would serve as a discounted proposed final account provided that firstly, the defendants reduced the retention being withheld from the plaintiff to 5% and secondly, that the full amount of claim 8, being R827 102-56 was paid by the close of business on 22 July 2016. The amount of R827 102-56 was not paid in full, instead the defendants certified the sum of R810 662-62 and the payment was not made by close of business on 22 July 2016.

[56] The plaintiff contends that the e-mail enclosing claim 8 was couched in clear and unambiguous terms as to the effect of the conditions imposed. If the conditions were not satisfied, the discounts offered by the plaintiff would not apply and claim 8 would therefore not be a final settlement claim.

[57] The plaintiff contends that the wording of clause 34 of the JBCC agreement is clear in that it is the defendants that must prepare the final account for comment by the plaintiff and the defendants did not do this.

[58] The plaintiff contends that retention must be reduced to zero in the final payment certificate and if certificate 6 and 7 were a final certificate as contended by the first defendant, then the defendants were obliged to reduce the retention to zero, which did not occur, and accordingly, it was argued, the certificate could not as a matter of principle serve as a final certificate.

[59] The plaintiff further avers that claims 9 to 12 were submitted to the defendants pursuant to discussions between the defendants in regard to the final account. The plaintiff maintains that its final claim is attached as annexure POC 4.

[60] The first defendant denies that annexure POC 4 is the plaintiff's final claim. The first defendant contends that during June 2016, the plaintiff submitted claims 6 and 7, however, on 18 July 2016, the plaintiff submitted its final account, styled as number 8, which replaced claims 6 and 7. Pursuant to receiving the plaintiff's claim 8, the first defendant assessed claim 8 during or about 22 July 2016 and issued a payment certificate to the plaintiff in the amount of R810 662-63 and paid this amount on 23 July 2016. As a result, the first defendant denies it is liable towards the plaintiff in respect to claim 8.

[61] Mr Gomes during cross-examination was asked why were further claims submitted after claim 8, if claim 8 was a final claim, to which Mr Gomes replied that claim 8 would be the

final claim if they paid the full amount of R827 102-56 as agreed to between himself and Mr Klingbiel, however, this payment was not made.

[62] The e-mail dated 18 July 2016 sent by Mr Gomes to Mr Klingbiel and Mr Baloyi states:

'Hi Johan/Mashudu
it has been agreed between myself and Johan that we are prepared to offer you a further discount of R96 933-71 to assist you with your losses provided that you reduce my retention down to 5% as per the clauses in the contract and that we get the full amount due, before close of Business this week (week ending 22.07.2016)
Amount due R827 102-56
This will conclude this part of the work and the final account is as per our claim attached (Claim no.8).'

[63] Mr Gomes wrote an e-mail to Mr Baloyi and Mr Klingbiel on 20 July 2016 at 8:49 where he stated:

'Good Morning Johan/Mashudu.
Please be advised that the discount which I offered you was subject to you paying the full amount of R 827 102.56 this was after the discount was already taken off, it seems that you are now playing games again, and wish to offer only R623 364.00, for this payment, which is not the agreed amount hence the **discount will now no longer apply**!!!!

[64] It is true that the wording of the email dated 18 July appears to be a final account, however, the additional wording and the context within which it was written clearly makes it conditional. Mr Andrin corroborated Mr Gomes by stating that '*The wording of the plaintiff in the e-mail stated 'final account', but based on my experience and what happened afterwards it cannot be a final account*.'

[65] During the cross-examination of Mr Baloyi he agreed that claim 8 was conditional. The plaintiff's counsel asked '*The fact you made an attempt to pay you accepted it was conditional and you did your best to comply?*' to which he replied '*Yes*'. During the cross examination by the second defendant's counsel, Mr Baloyi stated that '*the contract does not make provision for a conditional final account but we were thankful for the discounts and we paid it even if it was not in line with the contract.*'

[66] In the matter of *Endumeni*[24] it was stated that:

[24] *Endumeni* (note 10 above)

‘Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so … is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’ [25]

