

SOUTH AFRICA / JUDGMENT

Norland Construction (Pty) Ltd v O R Tambo District Municipality (37/2015) [2017] ZAECGHC 87 (4 July 2017)

[2017] ZAECGHC 87

COURT

Eastern Cape High Court, Grahamstown

BEFORE

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CASE / FILE NUMBER

37/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

no. 37/2015

Dates

heard: 12-16/9/16; 8/12/16

Plaintiff's

heads of argument received: 14/2/17

Defendant's

heads of argument due: 22/5/17

Date

delivered: 4/7/17

Not

reportable

In

the matter between:

NORLAND

CONSTRUCTION (PTY) LTD

PLAINTIFF

and

O

R TAMBO DISTRICT MUNICIPALITY

DEFENDANT

JUDGMENT

PLASKET, J:

- [1] The plaintiff, Norland Construction (Pty) Ltd, (Norland) is an East London-based civil engineering construction company. The defendant, OR Tambo District Municipality, (the Municipality) is a local authority with its head office in Mthatha. On or about 8 December 2011, Norland and the Municipality entered into a written contract in terms of which the Municipality employed Norland to construct the Cengane Dam and to perform other ancillary work.
- [2] It is common cause that the construction of the dam took far longer to complete than the period stipulated in the contract. The contract makes provision, in defined circumstances, for extensions of time and claims to be made by Norland in the event of delays to practical completion. Norland alleged that it was entitled to extensions of time in respect of two sets of delays of 55 and 187 working days and it claimed the amounts of R1 054 500.52 and R2 624 716.44 plus VAT in respect thereof.
- [3] The Municipality opposed Norland's claims. The defences raised by the Municipality were: first, the 55 day delay was not caused by events beyond Norland's control, as required by the contract; secondly, the physical conditions that gave rise to the delay of 187 days were reasonably foreseeable; and thirdly, Norland did not comply with the procedure for lodging claims as stipulated in the contract.

The Contract

- [4] The contract concluded by the parties is embodied in four volumes of documents. They are: (a) the General Conditions of Contract for Construction Works (Second Edition) 2010 (the GCC); (b) SANS 1200 – Standardised Specification for Civil Engineering Construction; (c) tender documents consisting of tendering procedures, returnable documents, agreement and contract data, pricing data and scope of works; and (d) drawings.
- [5] It is not necessary to deal with the contract as a whole. Instead, I shall outline those provisions that are relevant to the issues before me. They largely concern the provisions relating to claims by Norland for extensions of time and the procedure to be followed.
- [6] In terms of clause 4.1.1 of the GCC, Norland's obligation was to 'design (to the extent provided in the Contract), execute, and complete the Works and remedy any defects therein in accordance with the provisions of the Contract'.
- [7] A central figure in the scheme created by the contract is the Municipality's consulting engineer. He was the person who

administered the contract as agent of the Municipality. Clause 4.2.1 required Norland, in carrying out its obligations, to 'comply

with the Engineer's instructions in all matters related to the Works' and clause 4.2.2 placed an obligation on Norland to 'take instructions only from the Engineer, the Engineer's Representative or a person authorised by the Engineer...'

[8] The crux of the Engineer's function is encapsulated in clauses 5.9.1, 5.9.2 and 5.9.3. They read:

'5.9.1 On the Commencement Date, the Engineer shall deliver to the Contractor copies of the drawings and any instructions required for the commencement of the Works.

5.9.2 The Engineer shall deliver to the Contractor from time to time, during the progress of the Works, drawings for construction purposes or instructions as shall be necessary for the proper and adequate construction, completion and defect correction of the Works.

5.9.3 The Contractor shall give adequate written notice to the Engineer of any requirements additional to that contained in the Scope of Work or drawings, which the Contractor may require for the execution of the Works and the Engineer shall deliver such instructions and/or drawings to the Contractor.'

[9] In terms of clause 5.9.4, any instructions or drawings must be delivered by the Engineer 'in good time taking the approved

programme into account' and clause 5.9.5 provides that Norland was to 'give effect to and be bound by any drawings or instructions' given to it by the Engineer.

[10] Clause 2.2 makes provision for claims for additional costs in the event of a contractor encountering adverse physical conditions. As will be seen, this clause is relevant to Norland's second claim. Clause 2.2.1 provides:

'2.2.1 If, during the execution of the Works, the Contractor shall encounter adverse physical conditions (other than weather conditions at the site or the direct consequences of those particular weather conditions) or artificial obstructions, which conditions or obstructions could not have been reasonably foreseen by an experienced contractor at the time of submitting his tender, and the Contractor is of the opinion that additional work will be necessary which would not have been necessary if the particular physical conditions or artificial obstructions had not been encountered, he shall give notice to the Engineer in writing as soon as he becomes aware of the conditions or obstructions aforesaid, stating:

2.2.1.1 The nature and extent of the physical conditions and artificial obstructions encountered, and

2.2.1.2 The additional work required by reason thereof.'

[11] Clause 2.2.2 allows for further notices to be given to the engineer if additional or more extensive adverse conditions are encountered and clauses 2.2.3 and 2.2.4 allow for the contractor to do the additional work that is required and to claim. They state:

‘2.2.3 Unless otherwise instructed by the Engineer, the Contractor shall carry out the additional work proposed in the notice or notices under Clauses 2.2.1 and 2.2.2 without limiting the right of the Engineer to order a suspension of work in terms of Clause 5.11 or a variation in terms of Clause 6.3.

