REPUBLIC OF SOUTH AFRICA

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

CASE NO: 28993/2020

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

20 November 2023 .....
DATE
SIGNATURE

In the matter between:

LBMC Consulting (Pty) Ltd	Plaintiff
And	
Minister of Public Works and Infrastructure	1st Defendant
Department of Public Works and Infrastructure	2nd Defendant

JUDGMENT

MIA J:

Introduction

[1] The plaintiff and defendant concluded an agreement after the plaintiff was the successful candidate who tendered for the completion of work to be completed at the Alberton Police Station. The plaintiff alleges the defendants breached the JBCC contract agreed upon and it suffered a loss and damages due to the breach. The plaintiff claims damages it asserts were foreseeable

due to the second defendant's conduct and negligent breach of care. The plaintiff also framed a claim in the alternative based on the action *actio exhibendum.* The amount the plaintiff claims is R1 943 943 00 for loss of revenue, R6 464 137.18 for loss of expenses, R3 648 616.90 for standing time and R 3 481886.02 for stolen assets as well as a contract price adjustment amounting to R1 169 943.00. The total amount claimed is R23 021 916.30.

[2] The plaintiff is LBMC Consulting Pty (Ltd), a registered company with registration number 2007/ 030642/07, whose chosen *domicili citandi et executandi* is 55 Chesham Road Bryanston. The first defendant is the Minister of Public Works and Infrastructure, whose principal place of business is 256 Madiba St. Pretoria. The second defendant is the Department of Public Works and Infrastructure, whose address is 78 De Korte Street, Braamfontein.

[3] The scope of project consisted of renovation of existing offices, alterations of the public toilet and the construction of a new double storey structural frame office block. In addition, the existing porta cabins on site were to be removed and the cells had to be upgraded.

Background facts

[4] The plaintiff successfully received a tender after bidding to the second defendant for work to be completed at Alberton Police Station. The plaintiff accepted the bid after meeting with the second defendant informed the plaintiff that its bid was lower than the second defendant’s estimated cost for completion of the work. The second defendant afforded the plaintiff an opportunity to consider whether it would be profitable to accept the tender at the price it bid or whether it wished to withdraw its tender. The plaintiff informed the second defendant that it would complete the project at the indicated price of R14 291 940.88. The contract period was for eighteen (18)

months with the commencement date being 22 September 2017 and the anticipated practical completion date 23 March 2019.

[5] After signing the contract and commencing the work, the plaintiff discovered that there was a discrepancy between the BOQ furnished by the second defendant and the work required. The plaintiff continued with work on the project until December 2019. In August 2019, the plaintiff sent the second defendant a letter seeking to adjust the contract price, asserting that there was a huge financial discrepancy between the Bill of Quantities (BOQ) and the drawings that the second defendant gave all bidders. In the correspondence sent in August 2019, the plaintiff requested additional funds indicating it would cost substantially more to complete the project. The plaintiff informed the defendant it would take the builder's holiday and resume work in January 2020. The plaintiff did not resume work in January 2020.

[6] The second defendant sent correspondence placing the plaintiff in mora. It afforded the plaintiff 5 days to resume work and indicate how it would catch up with the programme. The plaintiff did not return. The second defendant cancelled the contract when the plaintiff did not resume work in January 2020. The parties were not able to resolve their dispute regarding the outstanding work. The plaintiff issued summons to claim for loss and damages. The defendants opposed the claim and lodged a counterclaim.

[7] At the commencement of the matter, counsel agreed that the counterclaim was not ripe for hearing. The defendants' requested that the counterclaim be postponed and tendered the costs in respect thereof. Moreover, counsel for the defendant admitted that there was a problem with the BOQ furnished as well as the scope of the work required to be done. Despite the above admissions, the defendant denies that it is liable in delict and disputes the amounts claimed by the plaintiff.

