

SOUTH AFRICA / JUDGMENT

**Khavhakone Construction Group (Pty)
Ltd v Housing Development Agency
and Another (22632/2022) [2024]
ZAGPPHC 1281 (5 December 2024)
[2024] ZAGPPHC 1281**

COURT

North Gauteng High Court, Pretoria

BEFORE

Retief

CASE / FILE NUMBER

22632/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case No: 22632/2022

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED:

DATE

05 DECEMBER 2024

SIGNATURE

In

the matter between:

KHAVHAKONE
CONSTRUCTION GROUP (PTY) LTD
(Registration
No.2014/178409/07)
Plaintiff
and
HOUSING
DEVELOPMENT AGENCY
First
Defendant
THE
MINISTER OF HUMAN SETTLEMENTS N.O.
(In
her official capacity as the responsible Minister for the
Department of Human Settlements)
Second
Defendant
This
judgment is prepared and authored by the Judge whose name is
reflected as such and is handed down electronically by circulation
to the parties / their legal representatives by email and by
uploading it to the electronic file of this matter on CaseLines.
The date for handing down is deemed to be 5 December 2024.

JUDGMENT

RETIEF J

INTRODUCTION

- [1] The plaintiff, initially on motion, sought payment from the first defendant of two interim payment certificates [IPC 25 and IPC 26] in the amount of R 887,785.06 and R 359,026.47 respectively, together with interest from the 28 December 2021. The origin and payment of IPC 25 and IPC 26 arises from a Service Level Agreement [SLA] concluded between the plaintiff and the first defendant in which, the plaintiff at the behest of the first defendant, was appointed to perform certain construction work and to install the remaining internal civil engineering services for 1,265 sites situated at Sesheng Mapoteng Informal Settlement, Kathu, Northern Cape.
- [2] Parallel to the application, the plaintiff issued a notice of termination of the SLA between itself and the first defendant following which, it launched arbitration proceedings. The first defendant opposed the statement of claim in the arbitration and launched certain counterclaims. Such counterclaims are subject to the determination in the arbitration proceedings and are not before this Court. The narrow issue which is before this Court is whether the plaintiff is entitled to payment of IPC 25 and IPC 26 and to terminate the SLA. Initially the plaintiff/applicant's claim for the payment of IPC 25 and IPC 26 served before

Baloyi-Mbembele AJ who, on the 23 February 2023, referred the adjudication of the application to trial due to a material dispute of fact. Both parties thereafter successfully sought commercial certification to enable the trial to proceed in terms of the commercial directives of this Division. In that way, instead of Baloyi-Mbembele AJ finalising the matter, the trial was then placed before the Commercial Court. This being the basis upon which the triable issues are to be adjudicated.

- [3] Although both the plaintiff and the first defendant adhered to the Commercial Court directives, exchanged their pleadings, tendered their respective witness statements, and even appointed expert witnesses, the parties could not, nor did they successfully agree to a succinct joint trial bundle in order to specifically curate the exact documents they wished to rely on. Be that as it may the Court will refer to the marked exhibits as it did during the trial and as they become material in the reasoning contained in this judgment. As to the pleadings, the first defendant it seems after having received the expert witness statement from their expert, Mr Marcus Cato [Cato] on the 19 October 2023 [exhibit 17], amended its plea on the 30 October 2023. No objection was raised

and the plaintiff filed a replication. The replication contained a point in limine which has become irrelevant to determine as the arbitrator has already issued an interim award which the plaintiff alleges will

settle the issue raised by the first defendant at paragraph 52 of its amended plea. The arbitrator issued an interim award in January 2024 [the award] however, none of the parties deemed it necessary to amend their pleadings as a result thereof. One would have thought that the first defendant may have amended its plea yet again to ensure that the amounts claimed by the plaintiff were challenged in terms of the rescripts of a lumpsum SLA. This was not done. To compound the issues yet further, the first defendant did not raise this issue as a triable issue either nor moved for an amendment at the date of the hearing. Instead the first defendant maintained its defence as pleaded in October 2023 this, notwithstanding the plaintiff's alleged that it is entitled to terminated the SLA which it has given notice of and that the prospect of further adjustments after February 2022, if necessary, to recoup inaccuracies, with the next interim payment appear uncertain. Of significance the first defendant was aware of the possible consequence of a lumpsum SLA when Cato dealt with the prospect and consequences in his witness statement in October 2023. The first defendant's failure to do the precision work before and now after notice to terminate the SLA has been received has consequences.