2.2.4 If the Contractor has duly given the notice referred to in either Clauses 2.2.1 or 2.2.2, he shall be entitled, in respect of the delay to Practical Completion and/or to proven additional costs, to make a claim in accordance with Clause 10.1, provided that the cost and time of all work done by the Contractor prior to giving the notice or notices in terms of Clauses 2.2.1 and 2.2.2 shall be deemed to be covered by the rates and/or prices set out in the Pricing Data and the time stated in the Contract Data relating to Clause 5.5.1.’

[12] Clause 2.3 is headed ‘Technical Data’. It provides that the contractor is ‘deemed to have based his tender on the Technical Data provided in the Contract and if, in the performance of the Contract, an circumstances shall differ from the said technical data, which difference causes delay to Practical Completion and/or brings about proven additional cost the Contractor shall be entitled to make a claim in accordance with Clause 10.1’.

[13] Clause 5.1.2 also deals with extensions of time for practical completion. As will be seen, this clause is relevant to Norland’s

first claim. Clauses 5.12.1 and 5.12.2 read:

‘5.12.1 If the Contractor considers himself entitled to an extension of time for circumstances of any kind whatsoever which may occur that will, in fact, delay Practical Completion of the Works, the Contractor shall claim in accordance with Clause 10.1 such extension of time as is appropriate. Such extension of time shall take into account any special non-working days and all relevant circumstances, including concurrent delays or savings of time which might apply in respect of such claim.

5.12.2 Without limiting the generality of Clause 5.12.1, the circumstances referred to in that Clause include:

5.12.2.1 The amount and nature of additional work,

5.12.2.2 Abnormal climatic conditions,

5.12.2.3 Any provision of these Conditions which allows for an extension of time, and

5.12.2.4 Any disruption which is entirely beyond the Contractor’s control.

[14] Clause 5.12.3 provides that if an extension of time is granted, ‘the Contractor shall be paid such additional time-related General Items, including for special non-working days, if applicable, as are appropriate regarding any other compensation which may already have been granted in respect of the circumstances concerned’.

[15] Clause 10 is headed 'CLAIMS AND DISPUTES'. Clause 10.1 sets out the procedure to be followed by a Contractor when claiming for an extension of time in terms of clause 5.1.2 or 'in terms of any clause that refers to clause 10.1'. The clause contemplates claims for 'additional payment or compensation'.

[16] The heart of the procedure is contained in clauses 10.1.1 and 10.1.2. These provisions read:

'10.1.1 The following provisions shall apply to any claim by the Contractor for an extension of time for the Practical Completion of the Permanent Works in terms of Clause 5.12, or in terms of any Clause that refers to Clause 10.1 for additional payment or compensation:

10.1.1.1 The Contractor shall, within 28 days after the circumstances, event, act or omission giving rise to such a claim has arisen or occurred, deliver to the Engineer a written claim, referring to this Clause and setting out:

10.1.1.1.1 The particulars of the circumstances, event, act or omission giving rise to the claim concerned,

10.1.1.1.2 The provisions of the Contract on which he bases the claim,

10.1.1.1.3 The length of the extension of time, if any, claimed and the basis of calculation thereof, and

10.1.1.1.4 The amount of money claimed and the basis of calculation thereof.

10.1.1.2 If, by reason of the nature of the circumstances of the claim, the Contractor cannot reasonably comply with all or any of the provisions of Clause 10.1.1.1 within the said period of 28 days, he shall:

10.1.1.2.1 Within the said period of 28 days notify the Engineer, in writing, of his intention to make the claim and comply with such of the requirements of Clause 10.1.1.1 as he reasonably can, and

10.1.1.2.2 As soon as is practicable, comply with such of the requirements of Clause 10.1.1.1 as have not yet been complied with.

10.1.2 If, in respect of any claim, the Contractor did not comply with the provisions of Clause 10.1.1 because he was not and could not reasonably have been aware of the implications of the facts or circumstances concerned, the period of 28 days referred to in Clause 10.1.1 shall commence to run from the date when he should reasonably have become so aware. The cost and time of all work done in this regard by the Contractor prior to giving such notice shall be deemed to be covered by the rates and/or prices set out in the Pricing Data and the time stated in Contract Data relating to Clause 5.5.1.'