Issues in dispute

[8] The parties agreed to narrow the issues for determination as set out hereunder:

8.1. Whether the plaintiff was entitled to issue a letter of suspension.

8.2 Whether the defendants were entitled to cancel the JBCC Construction Agreement, version 4.5 of 2005, concluded by the parties in 2017.

Plaintiff's evidence

[9] The plaintiff's first and only witness was Mr. Bonang Moletsane, the plaintiff's director. He testified that the plaintiff was awarded the tender after a bidding process. The contract sum was the amount of R 16 500 000.00. He informed the second defendant that the plaintiff could complete the project if the BOQ was complete. He estimated the plaintiff required fourteen days to complete the programme of action. Within the first few days after the site was hander over, the plaintiff discovered asbestos on site. This was not disclosed or provided for in the BOQ. The plaintiff removed the asbestos by subcontracting this part of the work to an expert in this area and sought approval for the subcontractor's appointment. This immediately increased the costs. Mr Moletsane said he appointed the company which submitted the lowest quotation for removing the asbestos.

[10] The plaintiff continued working on the project and encountered water seepage which was also not provided for in the BOQ. This required tests to be conducted to test the soil underground, and the water had to be pumped out. He explained that they were forced to wait for the results. He proposed a solution and awaited the defendant's response. Given this unforeseen delay, he requested an extension of time for the project. No details were furnished regarding the proposal or the second defendant's response to the solution or the extension required. At this point, he testified they were working for twenty

days and completed the project in respect of what was unforeseen in respect of the asbestos and the water seepage.

[11] He explained that the plaintiff's work was delayed for the above reasons, as well as the termination of the engineer by the second defendant, the poor performance of the quantity surveyor, and the disappearance of the second defendant's electrical engineer in 2018 for eight months. During this time, the plaintiff required an engineer on site on a daily basis and worked without the engineers input requiring the plaintiff to improvise. The absence of the electrical engineer was exacerbated by the defendant's failure to make payments. Notwithstanding the challenges, they completed a building in 2019 which was ready for occupation.

[12] The plaintiff sent a letter to the second defendant dated 30 August 2019. The problems the plaintiff highlighted were that:

> "2.1.1 the quantity surveyor completed a BOQ which does not appear to have been specifically meant for this project. The project drawings appear to have been for any other project and not for Alberton Police Station. Thus the contract documents which were handed over to the contractor at site handover on 23 October 2017 were fatally flawed.
>
> 2.1.2 The Principal Agent, had in general failed to manage the cause of the dispute, and thus , failed to execute the requisite duty of care, skill and diligence in respect of the dispute.
>
> 2.2…..The Principal agent caused a misrepresentation of a material fact in the JBCC"
>
> 2.3 What was not disclosed is that :
>
> 2.3.1 The contract documents do not properly describe the works to be carried out by the Contractor as a result of the inputs of the design team not

being sought and included in the finalisation of the BOQ prior to going out to tender.

2.3.2 The practical contractual effect of this is that there is a misalignment between the BOQ and the contract drawings leading to a financial inequity between the contract sum and the contract value of approximately R 20 million, over the 20% threshold as set by the National Treasury for variations."

[13] In addition to the "fatal flaw" in the agreement regarding the BOQ, Mr. Moletsane, stated in his evidence that the misrepresentations and absence of the engineer and the defendants' failure to address issues raised, compromised their ability to perform in terms of the contract. Moreover, the second defendant refused to amend the contract to reflect the correct work the plaintiff was required to perform, which included removing the asbestos, a specialised area. He indicated there would be a loss of 20 million rand due to the flawed BOQ.

[14] Mr Moletsane stated furthermore that the principal agent, an architect, was responsible for managing the engineers working on the project and the oversight. The principal agent was responsible for submitting the plaintiff's claims when the plaintiff submitted them. The principal agent only submitted four claims for extension of time out of twelve that the plaintiff submitted. The remaining extension claims are yet to be presented to the second defendant.

