Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED: YES/~~NO~~

6/5/'24 [redacted]
DATE SIGNATURE

In the matter between:

CASE NO: 34785/2022

COUNCIL FOR GEOSCIENCE Applicant

And

SMEC SOUTH AFRICA (PTY) LTD Respondent

AERODUCT MOYA CC 2ND Defendant

JUDGMENT

POTGIETER AJ:

[1] The Plaintiff, (an Organ of State), is applying for leave to amend its particulars of Claim, more particularly by substituting a new Particulars of Claim for the existing Particulars of Claim.

[2] The First Defendant, a company, objects to the Plaintiff's proposed amendment, hence the present application.

[3] A Second Defendant, a Close Corporation and the contractor referred to herein later, is not involved in the present application.

[4] The litigation between the Plaintiff and the Defendants arises from contracts concluded between the Plaintiff and the Defendants in which the roles of the Defendants were, in summary, the following:

[4.1] The First Defendant would design and supervise the construction works for the installation of a HVAC System. The supervision would be of the contractor contracted by the Plaintiff to install the system designed by the First Defendant.

[4.2] The Second Defendant would install the system designed by the First Defendant, according to the First Defendant's design and/or

instructions.

[5] Part of the First Defendant's obligations was to certify that payments could be made, from time to time, by the Plaintiff to the Second Defendant.

[6] The Plaintiff avers that the First Defendant's supervisory obligations also entailed that the work would be completed within the envisaged time line *viz* by 31 July 2015, (i.e. a period of two years from the appointment of the First Defendant).

[7] Completion of the project by 31 July 2015 did not occur.

[8] After the completion date expired the parties simply continued as before. The Plaintiff avers that this constituted a tacit extension of the contract until such time as a written Addendum to the original contract was concluded, (hereinafter "*the first addendum*").

[9] The envisaged new completion date set out in the first addendum was also not achieved.

[10] Once again the parties simply carried on as before until a second addendum was concluded and a new completion date for the project was determined.

[11] The project was never completed under the supervision of the First Defendant with the Second Defendant as contractor.

[12] On 6 December 2017 the Plaintiff terminated its contract with the Second Defendant.

[13] On 18 December 2019 the Plaintiff terminated its extended contract with the First Defendant.

[14] In the premises the Plaintiff appointed a new consultant engineer in the First Defendant's stead and a new contractor in the Second Defendant's stead.

[15] The Plaintiff thereupon instituted action against, *inter alia*, the First Defendant, (the action against the Second Defendant is not presently relevant and will therefore receive no further exposition), for damages for breach of contract.

[16] The Plaintiff also instituted an alternative delictual claim against the First Defendant for the same damages as are being claimed in the contractual claim. (There are often claims as well but they are not presently relevant).

[17] The present application and objection are not the first skirmishes between the Plaintiff and the First Defendant to date hereof. In their heads of argument both Counsels referred to the history of previous pleadings, objections and/or exceptions etc. I find that these previous skirmishes are presently irrelevant. The present application and its concomitant Particulars of Claim and the present objection stand and fall on their own feet.

[18] The Defendant's objections are that the proposed Particulars of Claim are excipiable either because they are vague and embarrassing or because they fail to contain averments required to sustain a cause of action or both of the aforegoing.

[19] The Defendant's objections to the Plaintiff's contractual claim for damages can

conveniently be summarized as follows:

[19.1] The tacit extensions relied upon by the Plaintiff contradict the express terms of the original contract because the original contract terminated after two years *viz* on 31 July 2015. Given that there is a non-variation clause in the original contract requiring variations and/or modifications to be reduced in writing and signed by both parties, the tacit extensions are of no force and effect.

[19.2] Procurement considerations, (i.e. the Constitution, Procurement Policies, National Treasury Regulations etc. which govern procurements by Organs of State), were required to be complied with pertaining to the extensions and the Plaintiff has made no averments that any of the extensions were made in terms of procurement legislation.

[19.3] The original contract did not provide for a renewal of the contract.

[19.4] Whereas the original contract contains a clause allowing for the extension of the time for performance in a certain prescribed manner the Plaintiff makes no averments that that clause had been complied with when it comes to the extensions.

[19.5] Any extension of the contract had to have occurred during the existence of the original contract, (i.e. before 31 July 2015), but not thereafter because the original contract terminated on 31 July 2015.

[19.6] The Plaintiff has failed to aver when the breach relied upon by the Plaintiff occurred. If same was after 31 July 2015 there could be no claim for contractual damages as there was no contract after 31 July 2015, (for reasons advanced above).

[20] The Defendant objects to the Plaintiff's alternative delictual claim for the same amount as is being claimed in terms of the Plaintiff's contractual claim on grounds that can be summarized as follows:

[20.1] The circumstances and facts giving rise to the Defendant's alleged duty of care are not advanced by the Plaintiff but are legally required to be advanced.

[20.2] The Plaintiff makes no allegations to establish a *concursus actionem* justifying a delictual claim above and beyond the contractual claim.