[67] Mr Gomes was not reluctant to admit to the finality of claim 8, however, he aligned himself with the fact that claim 8 was conditional. Mr Gomes testified that the plaintiff offered a discount to try and get this matter to bed, however, the amount of R827 102.56 was not paid and accordingly, the conditional offer lapsed. Mr Baloyi accepted that claim 8 was conditional and conceded that he even sought to comply with the conditions imposed by attempting to make payment timeously, however, this did not occur. Accordingly, this court finds that it is not un-business-like or insensible to accept that if the conditions were not adhered to, that the offer of a discount would no longer apply. Even though the subcontract may not expressly allow for the plaintiff to unilaterally offer a discount or to impose the conditions it imposed, the fact is that neither the first or second defendant objected to this conditional offer and by accepting same, it became applicable. The offer of a discount upon timeous payment would have been in the favour of the defendants and it would have made business-like sense to have adhered to the condition.

[68] Although the first defendant relies on the fact that claim 8 was certified and paid, much less than what was claimed by the plaintiff was in fact certified. In light thereof, claim 8 could not be regarded as the final claim. Due to the fact that claim 8 was not the final account, there is nothing precluding the plaintiff from having submitted POC4 as the final claim. This Court rejects the version of the first defendant that a short payment of R18000-00 is the only reason why Mr Gomes initiated this action.

[69] Even if the Court is wrong in this regard, the fact remains that the conditions imposed in clause 34 of the JBCC agreement were not adhered to.

[25] Endumeni (note 10 above) para 18

[70] Clause 34 of the JBCC agreement states:

‘the contractor shall cooperate with and assist the principal agent in the preparation of the final account by timeously providing all relevant documents on request. The principal agent shall issue the final account to the contractor within (90) working days of the date of practical completion’

[71] In order to achieve consistency between the principal contract and the subcontract, clause 2(b) of the second defendant’s conditions makes the provisions of the principal contract applicable to the subcontract. Clause 2(c) of the same conditions stipulates:

‘in the event of conflict between this Subcontract and the Principal Contract conditions, the Principal Conditions of contract will apply.’

[72] Clause 34 of the JBCC agreement therefore regulates the final account procedure and obliges the second defendant to prepare and issue the final account to the plaintiff for comment. The plaintiff then had (45) days to accept or object to the final account. There is no provision in the subcontract, whether in the second defendant’s conditions or the JBCC agreement that obliges or permits the plaintiff to issue a final claim or a final account. This obligation rests on the second defendant. Due to the non-compliance with clause 34 of the JBCC agreement, claim 8 could never stand as a final account and accordingly could not have been certified as a final account.

[73] The defendants were obliged in terms of clause 34 of the JBCC agreement to issue the final account to the plaintiff, which was never done. Although the non-compliance of clause 34 by the second defendant was never pleaded by the plaintiff, it is a condition of the JBCC agreement which is applicable to the parties and this Court in evaluating this case as a whole, cannot overlook such a clause which assigned certain functions to the defendants.

[74] The first defendant’s counsel argued that claim 8 cannot be regarded as the final account because it does not provide for the retention to be reduced to 0%. Counsel argued that the plaintiff misinterprets the subcontract by ignoring the clear wording of clause 29. Counsel argued that the plaintiff when submitting claim 8 informed the first defendant to reduce the retention by 5% which accords with clause 29.2.1 of the subcontract.

[75] The argument raised by the first defendant is not applicable because claim 8 was

conditional. Due the condition falling away, due to non-compliance, claim 8 was no longer the final account and therefore clause 29.2.1 is no longer applicable.

[76] A final reason why claim 8 and certificate 6 and 7 cannot be regarded as final is because, based on documents prepared by Mr Baloyi himself, that was not his intention. This is evident from the following:

(a) Under cross-examination Mr Baloyi accepted that he took care in the preparation of his payment certificates to ensure their accuracy. It was put to him in cross-examination that when he prepared the final payment certificate for another subcontractor, namely, Three Cee Projects (Pty) Ltd ("3C Projects"), he clearly marked it as "Final". Mr Baloyi accepted that he took care to mark this certificate as final because 3C Projects had finished its work.

(b) This is in contrast to the matter *in casu* where Mr Baloyi simply followed the sequential numbering in respect to certificate 6 and 7. In comparison to Mr Baloyi's conduct in relation to 3C Projects, had Mr Baloyi intended certificate 6 & 7 to be final, he would have marked it as such. He did not do so.