The Pleadings

Claim 1: Delay caused by labour problems

- [17] Norland pleaded that a disruption of its work in terms of the contract occurred between 6 February 2013 and 30 April 2013 when the local work force employed on the project 'either remained absent from site or, for the few days that they were on site, did not perform work of any significance'.
- [18] This disruption was beyond Norland's control. As a result, it suffered a delay to practical completion of the work for a period of 55 working days, incurring losses and additional costs of R1 054 500.52 plus VAT and was entitled to make a claim for payment of this amount in terms of clause 10.1 of the GCC.
- [19] It was pleaded that Norland gave notice of its claim to the engineer in terms of clause 10.1 of the GCC and complied with all other relevant terms of the contract. This notwithstanding, the Municipality, through the Engineer, did not grant any extension of time or pay the amount claimed. In its plea, the Municipality did not admit that a disruption occurred when the local work force stopped working. It also denied that the disruption was beyond the control of Norland.
- [20] The Municipality admitted that Norland gave notice of its claim to the Engineer but pleaded that: (a) the Engineer rejected the claim;
- (b) Norland disputed the rejection of the claim; (c) the dispute was referred to adjudication in terms of the contract;
- (d) the adjudicator refused the claim; and (e) as a result, the Municipality did not pay the amount claimed.

Claim 2: Unforeseen adverse physical conditions

- [21] Norland pleaded that, from time to time, it encountered adverse physical conditions and artificial obstructions which could not have been reasonably foreseen by an experienced contractor at the time of tendering, as well as circumstances that differed from the technical data provided in the contract documents. As a result, additional work became necessary and was executed by Norland, which incurred additional costs.
- [22] Norland, it was pleaded, gave notice to the Engineer in writing of the nature and extent of the unforeseen conditions and the additional work required. As a result, it was entitled to claim, in terms of clause 10.1 of the GCC, for the delay to practical completion caused by the unforeseen conditions and for the recovery of the additional costs occasioned thereby. It claimed an extension of time of 187 working days and additional costs in the amount of R2 624 716.44 plus VAT.
- [23] Notice of the claim was given to the Engineer as required by clause 10.1 of the GCC and Norland complied with its other relevant

contractual obligations. Despite this, the Engineer refused the claim for the extension of time and the payment of the additional

costs.

[24] In the alternative, Norland pleaded that the additional work was performed at the behest and on the instructions of the Engineer,

caused delays as a result of the implementation of the instructions and resulted in additional costs to Norland.

[25] It was pleaded further that it was agreed between Norland, represented by Mr D Bickell, and the Municipality, represented by the Engineer, that any 'variation of or addition to the Works resulting from such instructions from the Engineer shall not be dealt with in terms of Clause 6.3 of the GCC, but shall be the subject of a claim in terms of Clause 10.1 of the GCC to be dealt with and submitted in the normal course of events'.

[26] The Municipality denied that Norland encountered unforeseen circumstances, that additional work became necessary and was executed

and that Norland incurred additional costs.

[27] The crux of the plea to claim 2 appears to be this: (a) clause 2 of the GCC deems a contractor to have inspected the site and to have studied all available relevant information before submitting a tender; (b) as a result, a contractor is deemed to be knowledgeable

in respect of, inter alia, the form and nature of the site and the environmental, hydrological and climatic conditions; and (c) the relevant information referred to in clause 2.1 of the GCC included 'geological and materials reports in respect of the Works'.

[28] The plea appears to suggest a defence that the adverse conditions that Norland claimed to have encountered were reasonably foreseeable by an experienced contractor at the time of submitting the tender.

[29] The Municipality admitted that Norland gave notice in writing to the Engineer of its intention to claim. It denied Norland's

entitlement to claim and the extent and quantum of the claim. It pleaded that, as with claim 1, the Engineer rejected Norland's

claim; Norland disputed the rejection and the dispute was referred to adjudication; the adjudicator dismissed the claim; and, as a result the Municipality did not pay Norland the amount claimed.

[30] The alternative claim based on the work having been executed at the behest of the Engineer was denied on the basis that Norland

'performed the work required to be performed by it, in terms of the Contract', the Municipality paid it for the work performed and Norland did not perform additional work.

[31] It also denied that the Engineer and Bickell had agreed that variations or additions to the Works on the instructions of the

Engineer would be dealt with in terms of clause 10.1 of the GCC. Two principal reasons were given; first, amendments to the contract were required to be in writing and the Engineer, in any event, had no authority to amend the contract; and secondly, in terms of clause 6.3.2 of the GCC, variations of the work required a written order from the Engineer and, I infer, in the absence of an express

statement to this effect, that no written variations were issued by the Engineer.

The evidence

[32] The quantification of Norland's claims is not in dispute. I am therefore only required to decide whether Norland has established its claims.

[33] Norland called a number of witnesses, both expert and lay, in its endeavour to prove its claims. The witness who was central to both claims was Mr Dale Bickell, Norland's senior contracts manager in charge of the Cengane Dam project. His job entailed the establishment of the site, the management of the project from start to finish and reporting to Norland's board of directors.

[34] The Municipality closed its case without calling any witnesses.

[35] It is common cause that work on the site stopped on 6 February 2013 and re-commenced at the beginning of May 2013. The interruption of work was caused by labour-related problems.