[20.3] Breach of a contractual duty to perform specific professional work with due diligence is not *per se* a wrongful act for the purposes of aquilian liability.

[20.4] Contracting parties are deemed to contemplate that their rights and obligations will be regulated by their contract.

[21] The following principles are applicable to the present application:

[21.1] The objection must be adjudicated on the same basis as an

exception because that is all of the Defendant relies upon.

[21.2] The principles applicable to the amendment of pleadings by a litigant.

[22] The relevant principles applicable to exceptions are that the exception can only succeed if the grounds therefor are valid on any reasonable interpretation which the averments in the Particulars of Claim can sustain.

[23] The principles applicable to the amendment of pleadings are that any application to amend a pleading will be regarded with a benevolent eye because a party is entitled to properly plead its case.

[24] The South African Concise Oxford Dictionary, [1] defines "*extension*" as, *inter alia,* "*an additional period of time given to someone to hold office or to fulfil an obligation*". Whilst one could fruitfully criticize the terminology used by the Plaintiff in *inter alia* the addendums and the proposed Particulars of Claim I find that what is at play when it comes to the extensions is nothing more than the granting of more time to the Defendant within which to ensure completion of one and the same project that was originally contracted for. There was no question of any new procurement which would trigger the need to comply with procurement considerations such as those relied upon by the Defendant.

[25] In coming to this conclusion I have not lost sight of the fact that sometimes an extension of time could constitute a new procurement but this is not one of

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[1] 4TH Edition (2005).

those instances. One and the same procurement was at play and this much is clear from the addendums, (albeit that the second addendum records a reduction in the scope of the work but with concomitant reduction in the Defendant's remuneration of 30%).

[26] The above conclusion I have come to is the death knell for all of the Defendant's objections which rely upon the applicability of procurement considerations.

[27] In addition to the aforegoing the lament by the Defendant that the Plaintiff has made no averments pertaining to compliance with procurement considerations has been dealt with by the Plaintiff on the strength of high authority to the effect that it is not required of a Plaintiff to make averments pertaining to the validity of an agreement but rather it is required from a Defendant who wishes to defend itself on the basis that the agreement relied upon by the Plaintiff is invalid, to plead same. On my reading of the Defendant's heads of argument this authority advanced by the Plaintiff has not been countered, or, for that matter, not been dealt with. On this ground, too, I find that the Defendant's objections based on procurement legislation considerations, cannot be upheld.

[28] As far as the Defendant's objection relies on an alleged contradiction between the express terms of the original contract and the tacit agreements, especially given the non-variation clause in the original contract, I find that there is no merit in this objection for the following reasons:

[28.1] If the contract has expired, as the Defendant contends, on 31 July

2015, but the parties remained in the same relationship, (which could not conceivably have been anything but a contractual relationship as no other alternative comes readily to mind), it is inherent in the fact that there was a tacit extension that there was no amendment of the original contract at play. The position was *mutatis mutandis* analogous to the position where a tenant remains in a leased premises after the expiration of a written agreement of lease, continues to comply with all the original obligations in the expired Agreement of Lease whilst the landlord does likewise. It is, in these circumstances, trite that a tacit agreement on *mutatis mutandis* the terms of the expired agreement regulates the contractual relationship between the parties after the expiration of the original contract's term of duration. This also answers the Defendant's objection that the extensions could only have occurred during the duration of the contract.

[28.2] The Defendant's objection that the original contract was not complied with when it came to the clause providing for an extension of the time for performance does not stipulate the clause itself but on my perusal of the original contract it appears to me as if only clause 21.2 could be relevant. But clause 21.2 provides for nothing more than a well-known situation which often presents itself in construction contracts *viz* where a situation arises where a Service Provider concludes that events outside the control of the Service

Provider could negatively impact the achievement of the Service Provider's practical completion or final completion dates the Service Provider must bring this to the attention of the Employer whereafter any deadline agreed upon in the contract can be extended. In my finding this does not pertain to the present situation and I have no facts, on the basis of which I can conclude that clause 21.2 is at all applicable *in casu* for present purposes, and I therefore find that this objection is unsustainable.

[28.3] The last aspect of the Defendant's objections to the Plaintiff's contractual claim is that the Plaintiff has failed to aver when the breach which is relied upon by the Plaintiff occurred. In paragraph 4.5 of the Defendant's Notice of Objection the Defendant accommodates the possibility that the breaches complained of by the Plaintiff and which underlie the contractual claim for damages occurred continuously throughout the period of the original contract as well as the extensions thereafter until 18 December 2019. This accommodation by the Defendant is, in my finding, correct. The Plaintiff is indeed relying upon the whole contractual period until the termination of the Defendant's mandate. This being the case the Defendant contends that there can be no claim for contractual damages after the first two year period had expired. Given my findings above, which necessarily mean that there was an extended contract between the Plaintiff and the Defendant until it was

terminated by the Plaintiff, I cannot uphold this objection.