[15] He said the plaintiff spent six million rand on the project to date, which resulted in improvements to the defendants' premises. The plaintiff had not been paid for the improvements. In his view, the variation occasioned by the incorrect BOQ and failure to disclose the asbestos could not be disguised as negligence. The variations were required and necessary to complete the project according to the defendant's requirements. There was no line of communication when they were onsite, which he said was indicative of the various difficulties they encountered while working on the project. He wrote the letter of suspension dated 22 January 2020 when there was R1.4 million

due to the plaintiff to enable them to continue working to complete the project. He informed the second defendant the work on the project was suspended until they received payment. The principal agent requested the plaintiff to return to work and issued the plaintiff with a letter dated 24 January 2020, placing it *in mora.* The plaintiff was given five days to respond. The plaintiff denied that it received the letter dated 24 January 2020 and did not return to the site. The second defendant terminated the JBCC construction agreement on 30 January 2020.

[16] A meeting was held after the termination of the agreement. Mr Moletsane stated that the second defendant's representative conceded that they prematurely terminated the agreement. Mr. Phailane apologised to Mr Moletsane after he indicated he would not have terminated the agreement had the full facts been placed before him.

[17] Despite the concession that the agreement was prematurely terminated, the second defendant refused the plaintiff access to the property to enable it to collect its equipment. The defendant relied on a term of the agreement to retain the equipment.

[18] Mr Moletsane testified that the plaintiff suffered damages resulting from lost opportunities as it did not have the machinery and tools to fulfil any new agreement. The machinery and tools which the second defendant retained has since been ruined and damaged. Thus, the equipment can no longer be used profitably by the plaintiff. He indicated that the equipment would have to be replaced even if it was returned to the plaintiff. He referred to a quote the plaintiff obtained for new machinery and tools and indicated that was what the plaintiff claimed in respect of the amount for the machinery and tools.

[19] He explained that the plaintiff was penalised by the defendant for delays which occurred because an extension of time was requested whilst the delays occurred because of the design limitations. When the plaintiff arrived on the site it encountered work requirements that were not encapsulated in

the BOQ. Whilst they were appointed on the project at R16 105 868.44, the revised bill amounted to R31 569 300.16. The delays he reiterated arose as a result of the work not being accurately represented and included the asbestos removal, pimping water that was not detected and changes that occurred during the project that were not timeously approved or work that was not approved by the engineer appointed by the second defendant who disappeared for eight months.

[20] During cross-examination, Mr Moletsane said that it had not under-quoted resulting in a loss but based its bid on the BOQ which was flawed. He explained that the plaintiff owned equipment required for the project, which the plaintiff did not need to hire, enabling the plaintiff to adjust the costs where another company would have to factor in the equipment rental costs. He did conceded that the second defendant did approve extensions of time on certain occasions however the asbestos removal and water seepage discovered on site was not part of the work in the agreement and did not feature in the BOQ. He denied that the plaintiff had been paid by January 2020, rendering the suspension letter unlawful. He also explained that the plaintiff was not on site on 7 January 2022 due to supplier closure during the building holiday. They returned to the site as soon as their suppliers opened, and informed the defendants that the date of return was 13 January 2020.

[21] Mr Moletsane explained that the principal agent was not on site and relied on information communicated to him by its candidate on site who lacked experience. This prevented the parties from resolving issues and delayed approvals for extension of time. Whilst on site on 28 January 2020, he received a letter dated 24 January 2020, where the principal agent raised the plaintiff’s absence on site on 7 January 2020 and complained that no construction work occurred. It requested the plaintiff to remedy the complaint within five days. The principal agent was unaware of the plaintiff’s suspension of work letter and held the view that the plaintiff did not comply with the contract and recommended cancellation by 7 February 2020. Mr Moletsane

maintained his position that there was a payment discrepancy up to the date of cancellation, whereafter they were refused access to the site.

[22] He continued that he suffered a loss of revenue because he did not have the equipment withheld by the second the defendant in terms of the agreement. He would have had to hire machines to accept further contracts. He was unable to do so and maintained his business was destroyed due to the defendant withholding the equipment and failing to make payment during the period the plaintiff was onsite. The price of machinery and tools escalated over the period. He did not include the big machinery, which cost approximately R4 500 000 as part of the claim due to the loss of tools related to hand tools. The tools were stolen whilst in care of the defendant and the cost of replacement of the big machinery was not included in the claim.