- [4] This Court is left to adjudicate the matter on the pleadings as they stand and not on the heads of argument which may attempt to cure procedural inaccuracies and to introduce issues not apparent on the pleadings. As to the plea that was amended prior to the award, it raises a number of confusing defences in the alternative none of which, as will appear, clearly and unambiguously set out adherence of the GCC. An agreement not to be bound by the provisions of the GCC not in the pleadings. Notwithstanding, all of

defences appear to be triggered by exhibit 1. Exhibit 1 is in the form of a letter addressed to the plaintiff, it is dated the 29 November 2021 and was drafted by Mr Xolani Khumalo [Khumalo]. In the amended plea the first defendant raises the following defences, in the alternative, to the payment of IPC 25 and 26:

4.1. Exhibit 1 is a ruling rejecting the plaintiff's claims in respect of IPC 25 and 26. Such ruling drafted by Khumalo as the engineer's representative in terms of clause 6.10.7 of the GCC [paragraph 22 of the amended plea], alternatively;

4.2. Exhibit 1 is a notice of rejection of IPC 25 and 26 drafted by Khumalo as the first defendant's representative duly transmitted on the 17 December 2021 [paragraph 23- 25 of the amended plea], further in the alternative;

4.3. In the event that exhibit 1 is ruled not to be a payment certificate, exhibit 1 is a notice from the first defendant in terms of clause 6.10.4 of the GCC. The content of exhibit 1 indicating the first respondent's dissatisfaction as envisaged in terms of clause 10.2 of the GCC. Thereafter, Khumalo on the 17 December 2021 made a ruling in respect of IPC 25 confirming it's

rejection. Thereafter in a letter of the 20 January 2022, Khumalo, confirms IPC 25 and 26 remain rejected. Further in the alternative;

4.4. The first defendant substantially complied with clause 10.2 of the GCC pursuant to which Khumalo issued a notice, such notice referred to as P1 (P1 is not described nor attached to the amended plea, however, reference to P1 in the unamended plea refers to standard terms and conditions and is not a notice). After P1, exhibit 1 was issued pursuant to clause 10.2.2 of the GCC therefore the first respondent's dissatisfaction was known to the plaintiff and the engineer.

[5] To consider the plaintiff's claim and the first defendant's alternate defences, is to place exhibit 1 in its factual context. To do so, calls for a consideration of the admitted and common cause facts, the terms of the GCC relied on by both parties and the evidence of the witnesses relied on. None of the exhibits utilised nor the documents which appeared in the trail bundle were placed in dispute.

ADMITTED AND COMMON CAUSE FACTS ARISING

[6] The following admitted and common cause facts arising:

6.1. The terms and conditions of the SLA are governed by the provisions of the General Conditions of Contract for Construction Works, Second Edition, 1020 [GCC];

6.2. The first defendant is the employer;

6.3. The plaintiff is the contractor;

6.4. Kazia Engineering (Pty) Ltd is the engineer [engineer] and Khumalo was a qualified engineer in the employ of the engineer at the material time;

6.5. On the 22 November 2021, Mr Phumzile Nonduku [Phumzile] addressed and signed a checklist for agreed measurements on site for IPC 25 [initial IPC 25];

6.6. On the 22 November 2021, Khumalo authored and signed a letter on the Engineer's letterhead, addressed it to Mr W Monyera, the 'The Project Manager' of the first respondent in respect certified work performed subsequent to the internal water reticulation in Block E, namely IPC

25. Khumalo attached the invoice 25 from the plaintiff for the V.A.T exclusive amount of R 2,014,733.91 (R 887,785.07 for work done and, and amount of R 1,126,948.48 for materials on site);

6.7. The work done by the plaintiff was certified by Khumalo in the letter of the 22 November 2021 in that he, for and on behalf of the engineer stated to the first respondent in respect of the initial invoice 25 that "We have checked and therefore approve the claim";

6.8. On the 26 November 2021, the first defendant highlighted concerns relating to the material on site which was included in the initial IPC 25;

6.9. On the 29 November 2021 Khumalo drafted a letter addressed to the plaintiff headed "REF: PROJECT: PROVISION OF CONSTRUCTION FOR SESHING 1265 DEVELOPMENT (HAD/ NC/2017/002): PAYMENT CERTIFICATE NO.: 25" in which he, inter alia, states that the following: "Please note that after discussions with the client (the first defendant -own emphasis) regarding the IPCNo.25, the following factors have determined that the Contractor should (the plaintiff-own emphasis) note: -" Khumalo lists 5 factors, inter alia, "2. The material on site, if agreed should have been on a separate claim from work done. Kindly revise and resubmit the claim (own - emphasis) for work done separately for processing.", "4. Kindly look at your Preliminary and General, there are several items that have been previously claimed for under fixed charge items i.e. site office. Please revise and resubmit with verifiable evidence." (own-emphasis) and "we have checked and therefore reject this claim (singular - own emphasis) on the grounds of the above points." This letter is referred to annexure "P2" in the papers and as exhibit 1 in the trial bundle [exhibit 1];