[36] The Engineer dismissed Norland's claim for additional costs (including provisional and general costs) on the basis that the disruption of work was not entirely beyond Norland's control as envisaged by clause 5.12.1.4 of the GCC.

[37] In order to understand the nature of the labour-related problems faced by Norland, and to determine whether the disruption was entirely beyond its control, it is necessary to consider the evidence concerning the relationship between Norland, the Municipality and the local work-force employed on the site.

[38] Bickell testified that over the years a system evolved in projects such as this in terms of which local communities have a substantial say in who will work for contractors. The system typically involves a project steering committee (PSC) which represents local communities and acts as a link between the contractor and the local work-force. Municipal councillors play an important role in this system either as part of the PSC or alongside it and additional to it. Bickell explained the workings of the system thus:

'So we would deal with, the community would elect through their structures a Project Steering Committee and the councillors would

either sit on that committee or get feedback from it.’

- [39] The PSC decides who will work for the contractor. It is fairly straightforward when only one village is supplying labour but a bit more complicated when, as in this matter, seven villages were supplying labour. Two members from each of these villages made up the PSC and, generally speaking, equal numbers of workers were supplied by each village.
- [40] When problems arose, these were also to be dealt with by the PSC: if a person was, for instance, unsuited to the work assigned to him or her, the contractor, through a community-based liaison officer, would report the problem to the PSC who would solve the problem by having the worker swap duties with someone else. If a person constantly arrived late for work, the PSC would similarly be called upon to deal with the situation.
- [41] Municipal councillors also played a role but, it would appear, less of a ‘hands-on’ role than the PSC. They would sometimes attend meetings with Norland and the PSC. One councillor, a Mr Ludidi, appeared to take a particular interest in the contract in this case and did so, as far as Bickell was concerned, with the best of intentions.
- [42] Bickell testified that in order to allow for more people to be employed during a contract, municipalities – and this was common in the Transkei region – often set a wage in the tender below the statutory minimum. This happened in this case: the rate of pay was about half of the statutory minimum.
- [43] Norland was not informed by the PSC at any stage of problems among its local work-force. It became increasingly evident, however, that there were problems on site. This manifested itself in a lack of co-operation, insubordination and insolence and go-slow tactics.

Then, the site agent, Mr Peter Bessinger, was informed that a plan had been hatched to hijack and kill him: he was warned one evening

that when he came to work the next day, he should on no account stop to give a lift to any workers on their way to the site as this was when the plot was to be executed. He contacted Bickell who instructed him to proceed to the town of Qumbu and report what had happened to the municipal councillors.

- [44] When Bessinger did so, he was informed that they too had received threats. As a result, they enlisted the assistance of the police to protect them when they went to the site to speak to the work-force. In the meantime, four other senior Norland staff-members, because of threats to their safety, fled the site. Ludidi, accompanied by the police, led the contingent that went to the site. He spoke to the work-force and told them that the site had been closed but that meetings would be convened to find solutions to the problem.

[45] A meeting took place on 11 February 2013 at the municipal offices in Qumbu. No solution was found to the problem, which simply dragged on. A long chain of correspondence between Norland and the Engineer records the unfolding events. On 11 February 2013, the Engineer wrote to Bickell to enquire why work on the project had stopped. He requested Bickell to inform him 'in writing of the reasons for this and whether you intend to claim an extension of time with time related costs as a consequence of this stoppage'.

[46] The next day Bickell gave the Engineer notice of Norland's claim for an 'extension of time and standing time costs'.

He also provided an account of what had brought about the cessation of work. On 19 February 2013, Bickell wrote to the Engineer to enquire whether the Municipality had made any progress in resolving the problem. He did this, he testified, because it was 'obvious

to us then that the client needed to make a call on this' because it was the Municipality that set up the structures through

which local people were employed and because 'the contract called for us to liaise if there were any problems on site'.

[47] Over the next month or more, whatever meetings may have occurred produced no results. Norland was, Bickell testified, excluded from the meetings that did take place (apart from a planning meeting that did not include the local work-force on 21 February 2013).

[48] Eventually, without anything having been resolved, on 19 March 2013, the Engineer instructed Norland to 'resume operations on site with immediate effect'. This instruction, it would appear, was the result of a meeting on 15 March 2013 at which a decision was taken that work on the site would resume on 19 March 2013. Various parties, such as the Municipality, the PSC and the local work-force, attended this meeting but Norland was excluded from it.

[49] The Engineer's instruction elicited a response from Norland on the same day. In a letter drafted by Bickell but signed by Mr SB Hobson, Norland's managing director, the history of the problem was set out in detail and it was stated that, from reports received by Norland, the workers had been allowed 'to take control of the construction management on the site'. Hobson proceeded to say that the Municipality 'should be well aware that without effective on-site management and discipline, it is not possible to deliver the project to the required construction specifications without compromising very severely our structural integrity and health and safety issues'. In these circumstances, he said, Norland was not prepared to resume work and would only be prepared to do so once the issues 'have been discussed, resolved and agreed to between all concerned affected parties'.