[23] He also indicated that he did not include his loss of production. The standing time was discussed with the second defendant. He stated that the payment was due for the contract period until March 2020 by which time they had to be paid in full. Mr. Moletsane expressed his view that the second defendant breached the agreement when it furnished details which did not align with the project and failed to furnish the correct details. He stated that the second defendant could not place the plaintiff *in mora* when the plaintiff could not perform in terms of the contract where the BOQ were defective. The principal agent did not recommend extensions where appropriate. In his view, the plaintiff performed in terms of the contract and completed the extra work not provided for. He pointed out that the defendant would have imposed penalties during the contract period if the plaintiff failed to complete the necessary work.

[24] Mr Moletsane explained that the adjustment of the contract price to R 1 163 943.0 was necessary as prices of material did not remain stable throughout the contract. The contract price of R16 105 868.44 included material, labour and overheads. The price increased for the contract and was informed by publicised figures. On being questioned further about the

outstanding payments, he agreed that some certificates were paid. However, he pointed out that some, such as Certificate 15, were paid at 57 per cent of the amount. There were other amounts outstanding, such as Certificate 23, that were not paid. He maintained the final account was in line with the signed contract.

[25] In addition to the inaccurate information in the BOQ, resulting in necessary extra work being done, work was also hampered because the structural engineer appointed by the second defendant disappeared for eight months. The presence of the engineer was required daily to inform the plaintiff of the work they needed to complete. The plaintiff completed the work, and some aspects needed to be corrected as the engineer was not present to give directions or tell them what to do and how to do it. He explained that items were undermeasured and, to this extent, their work extended beyond the scope of work per the BOQ.

[26] He explained that whilst building the cage for a lift, they encountered an issue where extra support was necessary. They required the dimensions of the cage, which were not readily available. He had to source the information himself and found a company in the Western Cape that could furnish the information they required.

[27] He explained that the insurance did not cover the loss of machinery. The insurance the plaintiff had in place was firstly in respect to injury or events that occurred on site. This enabled the employees to receive treatment at a private hospital. The second insurance relating to the plant machinery was linked to the project. The construction guarantee was available at the tender stage. He could not claim on the insurance relating to the machinery as the time had lapsed. To extend the insurance, the plaintiff was required to provide an extension letter to the insurer for the period beyond the two years covered in terms of the tender and contract award. When the defendant terminated the contract on 31 January 2020, the contract period exceeded the two years in which cover was granted. The insurance would not cover the incident without

a letter of extension on the contract. There were 12 variation orders. Each variation order extended the contract and project life. Thus, the plaintiff could only send the final account after they left the project.

Defendants evidence

[28] Mr Albert Nedzamba testified on behalf of the defendants. He is an engineer and was appointed as Project Manager for the defendants. He managed projects for the past 15 years and conducts inspections of the building work. He accumulated 26 years of experience in the construction industry. He produced the drawings which went to the Quantity Surveyor who provided the estimates for the material required. Together, they consulted each other and compiled the tender document used to invite bids.

[29] He explained that the plaintiff's bid was the lowest and came in under the amount they had estimated to complete the project. They informed Mr Moletsane that his price was below the estimate for the project. The second defendant allowed him to decide whether to proceed based on his bid, knowing there would not be a profit. He was required to submit a letter of acceptance upon agreement. Mr Moletsane informed the second defendant he wished to proceed with the project. The site was handed over to the plaintiff, who had to furnish his programme of work and commence. The second defendant allocated a principal agent to oversee the progress and quality and recommend extensions and variations to the second defendant when it was necessary. The Principal Agent was an engineer from Ikemeleng Architects. They handed over the site as soon as Mr Moletsane submitted the acceptance letter. The second defendant continued to monitor the work as it received the principal agent's input. It also visited the site to discuss matters relating to the project with the plaintiff.