6.10. The plaintiff then on the 29 November 2021, re-issued invoice 25 in the amount of R 887,785.06 for work done. Khumalo approves the claim and issues a payment certificate in respect of the re-issued IPC 25 in the amount of R 887,785.06;

6.11. The plaintiff then on the 30 November 2021 issues invoice 26 in the amount of R 359,026.47 for a lesser amount than that claimed for material which formed part of the initial IPC

25. Khumalo approves the claim and issues payment certificates the issued IPC 26 in an amount of R 359,026.47. The plaintiff is informed on the 1 December 2021 via email;

6.12. On the 30 November 2021 Khumalo confirms in a WhatsApp conversation with a representative of the plaintiff that “I will send out a rejection for the initial IPC 25, then I will re look at the submissions for works done.” MOS [material on site] separately. “For MOS if it includes more than the delivery of manholes will wait Phumzile to provide clarity.” [exhibit 7];

6.13. On the 30 November 2021, the plaintiff also addresses a response to the engineer in respect of exhibit 1 and states “Contractor is in receipt of letter dated 29th November and response as follows:-“ The plaintiff in its letter reminds the engineer that the relationship between the engineer, the first defendant and themselves

is governed by the CCG. The plaintiff further reminds the engineer that the process for submission and approval of payment certificates

is clear with reference to clause 6.10.2 and clause 6.10.4, that should the first defendant, not the engineer, have a dissatisfaction

on the payment certificate agreed to by the engineer and itself, he should follow the provisions in clause 10.2.2 to raise his

dissatisfaction that a payment of material on site should be done in line with clause 6.10.2 and agreed between the parties. The plaintiff makes it clear that it does not agree with the approach adopted, but in the interest of continuity on the project, it undertakes to resubmit the payment certificate as suggested, namely, to split the work done from the material. It ends off by reiterating that the contractual provisions will be followed to avoid contractual disputes. [exhibit 8];

6.14. On the 2 December 2021, the original re-issued IPC 25 and the issued IPC 26 are sent to the first respondent by Mr N John Buck. On the 3 December 2021 via email Mr M Matsela of the first respondent referring to subject matter: “Valuation 25 & 26” confirms to the plaintiff that “Currently processing your payment certificates, and may I request in future ones you make sure the BOQ’s are well

oriented on the page to be clearer and more visible, filling the page. They are currently not so visible”;

6.15. On the 17 December 2021 Khumalo sends an email to the plaintiff, the subject referencing, inter alia, the rejection of IPC 25 in which he states: “Please see the attached correspondence from Kazia engineering with regard to the submitted IPC 25.” Exhibit 1 attached. [exhibit 16];

6.16. On the 18 January 2022 the plaintiff sends a letter of demand.

6.17. On the 20 January 2022 Khumalo authors a letter to the plaintiff stating that after the submission of IPC 25 and 26 on the 29 November 2021 several clarity meetings were held. The claims remain rejected until the plaintiff had submitted a portfolio of evidence. [exhibit 14];

6.18. The plaintiff, at the first defendant's further request and to facilitate payment, provides a portfolio of evidence of work done in respect of IPC 25. This is sent to the first defendant on the 24 January 2022;

6.19. On the 28 January 2022 Mr M Matsela via email instructed Khumalo as follows: "May you please provide the Engineer's certificates for work done. I see the photos are representative of what has been done." [exhibit 5];

6.20. On the 2 February 2022 Khumalo in an email confirmed that a clarity meeting was scheduled on the 2 February 2022 between the plaintiff, the engineer and the first defendant in which an agreement was reached that all payment certificates for work done would be prioritised for payment, pending the resubmission of the payment certificates. That the only reason for the resubmission would be to amend the payment certificate numbers. That payment certificate 25 would be paid, that payment certificate 28 would become payment certificate 26 and certificate 27 would be resubmitted in the following week. The materials on site certificates would still remain as rejected pending proof of G7 volume quantities available on site. Payment 25 in the amount of R 887,785.06 was indicated as "Accepted", certificate 26 in the amount of R 359,026.47 was indicated as "Rejected". [exhibit 4];