- [50] On 22 March 2013, the Engineer responded to this letter. He noted the reasons for Norland's refusal to commence work – concerns for the safety of its staff and equipment and the imposition of conditions by the local work-force as to the management of the site – but nonetheless asserted that Norland was in default of its contractual obligations. The tenor of the letter was that Norland should somehow sort out the problem.
- [51] A facilitator was appointed by the Municipality to attempt to resolve the problem in April 2013. A meeting was held on the site on 8 April 2013 from which Norland was excluded. New demands were made, such as that Bessinger should not be allowed to leave his office, thus being excluded from managing the site. Despite Norland's objections to the way the facilitator had conducted the process, it agreed reluctantly to start work again on 10 April 2013.
- [52] On 11 April 2013, Mr Warren Geyer, one of Norland's directors wrote to the Engineer to say that 'things appear to have gone from bad to worse'. He said that Norland was still extremely concerned for the safety of its staff and that 'given the general work attitude and production of the workers on site today, it is imperative that the client call an urgent meeting with all concerned parties in order to determine the future of the contract'. He recommended a suspension of work pending the resolution of the problems and said that Norland would, in the interim, 'begin assessing and quantifying our claim for time and costs incurred to date'.
- [53] On 14 April 2013, Bessinger sent an e-mail to the Engineer on the latter's request. It referred to an incident that took place on the site during the attempt to re-start work on the project. (I infer this from the date of the e-mail.) Bessinger stated:
- 'I was informed by my clerk who told me she had heard that there was a R35 000 bounty on my head and a further bounty on four other Norland staff members (in total R170 000). It also emerged that "they" wanted to know why the workers were afraid to "take the lamlungu out". "Lamlungu" refers to me.'
- [54] On 16 April 2013, Hobson sent an e-mail to the Engineer in which, as a result of what had happened after the resumption of work, he made a 'formal request to suspend all further work on the Cengane Dam site pending resolution of the ongoing labour issues and the emergence of further threats of intimidation against senior Norland staff'. He described the situation on site as 'intolerable' with the local work-force effectively in control of the site 'while senior Norland staff members are subjected to ongoing threats of intimidation as the contract sinks into an abyss'. He also painted a picture of the community-based structures being completely ineffective in resolving issues.

[55] Over the next while, however, the issues were resolved. According to Bickell, three crucial factors contributed to this. First, the Municipality agreed to pay the local work-force the minimum wage. Secondly, a new chairperson of the PSC was installed who was a great deal more effective than his predecessor. Thirdly, the PSC 'phased out' a number of people identified as trouble-makers. The result was that work resumed at the beginning of May 2013.

[56] Claim 2 is a claim for an extension of time for 187 days and for payment of R2 624 716.44 plus VAT, as well as interest. The claim is made up of provisional and general costs, loss of plant productivity, plant standing costs and diesel costs. The number of days involved and the amount claimed are not in dispute. It is not in dispute either that Norland executed a large amount of work additional to the work for which it had tendered, incurring additional costs in doing so. All of this work was done on the

instructions of the Engineer.

[57] Bickell testified that when he received the tender drawings from Geyer, who had done the estimating and pricing, he looked at them for possible problems which could impact on the type of work needed or the plant required. It appeared to him from the drawings that the construction of the dam would be 'a fairly simple exercise'. Once work commenced, however, problems were encountered.

[58] It was in this context that a geotechnical report referred to at a pre-tender site meeting was raised by the Municipality. Essentially, the Municipality's argument was that as a result of what was contained in the geotechnical report Norland, as a reasonable contractor, ought to have foreseen the additional work that it was later required to perform. It was common cause, however, that despite reference to the geotechnical report at the pre-tender site meeting, it was in fact not part of the tender documents.

[59] Bickell testified that a contractor establishes what work is to be done, and formulates the tender, with reference to the tender

documents including the specifications and drawings. In this case, the items of work and approximate quantities were set out in a schedule of quantities for pricing purposes. Most importantly, the nature of the work was to be gleaned from this schedule and the drawings.

[60] It was conceded by the Municipality that the Engineer had himself not foreseen the sub-surface conditions that later gave rise to the problems that I shall detail below. As a result, neither the specifications, the drawings or any other tender document made

provision for the type of work that later became necessary.

[61] Geyer had compiled the tender. He had a great deal of experience in this regard, estimating that during the course of his career, he had compiled over 500 tenders.

[62] When he priced the tender, he worked from the information contained in the tender documents, including the specifications, the schedule of quantities and the drawings. There were no warning signs in any of these documents. He discussed the tender with Hobson who had attended the pre-tender site meeting and it appeared to Geyer that this was 'a straightforward contract'.

[63] In particular, the drawings depicted a fairly regular line representing the sub-surface rock, the schedule of quantities made

provision for grouting on a square metre basis, which indicated that only small cracks would have to be filled, and there was no provision made for any cubic metre items for the filling of large cavities.