[30] Mr Nedzamba stated that the work on the project progressed slowly. They held regular meetings held on-site to determine the progress and to advise Mr Moletsane on the quality and standards applicable. In his view, the

plaintiff's slow progress was attributed to a lack of on-site personnel. When they raised the issue, Mr Moletsane undertook to place additional personnel on site. In addition to the delays, he stated that the plaintiff sought extensions of time. He agreed that the extensions relating to the asbestos and water seepage was necessary. The extensions recommended were usually granted. Ordinarily, he indicated extensions were granted due to a specified material's lack of availability or the supplier's late delivery. He also conceded that an extension was necessary when information was unavailable, such as the room's specifications. He maintained that extensions were granted when they were applied for, and delays were not critical.

[31] He recalled that the second defendant paid all the extensions of time when a claim was submitted, and it was approved for the reasons indicated above. Mr Nedzamba explained that the engineer clarified delays. In his view, their correspondence indicated that items were paid when the work was completed. He conceded that there were delays due to late instructions from the electrical engineer. He disputed that an engineer was away for eight months. He recalled that an engineer from the office was sent on-site whilst the allocated engineer was away. There was monitoring when a variation occurred, and an extension of time was applicable.

[32] According to his recollection, the project was terminated when the plaintiff failed to have the administration block ready and available on the date agreed upon in December 2019. He said he attended on-site and communicated with the plaintiff regarding the builder’s holiday and the plaintiff’s resumption of work which was agreed upon. The plaintiff did not resume work on 7 January 2020 as they had agreed and was requested to return to the site. When the plaintiff was not on site during the second visit to the site, the second defendant placed the plaintiff on terms and sent a letter placing it *in mora*.

[33] The letter was emailed to the plaintiff and a hard copy was furnished to Mr Moletsane when they met on site. Upon receipt of the letter, Mr Moletsane

refused to continue the meeting. Mr Nedzamba explained that the letter of suspension of works received from the plaintiff was not appropriate after it received payment in January 2020. He agreed that payment did not occur immediately upon submission of an invoice and explained that the invoice for December 2019 was paid in January 2020. However, he maintained that there was no money due to the plaintiff on 22 January 2020 when the plaintiff issued the letter of suspension of work.

[34] He said the plaintiff demanded an adjustment of the contract price amounting to a total of R 24 112 563.24, which exceeded 20% of the original contract price of R16 105 868.44. He explained that work that was not provided for in the BOQ and was unforeseen could be dealt with in three ways. An extension could be granted. Upon completion of the work the work was then costed and paid. Another way in which the plaintiff could recover money for work not provided for was through the variation which also allowed for recovery of money invested in the construction work. The third way was to remeasure an item. An example cited was when a room was provided for 20 square meters and was finalised at 30 square meters; the increased space and work done were charged at the applicable rate that both parties were aware of.

[35] In response to questions about the issues raised by the plaintiff, he explained that when the contract price exceeded 20% of the initially quoted figure, increasing the agreed price was inappropriate, as occurred when the plaintiff requested an adjustment to the contract price. The second defendant could not adjust the contract to the increased amount without a proper reason. He maintained that they had given the plaintiff sufficient support to mitigate the challenges. This included appointing an engineer to assist and supervise the electrical installation. When delays occurred, the plaintiff was afforded an extension of time. The monthly meetings took place to enable them to discuss any concerns. The second defendant addressed concerns raised by the plaintiff during these meetings. The variations required and extensions recommended by the principal agent could be similarly be clarified and

approval requested. However, the second defendant could not vary the contract from the agreed amount of R16 105 868.44 to add the additional R14 000 000 in circumstances where the plaintiff affirmed that he could complete the project on the bid price. The second defendant was governed by the Public Finance Management Act and its processes, which did not permit such a considerable amount that exceeded the 20% permissible.

