

SOUTH AFRICA / JUDGMENT

**Willie Webb Holdings JV Marang Distributors (Pty) Ltd
v
Member of the Executive Council responsible for
Public
Works, Roads and Transport: North West Province
(1020/2014) [2021] ZANWHC 57 (19 August 2021)
[2021] ZANWHC 57**

COURT

North West High Court, Mafikeng

BEFORE

DJAJE

CASE / FILE NUMBER

1020/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

Reportable:

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

CASE

NUMBER: 1020/2014

In

the matter between: WILLIE
WEBB HOLDINGS JV MARANG
PLAINTIFF
DISTRIBUTORS
(PTY) LTD
AND
THE
MEMBER OF THE EXECUTIVE COUNCIL
DEFENDANT
RESPONSIBLE
FOR PUBLIC WORKS, ROADS
AND
TRANSPORT: NORTH WEST PROVINCE

JUDGMENT

DJAJE J

[1] The plaintiff instituted an action for damages against the defendant arising from a building contract which was entered into on 14 March 2008. The contract arose as a result of the plaintiff being awarded a tender for the renovation, upgrading and alteration of the existing Moretele College including the construction of a sewer and water reticulation system as well as the construction of walkways. According to the parties the scope of work involved major renovations to the existing Moretele College. The plaintiff's claim is as a result of alleged delays by the defendant giving rise to a claim for damages suffered by the plaintiff.

[2] The plaintiff's particulars of claim are based on two claims constituted as follows:

"Claim 1 :

Head office Overheads – R2 730 923.30

Idle Labour – R329 700.00

Removal of Block A3 from the scope of work- R64 550.00

Redundant electrical material –R709 932.87

Redundant ironmongery – R120 000.00

Provision for unplanned financial assistance to the project during the extension of time – R700 000.00

Claim 2:

Invoice of R1 587 035.12 and defendant paid R1 031 240.31

Outstanding amount of R555 794.08 from said invoice."

- [3] The defendant conceded that the amount in claim 2 is owing to the plaintiff and it's due and payable. The dispute is only in relation to payment of claim 1. In this judgment claim 2 will not be dealt with as it has been conceded.
- [4] The plaintiff called two witness in support of its case. The first witness to testify was Mr Pule William Mutloane ("Mutloane") who is the director of Willie Webb Holdings. He testified that Marang Distributors is a company belonging to his wife and they had a joint venture. He did a lot of work for the department of public works which included building of schools, clinics and roads. He has extensive experience in construction. . He confirmed that a Joint Building Contract Committee Agreement ("JBCC") was entered into with the defendant. He represented the plaintiff and the defendant was represented by one Mr Monye ("Monye"). According to Mutloane when the work started for the renovations there were no drawings and he was only informed by the Engineers and the Project Monitors that the drawings would be provided at a later stage. Further that they were not provided with the Bill of Quantities ("BOQ") by the Quantity Surveyor and the Principal Agent when the work started.
- [5] Mutloane stated that throughout the duration of the contract they had no support from the Engineers or those who were overseeing the project. However, the plaintiff managed to perform in terms of the contract and received certificates of completion. The money was not all paid by the defendant. It is plaintiff's case that the date of final completion was 8 February 2011. According to him after the work was completed the defendant promised to pay the money later as there was no money to pay. He denied that they ever entered into a settlement agreement in respect of the payments to be made by the defendant and were never informed of any latent defects. The contract was also extended as a result of the delays from the side of the defendant and the plaintiff as the main contractor, was not involved in the appointment and payment of sub-contractors. The relationship with the Principal Agent was not healthy as he was overstepping and making variations to amounts claimed by the plaintiff.
- [6] It was explained during cross examination that the original amount for the entire contract was R54 304 408.19 and later on increased to R78 604 016.64 as a result of more work being added and the extension of time. Mutloane testified that the Principal Agent was the one who required the extra work to be done and would do so by giving instructions in the site instruction book. This book was not discovered as the defendant alleged that it was with the plaintiff when plaintiff alleged it was with the Quantity Surveyor appointed by the defendant. The version of the defendant was put to him that liability for the payments under claim 1 were denied by the defendant.
- [7] The second witness for the plaintiff was Mr Webb William Mutloane ("Webb") who was a director and quantity surveyor of the plaintiff at the time of the contract in question. His duties were to handle the quantity surveying and construction management for the plaintiff. He was actively involved in the project. He was responsible for the pricing on the BOQ as he was the quantity surveyor for the plaintiff. Webb confirmed the testimony of Mutloane at the commencement of the project that there were no contract drawings and they had to rely on

the BOQ. Further that they were able to commence with the project without the drawings as it was for renovations and not building from scratch. According to him the contract drawing were only provided to them at a later stage. He stated that the final completion was on 8 February 2011 and they never received any notification of defects from the Principal Agent or the Department of Public Works ("Client").