(c) Following the short certification of claim 8, Mr Gomes communicated his dissatisfaction with certificate 6 and 7 on a number of occasions.

(d) Mr Klingbiel himself did not regard Claim 8 as final or certificate 6 & 7 as final. On 8 August 2016, having received claim 9 from Mr Gomes, Mr Klingbiel wrote to Mr Gomes the following:

> '…I have not opened or assessed your latest claim [Claim 9], as we have not as yet reached agreement with the previous one.'

Mr Klingbiel's version was that he made this statement because of the R18 000 short certification that had been complained about by Mr Gomes. Whatever his motive, the statement makes it clear that he did not regard certificate 6 and 7 as final. Based on his own words, there had not been any final account between the parties.

(e) A final aspect in relation to the content of claim 8 as not being final, is the omission of certain items in claim 8 that have subsequently been claimed in claims 9 to 12, POC4 and the expert report.

Retention

[77] Clause 34 of the JBCC agreement is silent in respect to retention. The first defendant's counsel argued that any reliance on clause 34 of the JBCC agreement is misplaced. Counsel

argued that once the final account was certified on 22 July 2016, any further claims by the plaintiff could not be sustained. Reference was made to the case of *JI Construction Projects CC v William Wang t/a Bender Elektries* [26].

[78] The matter of *JI Construction*[27]is markedly different to the matter *in casu*, because in the matter of *JI Construction* in response to the contractor's claim, the employer sought to raise a counterclaim for payment of penalties for delay by the contractor in completing the work. There is no counterclaim in the matter *in casu*. In addition, in the matter of *JL Construction*, it concerned a final payment certificate issued by the employer's agent, being the architect, which was duly and properly issued by him in terms of the parties' agreement and by which the employer was bound. In the matter *in casu* no final payment certificate in terms of clause 34 was issued.

[79] The defendant's placed reliance on clause 29 of the subcontract in relation to retention.

[80] Clause 29 of the subcontract states that:

'29 Retention on Subcontract work:
29.1 Retention is held on all work executed as a contractual obligation.
29.1.2 10% Retention to be deducted from all Progress payments.
29.1.3 No other form of retention is accepted.
29.2 Retention release:
29.2.1 50% of retention held released on:
29.2.1.1 -The Subcontractor has complied with and has fulfilled his contractual obligations.
29.2.1.2 -Final account agreed between radon and Subcontractor
29.2.1.3 -Final account agreed between Radon and Employer
29.2.1.4 –Works Completion reached on contract
29.2.1.5 -Works Completion Certificate issued by the Principal/Agent
29.2.1.6 -Progress Certificate that includes retention release issued by the Principal Agent
29.2.1.7 -Progress Certificate that includes retention release paid by the Employer'

[81] Clause 14.7 of the JBCC agreement is important in that it states:

'14.7 Should the contractor fail to provide the security [14.1] the employer, in his sole discretion, may either:

[26] *JI Construction Projects CC v William Wang t/a Bender Elektries* 2008 JDR 0100 (T) (unreported judgment under case number A1467/2005) (28 November 2007)
[27] *JI Construction* (note 26 above)

14.7.1 Hand over the site to the contractor and withhold payment from the contractor until the amount withheld is equal to ten (10%) of the contract sum. Such amount shall be reduced to two per ent (2%) of the contract sum on the achievement of practical completion [24.0] and to zero in the final certificate [34.8],'

[82] It is common cause that the plaintiff did not submit any form of security. The retention was not reduced to zero in certificate 6 and 7, therefore certificate 6 and 7 could not be final. The failure to release all retention in certificate 6 and 7 has the effect that, irrespective of other arguments or disputes surrounding the status of claim 8 and certificates 6 and 7, it could never have been final.

[83] Due to the fact that the defendants never prepared and issued the plaintiff with a final account for comment, implies that this Court must undertake this task having regard to all the items that the plaintiff is entitled to in respect to the performance of the subcontract works.

[84] Retention is simply money which is withheld as security for the correction of defects. The version of the defendants that they withheld this money, due to the plaintiff's failure to extend the embankment in the correct manner, which resulted in the defendants paying money to defray the costs to correct it, is rejected by this Court as not probable. This Court's reasons are that Mr Baloyi accepted that there had been no notice placing the plaintiff in breach of its obligation to correct that defect. Accordingly, the plaintiff was not given an opportunity to remedy it. In light thereof the defendants had no right to claim damages against which the retention could have been applied. As stated in paragraph [77], there is no provision in either the subcontract conditions or the JBCC agreement that expressly allows for retention to be applied against an amount that may come due to the defendant in these circumstances. Accordingly, there is no basis for the defendants to have applied the retention.