6.21. On the 3 February 2022, the plaintiff sent the in response to the letter of the 3 February 2022, rejecting consensus to resubmit invoices, and places the first defendant on terms for the payment of both IPC 25 and IPC 26. On the 4 February 2022, the plaintiff through Messieurs RNC Incorporated informed the first defendant that there, inter alia, is no merit in the rejection of the material on site claim (IPC 26), that invoice 26 has been certified and remains due and payable and that the amount of R 887,785.06 is not disputed and is to be paid. [exhibit 9];

6.22. On the 9 February 2022, the plaintiff delivered a notice of termination of the contract as a direct result of the non-payment of IPC 25 and IPC 26. No interest is claimed.

6.23. On the 16 March 2022, the engineer responded to the plaintiff's termination notice mainly pointing to the fact that the plaintiff cannot terminate the contract in circumstances where it has not completed the works, and that the purported termination would amount to a repudiation by the plaintiff.

APPLICABLE TERMS RELIED ON IN THE OF THE GCC [exhibit 2]

TERMS OF CONTRACT

[7] In terms of paragraph 3.1 of the GCC the function of the engineer is as follows:

"ENGINEER

3.1 Functions of the Engineer

3.1.1 The function of the Engineer is to administer the Contract as agent of the employer, in accordance with the provisions of the contract.

3.1.2 Whenever the Engineer intends, in terms of the Contract, to exercise any discretion or make or issue any ruling, Contract interpretation or price determination, he shall first consult with the contractor and the employer in an attempt to reach agreement. Failing agreement, the Engineer shall act impartially and make a decision in accordance with the Contract, taking into account all relevant facts and circumstances.

3.1.3 In the event of the Engineer being required in terms of his appointment by the Employer to obtain the specific approval of the Employer for the execution of any part of his functions or duties, such requirement shall be set out in the Contract data.

3.1.4

6. PAYMENT AND RELATED MATTERS

6.1 Payment of Contractor

6.1.1 As consideration for the construction, completion and defect correction of the Works, the Employer shall pay the Contractor in terms of the provisions of the agreement.

6.10 Payments

6.10.1 With regard to all amounts that become due to the Contractor in respect of matters set out in clause 6.10.1.1, 6.10.1.2, 6.10.1.3 and 6.10.1.4 and 6.10.1.5 below he shall deliver to the Engineer a monthly statement for payments of all amounts he considers to be due to him (in such form and on such date as may be agreed between the Contractor and the Engineer, or failing agreement, as the Engineer may require) and the Engineer shall, by signed payment certificates issued to the Employer and the Contractor, certify the amount he considers to be due to the Contractor, taking into account the following;

6.10.4 The Employer shall deliver to the Engineer and the Contractor the payment certificate referred to in clause 6.10.1 within 7 days of the receipt by the Engineer of the Contractor's said statement. Any dissatisfaction in respect of such payment certificate shall be dealt with in terms of clause 10.2. The Employer shall pay the amount due to the Contractor within 28 days of receipt by the Employer of the payment certificate signed by the Engineer. Payment shall be subject to the Contractor submitting a tax invoice, if required by law, to the Employer for the amount due;

6.10.6 In respect of any amount payable to the Contractor in terms of the contract:

6.10.6.1 The Employer may deduct from such payment any amount to which he is entitled in terms of the contract or by law to set-off against such payment and shall state, in written notice to the Contractor, the reasons for such deduction; and

6.10.6.2 In the event of the failure of the Employer to make the payment by the due date, he shall pay to the Contractor simple interest, at the prime overdraft rate, as charged by the Contractor's bank, on all overdue payments from the date on which the same should have been paid to the date when payment is effected, without prejudice to the Contractor's other rights under the contract or by law.

6.10.7 The Engineer may by any payment certificate make any correction or modification of any previous payment certificate which has been issued by him.

9.3 Termination by Contractor

9.3.1 In the event that the Employer:

9.3.1.1 Persists in:

9.3.1.1.1 failing to pay the Contractor the amount due in terms of any payment certificate issued by the Engineer within the time of the payment provided in the Contract;

9.3.1.1.2 ...

9.3.1.1.3 interfering with or obstructing the issue of any certificate, after 14 days of receipt of written notice from the Contractor (with specific reference to this clause) to remedy the default; the Contractor may, by written notice to the Employer terminate the contract.