- [8] It was testified that there were delays in the project as a result of the professional team not providing what was required and adding more work to be done on the project. This resulted in claim 1 as reflected in the particulars of claim. In his evidence Webb indicated that claim 1 was related to the time delay and caused by circumstances beyond their control. He explained that they were entitled to claim overheads as a result of the extension of time and the delays. The

claim for redundant electrical material was caused by the initial electrical subcontractor who used the plaintiff's account to buy the electrical material. After buying the said material the Electrical Engineer then came in and specified different electrical

material. A new subcontractor came in and he brought his own material. This resulted in the first material being left unused and

the plaintiff was left with an account to pay.

- [9] According to Webb the redundant iron monger came about after the new Architect brought new drawings and specifications which resulted in some of the material that was already bought not being used. The iron monger was already opened and could not be sent back to the supplier.

- [10] During cross examination it was put to Webb that the defendant paid for the redundant mongery and the electrical subcontractor paid for the material that was on site. As a result the claims for the redundant materials could not be paid by the defendant to the plaintiff. It was denied by Webb that there was a compromise amount agreed upon with the defendant as a full and final payment.

- [11] The defendant called as its first witness Mr Mphage Jeoffrey Mathabatha ("Mathabatha") who was appointed as the Principal Agent for the project of Moretele College renovations. He testified that at the beginning of the project there were drawings from the architect and the civil and structural engineer. The only thing was that the plaintiff had not prepared the programme of works as required. The plaintiff as the contractor had a site book printed and left on site for all communication between the agent and the contractor. Mathabatha indicated that after the site was handed over to the contractor, a need arose for an electrical engineer and as such one was appointed. When the electrical engineer was appointed there was already an electrical mechanic subcontractor who was appointed by the plaintiff. The electrical subcontractor had already commenced with the work and he was instructed to halt with the work by the electrical engineer because of certain changes. This resulted in the electrical subcontractor leaving the construction site. According to Mathabatha there was a

settlement reached with the electrical subcontractor before he was excused from the site and that included the material that was bought.

- [12] On the issue of delay, Mathabatha testified that there were subcontractors who were not paid timeously by the plaintiff and that caused delay to the work on the project. He stated that the relationship between him as the Principal Agent and the plaintiff was strained and he was at some point denied access to the site by the plaintiff. He did confirm that there was an extension of time approved by the client. It was his evidence that he was not aware of any latent defects after the completion of the project. He however indicated that the claim for redundant electrical material and iron mongery was not justified. Further that the claim for unplanned financial assistance is also not justified.
- [13] It was put to Mathabatha during cross examination that he overstepped and mismanaged the project as indicated in the minutes of a meeting held with the defendant in March 2010. He denied the allegation and explained that he was never given an opportunity to respond to those minutes. He did confirm that the increase of the work had an impact on the project and it could not be completed within the stipulated period of nine months.
- [14] Mr Mothusi Monye (“Monye”) was employed as a Project Manager for the defendant and in 2006 he was assisting his principal to convert Moretele College into offices. He signed the JBCC as a witness for the defendant and was involved in the project. Monye testified that they visited the site fortnightly and if there were any delays, the consultants would advise the plaintiff as the contractor to issue a notice of delay and then apply for extension from the defendant. He did remember that there was delay caused by the shortage of water on site and some delays were caused by the end departments who were to take occupation of the offices. The upgrade of the sewerage also caused some delays according to Monye.
- [15] During cross examination, Monye testified that the delays as a result of the water shortage, sewerage additional work were not as a result of the conduct of the plaintiff.
- [16] The other witness for the defendant was Ms Emelda Mati (“Mati”) who is employed by the defendant as a Chief Quantity Surveyor. She only became involved in the Moretele project when she had to investigate a claim by the plaintiff. She testified that when submitting a claim, a contractor cannot claim for something that is not priced in the BOQ. According to her, the claim for recovery of office overheads was not in terms of the agreement and should have been priced as a variable.
- [17] The last witness to testify was Mr Eric Mafanywa (“Mafanywa”) who was the appointed Quantity Surveyor for the project. He also testified that at the commencement of the project there were drawings submitted and the plaintiff had not prepared the programme of works. It was his testimony that every payment certificate had to be approved by him as the Quantity Surveyor and if a payment certificate did not have his name and signature, it was not prepared by him. Mafanywa testified that the claim for office overheads was not included or priced in the BOQ and as such cannot be allowed. The same applied to the claim for overdraft facility interest.