[36] Finally, he disputed that funding for further projects was denied. He maintained that the second defendant was not in default of the agreement at R16 105 868.44. Thus, he continued the R 6 000 000 the plaintiff claimed as damages was unwarranted where the second defendant paid all claims submitted. He conceded there may have been design errors but denied that they amounted to such a considerable amount as claimed by the plaintiff. He maintained that no payment was outstanding on the contract and the plaintiff was not entitled to damages. He reiterated that Mr Moletsane undertook an exercise before accepting the contract to ensure it was viable for the plaintiff to accept the contract before he agreed the plaintiff would complete the project within the bid price. The plaintiff accepted the contract after considering that its bid was below the amount estimated to conclude the work required to be completed. After their discussion, the plaintiff undertook to complete the project at R16 105 868.44 and sent a letter of acceptance.

[37] His experience during the contract term was that Mr Moletsane was not on site when communication was necessary except for the last day. He continued that Mr Moletsane assured them the plaintiff would catch up with the timeline of the project, but the plaintiff did not. He recounts that the plaintiff's personnel lingered on site and did not make up time to complete the work. Instead, the plaintiff's personnel appeared to be placing personnel on-site to account for time rather than to complete work. The site was not cleaned and maintained whilst they were actively working on the programme. Whilst the plaintiff indicated that suppliers were closed, he recalled seeing material onsite that the plaintiff's personnel did not utilise. They also did not clear heaps of rubble present on the site during this time, which did not

require new material. To add to the delay, Mr Moletsane failed to indicate what his revised programme entailed to ensure the plaintiff met the objectives of the project and the second defendant's interim requirements to have the administration block complete and ready for occupation.

[38] Concerning the retention of equipment, he explained that the contract provided that no tools or machinery could be removed from the site as the second defendant was required to complete the project. They did not receive the administration block as agreed would be complete in December 2019.

[39] In *Kruger v Coetzee*[1], the Court stated:

> " For the purposes of liability culpa arises if –
>
> a) The diligens paterfamilias in the position of the respondent-
>
> i. Would foresee the reasonable possibility of his conduct injuring another in his person and causing him patrimonial loss; and
>
> ii. Would take reasonable steps to guard against such occurrence; and
>
> b) The respondent failed to take such steps. Whether *a dilgens pater familias* in the position of the person concerned would take any guarding steps at all, and if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down."[2]

[40] The parties agreed that the in considering the issues for determination the successful party will be identified. I consider the issues below.

Whether the plaintiff was entitled to issue a letter of suspension.

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[1] *Kruger v Coetzee* 1966 (2) SA 428 (A)
[2] *Kruger* at 430E-G.

[41] The plaintiff had been paid for December 2019 when it issued the letter suspending the work. The money was received by 18 January 2020, when the letter of suspension dated 22 January 2020 was sent to the second defendant. The second defendant did not owe outstanding monies to the plaintiff at tat point. It was not factually correct that the principal agent had not certified the payment certificate. The twenty two invoices that had been submitted were paid. The plaintiff had not issued invoices for the loss of standing time and damages, as alleged. It could not be considered by the second defendant in the absence of the invoices. The plaintiff's reliance on Clause 31.15 of the JBCC contract was, therefore, misplaced.

[42] It could only rely on this clause in the absence of invoices submitted as provided for in Clause 31.4 and 31.5. Clause 31.6 required that goods not be offered or delivered prematurely and had to be insured. The plaintiff's demand was premature in the absence of completion of the work. Moreover, on the plaintiff's version, it was not covered by insurance at that point. Whilst it blamed the absence of an extension for not having insurance, it conceded that extensions were granted. On that basis no evidence was led why the plaintiff did not secure insurance and request the correspondence required to secure such insurance where the extensions were granted.

[43] On the evidence presented, there is no denial that the administrative block was to be completed and handed over. The JBCC contract made provision for the plaintiff to inform the second defendant of any concerns or complaints it had with the principal agent and to remove the principal agent. There was no evidence of correspondence informing the second defendant about the problems it raised in the letter of suspension about the principal agent. There was no evidence that the plaintiff exercised this right in terms of the agreement by requesting that the principal agent be removed.