9.3.2 Upon such termination:

9.3.2.1 All the provisions of the Contract, including this clause, shall continue to apply for the purpose of:

9.3.2.1.1 resolving any dispute, and

9.3.2.1.2 determining the amounts payable by either the Employer or the Contractor to the other of them.

[8] Clause 10.2 of the GCC - dissatisfaction claim:

“10.2.1 In respect of any matter arising out of or in connection with the dissatisfaction contract, which is not required to be dealt with in terms of clause 10.1, the Contractor or the Employer shall have the right to deliver a written dissatisfaction claim to the Engineer. This written claim shall be supported by particulars and substantiated.

10.2.2 If, in respect of any matter arising out of or in connection with the Contractor, which is not required to be dealt with in terms of clause 10.1, the Contractor or the Employer fails to submit a claim within 28 days after the cause of dissatisfaction, he shall have no further right to raise any dissatisfaction on such matter.

10.2.3 The Engineer shall, within 28 days after the Contractor or Employer has delivered the dissatisfaction claim to him, give effect to clause 3.1.2 and give his adequately reasoned ruling on the dissatisfaction, in writing to the Contractor and the Employer, referring specifically to this clause. The amount thereof allowed by the Engineer, if any, shall be included to the credit of the Contractor or the Employer in the next payment certificate.”

What is exhibit 1 having regard to the admitted and common cause facts arising?

[9] Factually, exhibit 1 is addressed to the plaintiff as the contractor by Khumalo on the engineer's letterhead. The content refers only to an IPC 25 which had been submitted in respect of both work done on material on site. The content makes reference to the first defendant as "the client" and the drafter, Khumalo, confirms that he had a discussion with the first defendant regarding the submitted IPC 25. The only submitted IPC 25 at the material time was the initial IPC 25. Khumalo then lists five factors which the "Contractor should note" in respect of the submitted IPC 25. The plaintiff is told that "We have checked and therefore reject this claim (own emphasis) on the grounds of the above mentioned points." From the content, exhibit 1 refers to the initial IPC 25 certified by Khumalo on the 22 November 2021 as it was factually, the only IPC 25 submitted and the only IPC 25 with a total including both the work done and material on site which warranted the factor to be raised to resubmit as split. Exhibit1 therefore relates only to the initial IPC 25.

[10] Exhibit 1 is not addressed to the first defendant but conveys a message too, from the first defendant to the plaintiff in respect of the initial IPC 25. Khumalo in the content does not certify any amounts he considers to be due and payable to the plaintiff as envisaged in terms of clause 6.10.1 of the GCC. He requests

compliance with verifiable evidence and re-submission. In consequence, it flows that exhibit 1 is not a payment certificate referred to in clause 6.10.4 of the GCC as relied on by the first defendant in its amended plea. Furthermore, any dissatisfaction claim raised by the plaintiff or the first defendant in respect of "that payment certificate" referred to in clause 6.10.4, being the initial IPC 25, can only relate to the certified payment certificate referred to in terms of clause 6.10.1 and such dissatisfaction claim must be addressed to the engineer. Exhibit 1 is addressed to the plaintiff. The content of exhibit 1 clearly refers to the initial IPC 25 which was withdrawn, such is common cause. The necessity for a ruling where there is no dissatisfaction claim is not only obvious having regard to the GCC, but on the facts moot as the initial IPC 25 was withdrawn and/or replaced by the following re-issue IPC 25 and 26, such withdrawal/ and re-issue this is a common cause fact. This finding remains undisturbed by the mail of the 17 December 2021 as such merely refers to an IPC 25 and attaches exhibit

1. Therefore, the only reasonable inference is that the correspondence referred to the initial IPC 25.

[11] Because exhibit 1 is not a payment certificate verifying any amounts, it therefore does not attract clause 6.10.7 of the GCC as relied on by the first defendant. Clause 6.10.7 speaks of an engineer making a modification or correction by the issuing of a further payment certificate. Exhibit 1 is not a payment certificate nor does it modify nor correct anything, conversely Khumalo requests

the plaintiff to consider the factors, to correct the initial IPC 25 and to resubmit.

[12] Exhibit 1 is not a ruling by Khumalo. For it to constitute a ruling, Khumalo would, in terms of the GCC have to have acted impartially and made a decision taking into account all relevant facts and circumstances as envisage in clause 3. 1.2 of the GCC after receiving a

notice of dissatisfaction from the first defendant or plaintiff. The content of exhibit 1 does not speak to this. It speaks of discussions with the first defendant and not a written claim of dissatisfaction. Conversely, it too refers to a decision to reject which “We-“ have made. Annexure P1 relied on as the precursor for such ‘ruling’ on the papers remains unclear and was not rectified at trial. Exhibit 1 does not make reference to P1. In any event if it constitutes a ruling in terms of the GCC it could only be a ruling in terms of the initial IPC 25.