[64] Mr Steve Landolt, a civil engineer with considerable experience in both dam design and construction, also testified. In his opinion, contractors in the position of Norland are entitled to assume that an engineer in a contract like this one act reasonably and that the tender documents and drawings actually reflect the work that is to be done. The omission of the geotechnical report from the tender documents, he said, would justify a conclusion on the part of a contractor that no particular problems had to be brought to the contractor's attention. Furthermore, if the geotechnical report indicated that particular work would have to be done, that work should have been reflected in the schedule of quantities, specifications and drawings. In the absence of reference to that work in these documents it would be inferred by a contractor that the engineer did not consider that work to be necessary.

[65] Landolt considered the context of the reference to the geotechnical report in the pre-tender site meeting to be important. It was mentioned in the context of a warning as to the high moisture content of the materials to be used in the construction of the dam. (This issue was of little concern to Bickell, as he regarded it as easily manageable.)

[66] Landolt's main conclusions were that (a) a contractor was entitled to assume that the tender data would be a true reflection of the work that was anticipated; (b) a contractor would not have asked for a copy of the geotechnical report (and it was not normal practice in the industry for such reports to be given to contractors); (c) a contractor would have priced the tender exclusively on information contained in the tender data; and (d) the additional work that was done by Norland, when compared to the tender data, could not have been reasonably foreseen.

[67] These conclusions were strengthened by two further factors that indicated that the Engineer had himself not foreseen the problems

that later manifested themselves. First, a contingency amount of 7.5 percent – as opposed to the norm of 10 percent – was allowed for sub-surface work. Secondly, the acceptance of a period of 12 months for the completion of the dam was indicative of the fact that the Engineer did not foresee that significant extra work may become necessary.

[68] The most significant problem encountered by Norland related to the sub-surface conditions where the dam wall was to be built. The drawings depicted a fairly even level of rock to which Norland was to excavate in order to found the dam wall.

[69] When excavation work commenced, however, a very different picture emerged. The founding rock was uneven and riddled with fissures.

Whenever an attempt was made to clean the fissures, Bickell stated, 'we simply went deeper and deeper'. The material between the rocks was uncompacted detritus. If left in place, it would have rendered the dam unsafe. It consequently had to be removed.

[70] Bickell testified that neither Norland nor the Engineer had anticipated these conditions. Although boreholes had been drilled and holes dug during the Engineer's geotechnical investigation, it would have been sheer luck if the true nature of what lay below the ground had been discovered.

[71] When the problem was discovered, the Engineer instructed Norland to remove the detritus to the full depth of each fissure and clean the fissures. This was labour-intensive and time-consuming work. Once the work had been completed, however, the Engineer was unsure of how to proceed. The result was that the fissures remained open for about two months. They filled partially with unsuitable material. On the advice of a sub-contractor who had been engaged by Norland to do grouting work, the Engineer decided that the fissures were to be filled with dental concrete. Before this could be done, however, they had to be cleaned again. Later, the Engineer instructed Norland to raise the level of dental concrete, which was duly done.

[72] A particular problem related to the uneven rock layer and the fissures concerned a steel outlet pipe. It passed over a deep and wide fissure. This necessitated additional support being given to it by additional mass concrete and, in one area, the concrete had to be re-enforced.

[73] Problems were also encountered when excavation commenced for the construction of the spillway retaining wall. In the first instance, as a result of wet and sticky clay, Norland lost a 22 ton tracked excavator in the mud. It became necessary to remove the wet, sticky clay down to the layer of rock. The Engineer then instructed Norland to fill the large holes with rock and to lay mass concrete over them.

[74] On the left hand section of the spillway retaining wall a deep hole had to be excavated and the wet, sticky clay had to be removed. The hole then had to be filled with blasted rock and excavated boulders before mass concrete was placed over it.

- [75] After realising that the amount of freeboard from the normal water level in the coffer dam was insufficient in the event of heavy rain, the Engineer's representative issued an instruction to Norland for a 600mm diameter diversion pipe to be laid and to raise the wall. This was done. Despite that, however, the coffer dam overflowed on three occasions taking Norland ten, 15 and seven days to clean up.
- [76] Other extensive work was also undertaken which stemmed directly from the sub-surface conditions that had been encountered.
- [77] Bickell testified that all of the extra work, apart from the work on the coffer dam, arose as a result of unforeseen, adverse physical conditions as contemplated by clause 2.2 of the GCC; that all of the extra work, including that in relation to the coffer dam, arose because the circumstances that were encountered differed from the technical data provided in the contract, as contemplated by clause 2.3.1 of the GCC; and that all of the work was executed on the instructions of the Engineer.
- [78] When the problem of the sub-surface conditions was first encountered, Norland notified the Engineer in a site meeting that it intended to claim for an extension of time once the extent of the work required was known. Later, during discussions between Bickell and the Engineer about the constant delays caused by the unpredictable founding conditions, the Engineer said that Norland should keep an accurate record of the work if it intended to claim. The procedure agreed to was summarised as follows by Bickell:
- 'We were to keep an accurate photographic record and that we would report on a monthly basis as to the status of the ongoing matter and that we would submit our claim at the end of that time.'
- When asked what he meant by 'the end of that time', he said that this meant '[w]hen the full extent of the problem was known'.
- [79] Norland claimed payment for the extra work on a monthly basis, as agreed, and was paid. Throughout, the Engineer was informed of progress through site meetings, which were minuted, through the submission of photographs and through the submission of the measure of the work every month.
- [80] On 5 August 2013, Norland gave the Engineer notice of its intention to claim an extension of time as a result of the delays and stated that its claim would be finalised within a few weeks. The claim was filed on 11 November 2013.
- [81] The Engineer rejected Norland's claim for additional costs that were attributable to the delay. He did so on the basis that Norland ought to have foreseen the circumstances that caused the delay. When a dispute was declared by Norland and the matter placed before an adjudicator, the Engineer's rejection of the claim was upheld, but on a different basis: the adjudicator held that the claim was brought out of time.