Items B and C in the final account

[85] Items B and C relate to the clearance of the site of top soil which was part of the plaintiff's work. Item B concerned the stripping of top soil and the stockpiling thereof on the site. Item C concerned the stripping of top soil and the carting away thereof to a dumping location off the site.

[86] The first defendant contends that in respect of item C, due to the increase in the scope of the works, it was agreed during January 2016 that the plaintiff would not claim under item C.

The first defendant's counsel contends that this agreement is corroborated and underscored by the following facts:

(a) In claims 1 to 5 (and claims 6 and 7 that did not call for certification), including claim 8 (the final account), the plaintiff never charged any sum in respect of Item C;

(b) When the plaintiff submitted claim 9 (after the final account), it claimed R00.00 under item C.

(c) At the meeting of 19 May 2016, (a few days before practical completion was reached), in the presence of Mr Baloyi, Mr Klingbiel, and the project engineer, Mr Gomes agreed and signed the bill of quantities ('BOQ') with the engineer. Due to Mr Gomes having drawn a line through item C the parties agreed that the plaintiff would not submit a claim in respect of item C.

[87] As regards item C, Mr Gomes in his evidence in chief stated that the top soil needed to be stockpiled as per an instruction from Mr Klingbiel. Mr Gomes explained that at the meeting on 19 May 2016, the project engineer was not prepared to accept any amount for carting material away, (item C), because his drawings contained a note that all material was to be stockpiled on site. This was despite the fact that the subcontract BOQ explicitly provided for a significant portion of the original quantity of stripped away material to be carted away. The owner was then not happy and they had to remove the soil. Mr Gomes testified that it was agreed that he would claim it at the end.

[88] Mr Gomes stated that he had been informed that the defendants had been paid in respect of item C. This was apparent from payment certificate 20 issued to the defendants in terms of the Principal Contract. Mr Baloyi accepted that an amount was certified and paid by the JDA to the defendants in respect of item C. A closer examination of the figures appears to indicate that the quantities of material certified were 8 848 m2 for item B and 4 600 m2 for item C. It appears therefore that the defendants claimed and were paid the full 8 848 m2 for stockpiling material on site and a further 4 600 m2 for carting away, despite the fact that the agreed total quantity for items B and C was 8 848 m2. Neither of the witnesses for the defendants disputed Mr Gomes' explanation.

[89] The expert, Mr Andrin, explained his approach that the total quantity of 8 848 m2 must be split between the stockpiled portion and the carted away portion and that the plaintiff is entitled to this. Mr Andrin's evidence in this regard remained uncontested. Mr Andrin impressed this Court. It was put to Mr Andrin that he had an interest in the outcome of this matter and that is why he corroborated the plaintiff in respect to claim C, to which he replied, '*No, I act*

independently.' This Court could not find any reason why Mr Andrin would lie about item C.

[90] The plaintiff could not claim this amount in claim 8 submitted on 18 July 2016 or claim 9 submitted on 5 August 2016 as neither of them were final accounts.

[91] Accordingly, this court finds that items B and C should be allowed as claimed by the plaintiff in POC4.

The restricted works

[92] Mr Gomes was asked how come in July 2016 when he submitted the final claim, no mention was made of restricted works. To this Mr. Gomes replied that this came about because he spoke to Mr Klingbiel and Mr Baloyi that he had to extend the platform by 4 to 5 meters to dig the trench and put the sewer pipe back, as the platform was 4 to 5 metres higher than the street level. Mr Gomes stated he was unaware this was an issue, but at some stage Mr Klingbiel and Mr Baloyi wanted to take off R178 000 and they wanted Mr Gomes to pay the other contractor. The only way Mr Gomes could claim this amount was by restricted works. Therefore, in order to accommodate these changes, Mr Gomes needed to be paid for additional work. He therefore claimed for the restricted works in the amount of R380 000 which included vat. He was adamant although the restricted work was not in the scope of the initial work, the restricted work was necessary. This was corroborated by Mr Andrin.