[29] The fact of the matter is that I must accept, at this stage, that the parties continued in a contractual relationship and everything remained the same as before 31 July 2015. The Defendant attempted to fulfil the Defendant's obligations, certified payments to be made to the Second Defendant and the Plaintiff paid the Defendant for this. That it was on a contractual basis before the addendums were concluded is borne out by the addendums which are obviously contracts. The addendums are retrospective in that they cover the periods of tacit extensions.

[30] I turn now to deal with the Defendant's objections to the Plaintiff's alternative delictual claim.

[31] In my finding the Defendant's objection to the Plaintiff's alternative delictual claim for payment of exactly the same amount as is claimed on the basis of that amount being contractual damages, must be sustained for the reasons advanced in the Defendant's Notice of Objection.

[32] During argument I enquired from the Plaintiff's Counsel what would remain of the alternative delictual claim if all the reliance contained in the proposed Particulars of Claim upon the same averments as are relied upon in the contractual claim, were removed therefrom. The point being that if a Plaintiff is constrained to rely on a contract as a reason for a delictual claim there can be no talk of a *concursus*. The answer by the Plaintiff's Counsel was to the effect that the Defendant's profession is governed by statute and a governing body

and by virtue of same a legal duty was owed to the Plaintiff.

[33] I cannot agree with Plaintiff's Counsel. It must, of necessity, be either tacit or implied terms of the contract between the Plaintiff and the Defendant that the Defendant would comply with all trade usages, Codes of Conduct and Statutes regulating the Defendant's profession as an engineer because there is nothing in the original contract or any of the further extensions thereof excluding such considerations. Reliance on these considerations as justification for a delictual claim is, therefore, a *non sequitur*. Nothing new is brought to the party.

[34] Ever since the decision in **Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd 1985 (1) SA 475 (A)** our Courts have consistently found that an aquilian claim for damages does not sit comfortably in a situation where there is a contractual relationship. Whilst it is true that the existence of a contract does not *per se* and automatically exclude the possibility of a delictual claim, the fact remains that a proper and convincing case must be made out why a delictual claim should be entertained in a contractual setting where the parties had more than ample opportunity to comprehensively regulate their rights and obligations or where contractual remedies recognized *ex lege* do not assist. In this regard I can do no better than to quote the following remarks:

> "*Generally speaking, I can see no reason why the Aquilian remedy should be extended to rescue a plaintiff who was in a position to avoid the risk of harm by contractual means, but failed to do so.*" [2]

[35] In my finding the Plaintiff has simply failed to make out a case in its proposed

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[2] **Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006 (3) SA 138 (SCA), par. [24] at p. 149.**

Particulars of Claim to support the Plaintiff's alternative delictual claim on the basis of a *concursus actionem* existing.

[36] Normally the success of any objection to a proposed amendment would justify a refusal to grant the amendment and, on the basis that costs should follow the result, such an unsuccessful Applicant would be ordered to the costs of the application. It is not for a Court to cut and paste a proposed amendment only to be able to ensure that the Plaintiff has a viable amendment.

[37] However, it cannot be gainsaid that the Plaintiff was wrong to persist with the alternative delictual claim whilst the Defendant was wrong to persist with the objection against the contractual claim. One can only speculate on what might have occurred had the Plaintiff jettisoned the alternative delictual claim and the Defendant jettisoned the objections to the contractual claim.

[38] When I addressed these issues with the Plaintiff's and the Defendant's Counsels they were *ad idem* on the following:

[38.1] I should nevertheless grant the amendment to the extent that the objections are not upheld.

[38.2] Costs should be costs in the cause.

[39] I therefore make the following order:

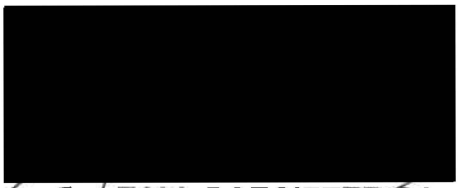
[39.1] The Defendant's objections to the Plaintiff's contractual claims are dismissed.

[39.2] The Defendant's objection to the Plaintiff's alternative delictual claim is upheld.

[39.3] The Plaintiff's application to amend the Plaintiff's Particulars of Claim is granted save for the Plaintiff's alternative delitual claim which cannot remain as part and parcel of the Plaintiff's substituted Particulars of Claim as it is presently formulated.

[39.4] Costs of this application are costs in the cause and such costs are taxable by the successful party on Scale B.

[40] *Ex abudante cautela* I record that nothing contained in this judgment creates a situation of a *res iudicata* on the merits of anything. This judgment is limited to the confines of what the application consists of *viz* a consideration of the principles applicable to exceptions and the amendment of pleadings and nothing more.



TALL POTGIETER SC

ACTING JUDGE OF THE HIGH COURT, PRETORIA

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This judgment has been delivered by uploading it to the Court Online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and for the delivery is the 6TH day of MAY 2024.