Determination

of the issues

[82] In my view, Bickell was an excellent witness. He testified in a great deal of detail as to the events relevant to Norland's claims. His evidence was supported by a long trail of contemporaneous documentation, most of which had been generated by him. He gave evidence in a forthright manner and was willing to make concessions when necessary. The other witnesses called by Norland impressed me as good witnesses as well. I accept the evidence of Bickell and of the remaining witnesses.

[83] There was, of course, no gainsaying evidence tendered by the Municipality and a great deal of the factual foundation of Norland's

case was not placed in dispute.

[84] I turn now to the determination of the issues in dispute. They are the following: (a) whether the cause of the delay in claim 1 was entirely beyond Norland's control; (b) whether the physical conditions that gave rise to claim 2 were reasonably foreseeable by an experienced contractor at the time of tendering; (c) whether the procedure followed in making both claims was contractually compliant; and (d) whether, in respect of both claims, the adjudicator could decide *mero motu* that they were time-barred.

Claim 1: The cause of the delay

[85] The evidence of Bickell established that the system concerning the employment of a local work-force lay in the hands of the

community-based PSC and the Municipality. Norland appears to have had no choice: if it wanted the work, it had to accept the system.

[86] While for the most part, the system worked fairly well, according to Bickell, in this instance it broke down. When it did, Norland was powerless to remedy the situation: it was excluded from the process that was put in place.

[87] It did not even know what the problems were that had caused the go-slow, insubordination and worse. It would appear, however, that the root cause of the problem was the wage paid to the local work-force in projects of this nature throughout the Transkei region (with the well-intentioned motive of providing employment for greater numbers of local people). Even if Norland had known that this was the core issue involved in the disruption of work, it was powerless to do anything about it. Only the Municipality had the power to increase the wage for the local work-force, and it eventually did so.

[88] The problem with the local work-force had to be taken especially seriously when information emerged of the plot to murder Bessinger

and threats were made against other Norland staff on the site. In these circumstances, the only reasonable response was to shut down the site, as Ludidi, escorted by the police, did. Once again, the decision to cease work was beyond the control of Norland and was not taken by Norland.

- [89] Even when work resumed again for a brief period, events beyond the control of Norland brought it to a stop: a threat to the life of Bessenger and other Norland staff was discovered and intolerable demands, incompatible with managing and operating a site, were made by the local work-force. In all of this Norland had no control and no choice but to close the site.
- [90] Resolution of the problem was achieved when, according to Bickell, three things happened: first, the Municipality agreed to pay the local work-force the statutory minimum wage; secondly, a new and effective chairperson was appointed to the PSC; and thirdly, the PSC 'weeded out' so-called trouble-makers from the local work-force. With that, matters on the site returned to normality and work on the dam resumed. The three remedial steps that brought an end to the labour unrest had nothing whatsoever to do with Norland – and the implementation of none of them lay within its power.
- [91] I accordingly find that the evidence establishes on a balance of probabilities that the delay of 55 days caused by labour unrest was, in terms of clause 5.12.2.4 of the GCC, entirely beyond Norland's control. Claim 1 has, accordingly, been proved.

Claim 2: Unforeseen physical conditions

- [92] Clause 2.2.1 of the GCC allows for a claim in the event of a contractor encountering 'adverse physical conditions'

which 'could not have been reasonably foreseen by an experienced contractor at the time of submitting his tender'.

- [93] The evidence concerning this issue is clear and largely uncontested. The geotechnical report may have been referred to in the pre-tender site meeting but that was in the context of the moisture content of certain of the materials and it was not part of the tender documents. That is common cause.
- [94] Norland was entitled to compile its tender with reference to the tender documents, particularly the drawings, specifications and schedule of quantities. Every other tenderer no doubt did exactly the same. No red flags were raised by any of these documents which could have placed a reasonable tenderer on guard. On the contrary, these documents indicated that the construction of the dam would be straightforward. It would appear, therefore, that even the Engineer did not foresee the great difficulties that lay ahead when vastly different sub-surface conditions were encountered than those envisaged in the drawings. Landolt's evidence was to the effect that a contractor is entitled to assume that an engineer acts reasonably and that the tender documents and drawings reflect the work that is to be done.
- [95] In all of these circumstances, I find that the adverse physical conditions that Norland encountered were not reasonably foreseeable

by an experienced contractor at the time of tendering.