- [13] The plaintiff in their letter to Khumalo on the 30 November 2021, respond directly to exhibit 1. In unambiguous terms, the plaintiff clearly confirms that it does not accept the procedure followed by Khumalo (the rejection and resubmission) and, inter alia, reminds him of the correct procedures to follow in terms of the GCC.. Khumalo and the first defendant did not deny receiving the letter, they were therefore aware of its content and consequences going forward with the project. Notwithstanding no response to the letter of the 30 November 2021 was placed before Court. In other words, the first defendant nor Khumalo corrected the plaintiff’s

understanding, view or procedure to be followed in the future at all after receiving exhibit 1. None of the defences raised by the first defendant in the amended plea, are supported by the admitted and/or common cause facts arising in respect of IPC 25 and IPC 26 as claimed by the plaintiff.

What was the intent with exhibit 1 having regard to the evidence?

SALIENT AND MATERIAL EVIDENCE ARISING FROM MR KHUMALO’S EVIDENCE

- [14] Khumalo was a witness for the first defendant, the author of exhibit 1 and whose testimony was in direct contrast to the first defendant’s material defences raised in the amended plea. His evidence too, was at variance to the opinion proffered by Mr Marcus Cato [Cato], the first defendant’s expert witness regarding exhibit 1.
- [15] Khumalo repeatedly testified that exhibit 1 dated the 29 November 2021, was just a letter he wrote as the first defendant’s representative. It was intended to be a ‘rejection letter’ relating to the plaintiff’s initial invoice 25 only. It was used to guide the plaintiff on how to re-issue IPC 25. In contrast, Cato came to the conclusion that exhibit 1 appeared to be a rejection of both certificates IPC 25 and IPC 26. He came to this conclusion by relying on the fact that the content of the initial IPC 25 contained both the information contained in the IPC 25 and IPC 26. This opinion Cato proffered is incorrect, it appears to have been formulated without consideration of the facts testified to by Khumalo and without dealing with the other facts which all demonstrated that, although the re-issued IPC 25 and IPC 26 split the work done from the material on site, IPC 26 differed materially from the initial IPC 25. IPC 25 certified an amount which the plaintiff had reduced in the submitted claim 26. The material on site claim differed materially from the initial IPC 25. The plaintiff appeared to have considered the factors set out in exhibit 1.

[16] Khumalo testified further that exhibit 1 did not amend a previous payment certificate nor was its dissatisfaction notice as envisaged in terms of 10.2.3 of the GCC. He went as far as to testifying that the first defendant was incorrect in holding the views they did in respect of exhibit 1 in their pleadings. This view he too held, in terms of the 'rejection letter' of the 20 January 2022. He confirmed that the rejection letter was not a ruling as envisaged in terms of clause 10 of the GCC. In short, he admitted that the process he followed in respect of IPC 25 and IPC 26 was not in line

with the provisions of the GCC.

[17] He conceded that IPC 25 and IPC 26 were certified by him for payment and did not shy away from the consequences of the emails of the 3 and 28 February 2022 but, he maintained that there were issues pertaining

to the work of the plaintiff and the standard of work therefore, he did not want to stand by his certifications. He was not taken through IPC 25 and 26 in evidence by the first defendant's Counsel to demonstrate with accuracy what was and was not payable to support a dismissal of both claims.

SALIENT AND MATERIAL EVIDENCE ARISING FROM MR M MASILELA'S EVIDENCE

[18] Mr Masilela was the project manager and a witness for the first defendant. His evidence too, did not support the first defendant's pleaded case in all respects. He, like Khumalo conceded that exhibit 1 was not a dissatisfaction notice as envisaged in terms of the GCC nor was it an amended payment certificate but a 'letter of rejection'. He however testified at variance to Khumalo in that he stated that exhibit 1 related to the re-submitted IPC 25 and not the initial IPC 25 certified on the 22 November 2021. This did not make sense on the facts, nor did it accord with the content of exhibit 1 which called for a split between the work done from the claim for material on site. Only the initial IPC 25 did not split the work done from the material on site. His testimony was unreliable and, when the shoe began to pinch he resorted to blaming Khumalo for

the first defendant's predicament. To his credit though, he conceded that he was not au fait with the terms of the GCC nor what a dissatisfaction notice was in terms of clause 10.2 of the GCC. His testimony did not advance the matter for the first defendant one way or the other. This is a pity as he testified that certain items were to be charged in phase 2 that had been included in IPC 25 and/or

26. Yet, his Counsel failed to take him through the payment certificates to demonstrate exactly which items should not have been included. His witness statement too is silent on that point.