[44] The contract does not cover the suspension of work and demand for payment in advance to complete the programme of work. The plaintiff did not provide any statement or invoices for work that was complete and not paid.

The payment it demanded in the letter dated 22 January 2020 was for work to be completed in the future. In relation to the proof required, the plaintiff did not provide proof of the increased amount it paid for materials compared to its initial costing. It also did not prove that the principal agent failed to take relevant adjustments as provided in clauses 31.4 – 31.6 of the JBCC contract. In the absence of the invoices relating to remeasured work and adjustments as provided for in the JBCC contract, there was no basis on which the plaintiff can rely on the JBCC contract to issue the letter of suspension dated 22 January 2020.

Were the defendants entitled to cancel the JBCC Construction agreement concluded in 2017

[45] Upon being informed that its bid was the lowest, the plaintiff signed a letter of acceptance confirming it would complete the project for the amount it tendered. This was after the second defendant informed the plaintiff that its bid was below the second defendant's estimate of the work required. The plaintiff's letter of acceptance indicates:

> "This letter serves to confirm our bid price as stated in the Form of Offer and Acceptance in the amount of R16 105 868.00, this is despite the price being below the pre-tender estimate as well as the arithmetic errors on the tendered amounts.
>
> We have since gone through an exercise of analysing the Bill of Quantities(BOQ) and we are confident that we will complete the work on time, within the budget, safely and to the quality required by the Employer"[3]

[46] In addition to the letter of acceptance, the plaintiff signed the site Inspection Meeting Certificate indicating:

> "I have made myself familiar with all local conditions likely to influence the work and the costs thereof. I further certify that I am satisfied with the description of the work and explanations given at the site inspection meeting

[3] Caselines record, p006-23, Letter of acceptance

> and that I understand perfectly the work to be done, as specified and implied in the execution of this contract."

[47] The completion of the project was delayed understandably of the asbestos and water seepage. However, Mr Nedzamba indicated the plaintiff undertook to make up for the delays. At that stage, the project's original completion date, September 2019, had passed. The plaintiff agreed it would hand over the administration block in December 2019. This was not realised. The evidence indicates that the building was complete, and the paving was the only item requiring completion to hand over the building for occupation.

[48] Given my conclusion above that the plaintiff issued the letter of suspension of work when the second defendant had paid the invoices submitted, the plaintiff's conduct runs contrary to the JBCC contract and amounts to a breach. The second defendant viewed the plaintiff's failure to complete the work as absconding from the work. It thus requested the plaintiff to return. The principal-agent sent the letter on 24 January 2020, affording the plaintiff five days to return to the site. The JBCC contract makes provision for calendar days.[4] The plaintiff failed to return within five days after it was placed *in mora* on 24 January 2020.

[49] Mr Moletsane's view that the correspondence was not served on him does not take in to account that the contract was concluded with the plaintiff. Mr Moletsane conflates his identity with that of the plaintiff, the contracting party to the JBCC contract. The second defendant took the same letter to the meeting that was called onsite. At that meeting Mr Nedzamba said Mr Moletsane refused to continue with the meeting because the plaintiff had been placed *in mora* and dismissed the meeting. Where the notice came to Mr Moletsane's attention his dismissal of the meeting does not address the second defendants request that he return to the site and to move forward constructively. Mr Moletsane's conduct reinforced the view held by the second defendant that he did not wish to continue. The cancellation of the contract

[4] Caselines 006-660 Definitions, "Calendar days means twenty four(24) hour days commencing at midnight(00:00) which include working and non-working days."

under the circumstances cannot be faulted when the plaintiff had abandoned the site, believing it was within its rights to suspend the work. The plaintiff was in breach and failed to remedy the breach. It did not indicate how it wished to catch up with the programme and to deliver the administration block as it had undertaken to. Cancelling the contract for the plaintiff's breach when the plaintiff abandoned the site was the only step the second defendant could take in the circumstances. Under the circumstances, the second defendant was entitled to cancel the contract on 31 January 2020.