[93] It was put to Mr Gomes during cross-examination that there was no site instruction for this work or a quote given to the first defendant to enlarge the embankment. Mr Gomes maintained the pipes needed to be installed to place the defendants in a position to complete the work. In addition, Mr Gomes stated that Mr Klingbiel and the engineer were both aware of this necessity. Mr Gomes disagreed that the restricted works were an opportunistic or fictitious claim, as there were guidelines in the SANS document to claim this work. Mr Gomes replied during cross-examination that the costs for the restricted work could not be claimed in May or July 2016 and that is why it first appeared in POC4.

[94] This court can find no reason why Mr Gomes or Mr Andrin would lie about the necessity of this work and accordingly this Court finds that the amount claimed for restricted works in POC4 should be allowed.

The additional works

[95] Mr Gomes was confronted during cross-examination with his e-mail dated 18 July 2016

stating that claim 8 was the final account. This Court has already dealt with the issue pertaining to the finality of claim 8, however, the response of Mr Gomes to this question was that '*There was sewer lines, storm water lines, bulk earthworks and additional works'*.

[96] During cross-examination Mr Baloyi accepted that the additional work items were carried out by the plaintiff. Mr Andrin's evidence as to the quantification of these items is uncontested.

[97] Clause 5 of the subcontract conditions requires the plaintiff to obtain written authority before undertaking extra work. The clause reads as follows:

'The Subcontractor shall not undertake work involving variation or extra work without prior written authority i.e site instruction from the Contractor.'

[98] There is a site instruction signed by Mr Klingbiel dated 13 January 2016 for the construction of the terrace which is item 6 on POC4. In respect to item 7 on POC4, (which also pertains to the construction of the terrace), there is a signed site instruction from Mr Klingbiel dated 26 January 2016. In respect to item 12 on POC4, (which is in respect to the supply of a storm water pipe), there is a signed site instruction from Mr Klingbiel dated 4 April 2016.

[99] It is clear that these items fall squarely within the ambit of clause 5 of the Subcontract conditions. It is clear that this work was done and accordingly it should be certified and paid.

[100] There is other work done where there is no signed site instruction. Clause 17.3 of the JBCC agreement states that:

'An oral instruction given by the principal agent or any other agent shall be of no force or effect. Neither the contractor nor the employer may rely upon an oral instruction for any purpose.'

[101] Although there is other work which does not satisfy the requirement of prior written authority in respect to clause 5, the plaintiff contends that in respect to the other additional work, specifically in claim 6 and 7, the defendants certified and paid these other amounts on the strength of foreman reports, delivery notes and invoices alone. Mr Baloyi was cross-examined about these amounts paid and he replied that they were certified in good faith.

[102] The plaintiff's counsel referred this Court to the matter of *Bank v Grusd* [28] stating that our law does not permit a party who has accepted and derived the benefit of work that was not authorised in writing, to fall back on a clause in a contract requiring such written authorisation in order to avoid payment.

[103] The second defendant contends that clause 1.8 of the JBCC agreement specifically provides that no representations, terms, conditions or warranties not contained in the subcontract shall be binding on the parties and that no agreement or addendum varying, adding to, deleting, or terminating the JBCC agreement which includes a non-variation clause, shall be effective unless reduced to writing and signed by the parties.

[104] Counsel for the second defendant contends that acquiescence cannot prevail in the face of a contractual provision which prohibits it and renders it unenforceable. Counsel argued that accepting foreman reports and delivery notes goes against the provisions of clause 5 of the second defendant's conditions of the subcontract, and clause 17.3 of the JBCC agreement, disallowing such extra work without prior written authority.

[105] If Mr Baloyi certified these amounts in good faith, by implication it means he accepted the liability of paying them. Accordingly, this Court finds that the defendants' acceptance of the foreman reports and delivery notes implies they regarded them as sufficient for purposes of approving the additional work.

[106] In the matter of *Bank v Grusd* [29], the building contract provided that no extra work was to be done unless the written order of the owner was obtained and that no claim for extra payment would be entertained unless supported by the written authority of the owner. The Court held that notwithstanding such term, if the owner verbally agreed that the extra work should be done, or knew that the work to be done by the builder fell outside the contract, yet stood by and allowed the builder to proceed, knowing that the owner would derive the benefit of such work, then the owner could not deny liability for such work on the ground that no written authority was granted.