[19] Of significance, in his witness statement he stated that the supporting information provided by the plaintiff on 24 January 2022 was unverified. In consequence, he testified that the breach notice of the 18 January 2022 in respect of the non-payment of IPC 25 and IPC 26 was delivered when the issue had not been resolved in December

2021. In consequence, the termination on the 9 February 2022 was unjustified. This evidence is in direct contrast with the content of his own email addressed to Khumalo regarding the verification and payment IPC 25 dated the 28 January 2022. In the latter he confirmed the verification and requested that a certificate be issued. His Counsel did not take him through this email to explain it in context.

SALIENT AND MATERIAL EVIDENCE ARISING FROM THE EXPERT EVIDENCE OF DE WITT AND CATO [exhibits 16 and 17]

[20] The necessity for and the costs associated with such witnesses unclear considering the facts in dispute. Their respective opinions were not specifically relied upon and at times it appeared did not speak to the pleadings, in particular that of the first defendant's witness, Cato. However, De Witt, the plaintiff's expert witness

tendered viva voce evidence and was cross-examined. The weight of his evidence was to bolster that exhibit 1 was not a dissatisfaction claim nor a ruling in terms of the GCC and that IPC 25 and 26 should be paid. He testified further that the GCC made no provision in relation to an engineer possessing the ability in "to reject a previously signed payment certificate." He reminded the Court that an engineer when making a ruling cannot wear two hats at the same time, that of the employer's

representative and that of an adjudicator. For this reason, he testified that exhibit 1 does not constitute a ruling as envisaged in terms of the GCC as Khumalo did not act impartially at the time as he testified that he wrote exhibit 1 acting as the first defendant's representative. This too with regard to the letter of the 17 December 2021 and the 20 January 2022.

[21] Cato's evidence spoke to a number of aspects not on the papers however, he did conclude on material aspects before this Court that, the initial IPC 25, re-issued IPC 25 and 26 are intrinsically linked in content and in time which resulted in exhibit 1 dealing with a "rejection" or "dissatisfaction" of both re-issued IPC 25 and 26. Cato also testified that exhibit 1 appeared to be a "rejection notice" in respect of both certificates in that the content of the initial IPC 25 contained both the information in the IPC 25 and IPC 26. This opinion he proffered without consulting with Khumalo. It is noted that the dates in the witness statement of Cato are incorrect, he continually referring to the 29 November 2023 instead of 2021 – this was not corrected. He also concluded that IPC 25 and 26 were issued before the rejection letter, a conclusion reached without having regard to Khumalo's evidence nor the evidence tendered as a whole, in particular, the intention of the parties as evidenced in the WhatsApp messages to the plaintiff on the 30 November 2021. He further opined that failings and omissions in respect of the plaintiff's work were manifest and remain

unaddressed. However, he stated the engineer did not have the opportunity to amend the following certificate because it was never issued by him. In consequence a missed opportunity because of the Khumalo's inaction. He then testified to what Khumalo did do, stating that the engineer rejected the application for payment whereas a revised certificate (a further payment duly modified and or corrected) would have been preferred. Ostensibly preferred as the GCC does not speak of a rejection letter but a process to be followed when dissatisfied.

Is the plaintiff's claim payable?

[22] The plaintiff in its declaration now seeks payment in the amount of R 1 246 811.53. It appears to have corrected any arhythmic errors which crept in in its founding papers in order that the claimed amount now accords with IPC 25 and 26. Having regard to all the evidence, applying the provisions of the GCC, considering the pleadings and the plaintiff's onus together with the following common cause facts that on the 28 January 2022, Mr M Matsela via email instructed Khumalo as follows: "May you please provide the Engineer's certificates for work done. I see the photos are representative of what has been done"; [exhibit 5], and on the 2 February 2022, Khumalo in an email confirmed that a clarity meeting was scheduled on the 2 February 2022 between the plaintiff, the engineer and the first defendant in which an agreement was reached that all payment certificates for work done would be prioritised for payment, pending the resubmission of the payment certificates, that the only reason for the resubmission would be to amend the payment certificate numbers and that payment certificate 25 would be paid, IPC 25 had already been issued and certified and is payable.