[50] Our courts have held[5]

> "[I]t is a principle of our law that for the appellant to succeed with its claim "against the Respondent it must establish on a balance of probabilities that its version is reliable and can be believed.

To succeed in its claim, the plaintiff must prove an act or omission on the defendant's part and the amounts due. Regarding the evidence, it is clear that the plaintiff and second defendant did not interpret and understand the JBCC contract in the same manner, resulting in misinterpretation which informed their conduct. As became clear they did not agree about extensions and variations. The plaintiff asserted that the defendant failed to furnish the correct BOQ to inform all tenders. In so far as there may have been errors, it is clear from the evidence that the second defendant approved all extensions recommended by the principal agent. The second defendant took steps to address the challenges presented as the project progressed. The plaintiff has not succeeded in showing how the second defendant did not address problems that they failed to act. This is so because the extensions regarding the asbestos removal was approved and paid as was the water seepage. There is no evidence placed before this court showing the second failed to grant an extensions where it was recommended or that the plaintiff drew it to the second defendant's attention. There were regular site

[5] *E G obo S G v MEC for Health Gauteng Provincial Government* (13524/2018) [2020] ZAGPJHC 12 (28 January 2020).

meeting to inform and find solutions to challenges. I am unable to find that the second defendant did not take reasonable steps to guard against loss the plaintiff would experience where the asbestos and water seepage presented unforeseen problems in the particular circumstances

[51] In the circumstances where the plaintiff experienced loss in relation to the BOQ being incorrect, the plaintiff must prove the amounts due if they are so. The errors in the design documents could be and were being addressed as the project progressed. The evidence indicated that the second defendant granted the extension of the project as it was submitted. Mr Moletsane also conceded that extensions were granted. The extensions addressed the plaintiff would encounter and was paid once the work was complete and the certificate was submitted. To the extent that there are extensions to recommend the plaintiff did not bring it to the attention of the second defendant, as provided by the JBCC contract. The outstanding extension can only be considered once the principal agent approves the work completed and recommends and sends through the approved certificates.

[52] The plaintiff must prove the amounts claimed, which he maintains are substantial. Regarding the claim for loss of revenue of R1 943- 943.00, it is unclear how this amount is made up. The plaintiff indicated he relied on an actuarial calculation. No actuarial report was discovered or placed before the court to show how this amount arrived. The same applied to R6 464 137.18 for loss of expenses and R3 648 616.90 for standing time. The plaintiff was paid for the certificate submitted in December 2019. It is not clear why it did not hire tools where the tools were retained. He would have mitigated his losses in this manner where the profit would have been considered and set off against any losses due on the project. Any amounts due by the second respondent would have been calculated based on the invoices submitted to the second

defendant for work on this project. The losses averred on this project have not been proven.

[53] Regarding the damaged or stolen tools, R 3 481886.02 was calculated based on the quote received. The plaintiff's materials were not new. The material would have been covered had the plaintiff extended the insurance based on the extensions granted. In failing to extend the insurance, the plaintiff's conduct indicated the abandonment of the site and its failure to act in terms of the JBCC contract. This amount has not been proved. The JBCC contract makes provision for the contract price adjustment. It will only be a contract price adjustment. The adjustment cannot be based on work still to be completed. The amount of R1 169 943.00 has not been proven.

[54] I move now to costs. The usual order is that costs follow the cause. There is no reason to divert from this.

Order

[55] For the reason given above, I granted the following order:

1. The plaintiff’s claim is dismissed with costs.

_____

S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the Plaintiff	: Adv TJ Moraka
Instructed by	: PJ Maduna Attorneys
On behalf of the Defendants	: Adv. TJ Machaba SC
Instructed by	: The State Attorney
Date of hearing	: 10,11,12,13,14 October 2022,10 March 2023
Date of judgment	: 20 November 2023