Claims 1 and 2: Contractual compliance

- [96] I turn now to whether the procedure followed by Norland in making both claims was contractually compliant.
- [97] Clause 10.1.1 of the GCC requires a claim to be made within 28 days of the circumstances giving rise to it having occurred. If a contractor cannot reasonably claim within this time because of the nature of the circumstances concerned, it must notify the engineer of its intention to claim, comply with as many of its obligations in terms of the clause that it can and comply with the remainder of its obligations as soon as it is practicable to do so.
- [98] Norland submitted its notice of intention to claim in respect of claim 1 within six days of the closure of the site. It could do nothing further thereafter until the labour problems had been resolved. It was only then that Norland was able to begin to formulate and quantify its claim.
- [99] On 6 May 2013 Bickell wrote a letter to the Engineer in which he stated that Norland was 'now in a position to complete our claim as work on the site has started'. He added that when Norland was 'in a position to deliver our final claim we will do so in accordance with Sub Clause 10.1.1.3 of the General Conditions of Contract'. On 3 June 2013, he requested an extension of seven days for the submission of the claim. The claim was submitted on 4 June 2013.
- [100] Bickell testified that the claim was submitted to the Engineer as soon as was practicable. This evidence was not challenged.
- [101] I turn now to claim 2. The evidence established that the full extent of the problems encountered by Norland only became apparent over time. Because of this, the Engineer instructed Norland to keep a record for purposes of a later claim and to report to him on a monthly basis. These steps were taken. It was envisaged that the claim would be submitted when the full extent of the delay and the work required was known. At the monthly site meetings the Engineer was kept informed of progress and this information was reduced to writing in the site meeting minutes. A detailed photographic record was kept.
- [102] Norland kept a detailed record of the additional work that had to be done and the circumstances giving rise to the delay. It submitted a notice of its intention to claim. In this notice it referred to the fact that the 'delay has been recorded and minuted in previous site meetings'.
- [103] In the circumstances described in detail in the evidence of Bickell, it clearly was not possible for Norland to have complied with clause 10.1.1.1 of the GCC – to lodge a claim within 28 days. It did give notice of its intention to claim in terms of clause 10.1.1.2 and complied with its obligations in terms of clause 10.1.1.2.2 as soon as practicable.

[104] I conclude from the above that claim 1 and claim 2 were made in accordance with the procedures stipulated in clause 10.1.1.2 of the GCC.

Claims 1 and 2: Time-barring

[105] The final issue to be determined is whether the adjudicator could have dismissed the claims on the basis that they were time-barred.

The adjudicator took the point *mero motu*.

[106] There are two problems with the adjudicator's approach. The first is that, factually, he appears to have erred because the claims were lodged timeously. The second is that, even if they were not, the issue of them being out of time was not before the adjudicator. As the Engineer never took the point, the issue was not a live issue for the adjudicator to determine.

[107] In *Fischer & another v Ramahlele & others*[1] the judge in the court below had required the parties to address him on issues that he had identified and which were not pleaded by any of them. He had decided the matter on these issues. Theron and Wallis JJA held that in our system of civil procedure the pleadings or the affidavits set out and define the issues and it is the presiding judge's duty to 'adjudicate upon those issues'. [2] They continued to state: [3]

'It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.'

[108] In the result, I conclude that the claims could not have been dismissed because of any lateness in their filing.

Costs and the order

[109] It was argued by Norland that because the Municipality refused to agree that the dispute between them be referred to mediation, the Municipality should be ordered to pay Norland's costs on an attorney and client scale. The Municipality took the view that it had defences to Norland's claims, and that as a result, mediation would serve no purpose.

[110] As it happened, the Municipality's defences were not good in law but that does not detract from the fact that they were entitled to rely on them and raise them. During the course of the trial, I may add, the Municipality made a number of concessions that shortened proceedings. It thus cannot be accused of acting unreasonably.

[111] I make the following order:

1 It is declared that the plaintiff is entitled to extensions of time of 55 and 187 days in relation to claims 1 and 2.

2 The defendant is directed to pay to the plaintiff:

- (a) the amount of R1 054 500.52 plus VAT, in respect of claim 1, as well as interest thereon at the prescribed rate from date of demand to date of payment;
- (b) the amount of R2 624 716.44 plus VAT, in respect of claim 2, as well as interest thereon at the prescribed rate from date of demand to date of payment;
- (c) costs of suit on a party and party scale.

C Plasket

Judge of the High Court

APPEARANCES

For the plaintiff: A Nelson SC instructed by Joubert Galpin Searle Inc, Port Elizabeth and Huxtable Attorneys, Grahamstown

For the defendant: L Pillay SC instructed by Mdledle Inc, Mthatha and Netteltons, Grahamstown

[1] Fischer & another v Ramahlele & others [2014] 3 All SA 395 (SCA).

[2] Para 13.

[3] Para 14.

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