[107] In the matter *in casu*, it is clear that the plaintiff performed these additional works which were not covered by the subcontract. The defendants knew that the work was additional but allowed it to be undertaken, knowing the benefit would be derived not only to themselves, but

[28] *Bank v Grusd* 1939 TPD 286
[29] *Bank v Grusd* (note 28 above)

also to the JDA. It is not in dispute that the foreman reports and delivery notes were signed by the representatives of the defendants. These foreman reports and delivery notes also demonstrated to the defendants that the additional work was done.

[108] Even though the decision of *Bank v Grusd* is an old case, the principle is sound. The facts in the matter *in casu* do not demonstrate that only one party was aware of what was going on, or that this arrangement pertaining to the additional works was one-sided. There is a difference between the alleged cession by the second defendant, which was not accepted by the plaintiff, as opposed to the situation pertaining to the additional works where both the plaintiff and the defendants were privy as to what was going on and accepted to proceed without reducing this down in writing. Had the defendants wanted to rely on clause 1.8 or 17.3 of the JBCC agreement they should have pleaded this.

[109] There is an e-mail dated 9 July 2016 at 02:31 sent from Mr Gomes to Mr Klingbiel in respect to the additional works, where Mr Gomes informed Mr Klingbiel that it would take an extra 4 days to do the job. Mr Klingbiel replied to this e-mail on 9 July at 6:51 stating '*No problem. Agreed*' which further supports the fact that the defendants ratified the additional work.

[110] In relation to the breaking of the rock bases, Mr Baloyi conceded under cross-examination that these amounts ought to have been certified to the plaintiff. Mr Andrin's quantification of the additional work was uncontested and the plaintiff is entitled to payment of all additional amounts claimed as per the expert report.

The additional P and G's

[111] The preliminary's and generals are hidden costs. Mr Gomes explained that the shortfall between what is claimed and what is certified arises from the subcontractor measuring, the main contractor measuring and the quantity surveyor measuring, which may result in differences in measurement.

[112] Mr Gomes stated that the job had grown 4 to 5 times and as a result his P and G's had also increased as compared to what had been provided for in the BOQ attached to the subcontract. These related to the oversite to form platforms and the surplus material from excavations and or stock piles on site to a dumping site to be located by the contractor. As a consequence of these increased quantities, the plaintiff gave notice to the second defendant on 4 February 2016 of the delay caused by the increased quantities and informed the second defendant of the plaintiff's intention to claim a revision to the completion date and to recover

expenses and losses arising from the delay.

[113] There was much cross-examination of Mr Gomes in respect to the additional P and G's. It is clear that the amount in respect to additional P and G costs fluctuated between the parties over time and was undetermined. However, the plaintiff's entitlement to payment for such costs as a matter of principle was agreed to. This is clear from the evidence of Mr Gomes and Mr Baloyi. The only difference is that the first defendant maintains that Mr Andrin disregarded the agreement between Mr Gomes and Baloyi to only pay R120 000.

[114] Clause 29.2.10 of the JBCC agreement is the empowering clause that affords the plaintiff the right to an extension of time and additional payments if the bill of quantities are insufficient for the actual work that happened. No amendment of the contract is needed.

[115] The parties attempted to agree on the final amount but they were not able to and accordingly, the plaintiff is entitled to specific performance of the agreement in principle and the value in accordance with the principles for P and G costs that are stipulated in the subcontract and which Mr Andrin testified about and applied.

ORDER

[116] In the result, I make the following order:

The defendants are jointly and severally liable, the one paying the other to be absolved for:

1. Payment of R 1 150 500-82
2. Interest at the prescribed rate from 23 November 2017 to date of final payment by

the defendants.

3. Costs to follow the result.

D DOSIO
JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 28 December 2022

Appearances:

On behalf of the applicant:	Adv. C.T. Picas
Instructed by:	Fasken (incorporated as Bell Dewar)
On behalf of the first defendant:	Adv. P.G. Louw
Instructed by:	Van der Meer & Partners Inc.
On behalf of the second defendant:	Adv. C. Carelse
Instructed by:	Terry Mahon Attorneys