[23] In consequence, the plaintiff's claim of R 887,785.06 in respect of IPC 25 succeeds. Although it appears from the evidence that certain queries were raised in respect of IPC 26 and that the same still persisted triggering the response in exhibit 5 in which the following was stated: "The materials on site certificates would still remain as rejected pending proof of G7 volume quantities available on site..." Khumalo factually did not receive a dissatisfaction claim from the first defendant pertaining to IPC 26, nor did he on his own evidence, as an impartial adjudicator make a ruling based on the specific dissatisfaction claim in respect of IPC 26 notwithstanding the

queries. The plaintiff rejected the agreement to resubmit invoices, it did in writing both after the request in November 2021 and in January 2022. Both letters remain unchallenged. It therefore appears as if Khumalo and the first defendant were unable to, with any precision, during the project accurately modify or correct the certified payment certificates they were unhappy with to reflect their version. This is not only borne out by the facts but by Cato. Instead rejection letters were written calling on the plaintiff to correct and modify and verify. In this way the payment of certified certificates was delayed. All facts and evidence demonstrate that the first defendant, Khumalo and the engineer did not apply the provisions of the GCC. This is why Cato in his conclusion affirms that a different result may have been achieved "-were the provisions of the Contract applied in accordance with its terms."

- [24] No evidence was presented to rebut the plaintiff's claim in respect of the full amount certified and claimed. The mere suggestion and the first defendant's inability to follow through and rely on the consequences and prescripts of the SLA and GCC does not warrant a dismissal. Therefore, applying the provisions of the GCC it then flows that IPC 26 as pleaded must succeed as the provisions and applicability of the GCC are common cause. The first defendant raised that the plaintiff claimed an amount of R 359,026.47 was incorrect as pleaded. The IPC 26 certified by Khumalo which content was not challenged at trial, was R 359,026.47. Khumalo checked and approved the claim in the letter dated 30 November 2021. This accords with the prayers.
- [25] In terms of the GCC, the plaintiff can terminate if the first defendant persists in failing to pay an amount "-due in terms of any payment certificate issued by the Engineer. Such termination to occur by written notice. The fact that a written termination was sent on the 9 February 2022 is not in dispute. The evidence indicates that the first defendant has persisted in not paying IPC 25 notwithstanding the provisions of the GCC and notwithstanding its own undertakings to do so. In respect of the persistent failure to pay IPC 25 alone, the plaintiff is entitled

to terminate the SLA and has acted in terms of the GCC to do so. The steps taken by the plaintiff to terminate are not in dispute merely the entitlement to do so. In consequence, the plaintiff, on the pleaded facts and evidence, was entitled to terminate the SLA. The Court notes that although the GCC in clause 9 makes provision for the payment of additional amounts of loss and damages, the plaintiff in its demand did not do claim any. The plaintiff in its pleadings claims interest.

- [26] The demand and the date, including the date of termination are not disputed and in consequence to consider the summons as demand is not relevant, nor was it argued. In consequence interest will be payable, in the absence of it being claimed in the demand on the 18 January 2022, from date of judgment.

COSTS

- [27] There is no reason why the costs should not follow the result. The order by Baloyi-Mbembele AJ indicated that the Trial Court should deal with the costs of the application. This was an aspect not argued by either Counsel but one which this Court in the interest of both parties and to finalise the matter now deals with. From the facts it is clear that a dispute regarding the payment of IPC 25 and 26 was alive when the plaintiff launched the application, including their liquidity. Furthermore as is apparent the first defendant and Khumalo did not adhere to the provisions of the GCC and adopted their own process, a fact known by the plaintiff before the application was launched. A factual dispute foreseeable. It too, is apparent that the evidence of Khumalo was critical in the determination of the weight of exhibit 1. He after all was the author. He did not depose to an affidavit in support of the application. Considering all the circumstances and considering that the plaintiff was dominus litis and as such elected motion proceedings at that material time, This Court exercises its discretion and orders that the plaintiff should bear the wasted costs occasioned

by the application before Baloyi-Mbembele AJ.

[28] The following order:

1. The first defendant is ordered to pay the plaintiff the sum of R 1 246 811.53.
2. The first defendant is ordered to pay the interest on the sum of R 1 246 811.53 from date of judgment, calculated at the prescribed interest rate, until date of payment.
3. The first defendant is ordered to pay the costs of suit taxed on scale C.
4. The plaintiff is ordered to pay the wasted costs occasioned by the application launched heard before Baloyi-Mbembele AJ, taxed on scale C.

L.A. RETIEF

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

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