- [18] It was stated by Mafanywa that the plaintiff was not entitled to claim for idle labour as labourers are paid per hour, which meant if they were not working they could not be paid. As far as redundant iron monger was concerned, he testified that he never saw such on site and the claim cannot stand. It was his version that the redundant electrical material was paid for and as such there should be no claim for redundant electrical material.
- [19] As the defendant has conceded payment of claim 2, the issue remaining is whether the plaintiff has succeeded to make out a case for the payment of claim 1 in the amount of R5 306 820-91.
- [20] It was submitted on behalf of the plaintiff that based on the defences raised by the defendant during the testimony of its witnesses, the claims for removal of Block A3 and redundant electrical material and iron mongery were not proven on a balance of probabilities and abandoned. The submissions were thus only made in relation to the claims for unplanned and unscheduled financial assistance, idle labour and recovery of Head office overheads.
- [21] The plaintiff's case is that the work was completed in a diligent manner and no latent defects were raised or pointed out by the defendant. As such the final completion of the project as defined in the JBCC was reached free from all defects. On the issue of delays it was submitted that Monye on behalf of the defendant indicated that the delays of water, sewerage and additional work were not as a result of the conduct of the plaintiff but that of the defendant. Consequently, the defendant should then be held liable for the payment as a result of the delays.
- [22] Plaintiff argued that the delay claims were submitted in accordance with the JBCC agreement and they were discussed at the meeting held on 5 March 2010 which was held before the final completion certificate was issued. There was correspondence from the plaintiff in a letter dated 20 February 2009 addressing the issue of extension of time claims. There were delay claims submitted and were paid by the defendant. The plaintiff's case is that payment of those claims show that they were submitted in line with the JBCC agreement.
- [23] In contention the defendant argued that the relationship between the parties is regulated by the JBCC agreement signed and both parties should fully comply with the terms thereof. The defendant submitted that the plaintiff failed to comply with clause 29.4.3* which provides that the contractor should notify the principal agent once aware of potential delay of the intention to submit a claim. Defendant's case is that the plaintiff should have applied for a revision of the date for practical completion because failure to do so could result in the loss of possible claims. According to the defendant the plaintiff in this matter failed to produce any notice given in respect of each time delay to prove that such delay was as a result of the defendant's conduct.

- [24] The defendant's argument was also that the plaintiff did not comply with clause 29.5 of the JBCC agreement by failing to prove that it submitted a claim to the principal agent within 60 (sixty) working days of the delay season. Failure to do so results in the forfeiture of such claim. According to the defendant the plaintiff submitted its delay claim way after the period of sixty days had passed and as such the claim is out of time and not in compliance with clause 29.5 of the JBCC agreement.
- [25] The plaintiff discovered minutes of a meeting held on 5 March 2010 wherein the delay claims were discussed. This was not disputed by the defendant. There was also correspondence between the plaintiff and the defendant pertaining to the submission of the extension of time claims. The defendant paid some of the time claims submitted by the plaintiff which meant that the extension of time claims were submitted in accordance with the agreement.
- [26] The relationship between the plaintiff and the defendant in this matter is based on a contract that is referred to as the JBCC agreement. In the main the plaintiff's claim is based on the delay in the finalisation of the project of the renovation of the Moretele College into offices. Clause 29 of the JBCC deals with the "Revision of date for practical completion". The relevant parts of the said clause are from 29.2 and provide that:

"29.2 The circumstances for which the contractor is entitled to a revision of the date for practical completion and for which revision the principal agent shall adjust the contract value in terms of 32.12 are delays to practical completion caused by:

29.2.1 Failure to give possession of the site to the contractor in terms of 15.2.1

29.2.2 Making good physical loss and repairing damage to the works in terms of 8.0 where the contractor is not at risk

29.2.3 Contract instructions not occasioned by default by the contractor

29.2.4 Failure to issue or the late issue of a contract instruction following a request from the contractor

29.2.5 Late acceptance by the principal agent of a design undertaken by a selected subcontractor where the contractor's obligations in terms of 4.3 have been met

29.2.6 Suspension or cancellation invoked by a nominated or selected subcontractor due to default by the employer or the principal agent in terms of 38.1

29.2.7 Insolvency of a nominated subcontractor

29.2.8 A direct contractor

29.2.9 Opening up and testing of work and materials and goods in terms of 17.1.5 and 17.1.6 where such work is according to the contract documents

29.2.10 The execution of additional work for which the quantity included in the bills of quantities is not sufficiently accurate

29.2.11 Late or failure to supply materials and goods for which the employer is responsible

29.3 Further circumstances for which the contractor is entitled to a revision of the date for practical completion are delays to practical completion caused by any other cause beyond the contractor's reasonable control that could not have reasonably been anticipated and provided for

29.4 Should a circumstance as listed in 29.1, 29.2 or 29.3 occur which could, in the opinion of the contractor cause a delay to practical completion the contractor shall:

29.4.1 Give the principal agent reasonable and timeous notice of such a circumstance

29.4.2 Take any reasonable practical steps to avoid or reduce the delay

29.4.3 Within twenty

(20) working days from the date upon which the contractor became aware or ought reasonably to have become aware of the potential delay notify the principal agent of his intention to submit a claim for a revision to the date for practical completion or any previous revision thereof resulting from such delay, failing which the principal agent shall not consider such claim

29.5 The contractor shall, within sixty (60) working days of the delay ceasing, submit such claim to the principal agent, failing which the contractor shall forfeit such claim

29.6 Where the contractor requests a revision of the date for practical completion the claim shall in respect of each circumstance separately state:

29.6.1 The relevant clause or clauses of 29.1, 29.2 or 29.3 on which the contractor relies

29.6.2 The particulars of the cause of the delay

29.6.3 The extension period claimed in working days, and the calculation thereof.”

[27] Another important clause in relation to the issue in this matter is clause 32 which provides that:

“32.0 ADJUSTMENT TO THE CONTRACT VALUE

32.1 The principal agent shall determine the value of adjustments to the contract value according to the bills of quantities/lump sum document. Where items of additional work are required the principal agent and the contractor may agree on the adjustment before the commencement of such work

32.2 Adjustment to the contract value resulting from a contract instruction shall be determined as follows:

32.2.1 Items of additional work of similar character and executed under similar conditions shall be priced at the rates in the bills of quantities/lump sum document

32.2.2 Items of additional work not of a similar character or not executed under similar conditions shall be priced, where applicable, at rates based on those in the bills of quantities/lump sum document and adjusted to suit the changed circumstances

32.2.3 Where 32.2.1 and 32.2.2 cannot be used to determine the value of additional work, such work shall be priced at new rates that take into account the labour, engineering, drawings, material, transport and plant necessary for executing the work plus an allowance of ten per cent (10%) mark-up thereon

32.2.4 Items of work omitted shall be valued at the rates in the bills of quantities/lump sum document, but where the omission of such work varies the circumstances in which the remaining work is carried out, the value of the remaining work shall be determined by the method in terms of 32.2.2

32.3 Where work has been identified in the bills of quantities/lump sum document as provisional, the principal agent shall omit the value thereof from the contract value and the work as executed shall be valued in terms of 32.2 and added to the contract value

32.4 Where the contractor has paid charges for items that are not included in the bills of quantities/lump sum document, the actual amounts paid by the contractor plus a ten per cent (10%) mark-up shall be added to the contract value for the following:

32.4.1 Charges in terms of 7.1

32.4.2 The cost of opening up and testing in terms of 17.1 .5 and 17.1.6, provided that the contractor shall bear the cost thereof should the test show' that the work is not according to the contract documents

32.4.3 The cost of insurance in terms of 12.3

32.4.4 The cost of support insurance in terms of 11.2

32.5 Where the contractor has incurred expense and loss arising from a circumstance for which provision was not required in the contract sum and for which reasonable compensation has not been made in terms of 32.2 and 32.12, the contractor shall provide details of such an expense and loss to the principal agent in terms of 32.6. Such circumstances

32.5.1 The issue of a contract instruction

32.5.2 Failure to issue or the late issue of a contract instruction following a request from the contractor

32.5.3 Nondisclosure of changes made to the provisions of JBCC standard documentation in terms of 3.10

32.5.4 Expense and loss caused by a direct contractor in terms of 22.0

32.5.5 Default by the employer or his agents

32.5.6 Suspension or cancellation of a selected or nominated subcontract due to default by the employer or his agents

32.5.7 Default or insolvency of nominated subcontractor

32.6. The contractor shall notify the principal agent within forty (40) working days from becoming aware or from when he ought reasonably to have become aware of such expense and loss in terms of 32.5 failing which no compensation will be made. Where such notification has been given

32.6.1 The contractor shall submit details of the expense and loss once these can be quantified

32.6.2 The principal agent shall make a reasonable assessment of the compensation to be added to the contract value within twenty

(20) working days of receipt of such details

32.6.3 The claim shall be deemed to have been refused where the principal agent fails to make such an assessment

32.7 The principal agent shall omit the nominated and selected subcontract amounts from the contract value and determine the amounts as the final account value of the respective subcontract works to be added to the contract value

32.8 The principal agent shall prorate the contractor's attendance and profit on the nominated and selected subcontracts in the contract sum to the value of each subcontract in terms of 32.7 excluding any allowance for CPAP

32.9 The principal agent shall omit budgetary allowances and any other monetary provisions from the contract value and determine the value of work related thereto in terms of 32.0 to be added to the contract value

32.10 The principal agent shall omit prime cost amounts from the contract value and the actual delivered cost of such items, including a reasonable allowance for waste, shall be added to the contract value

32.11 The principal agent shall prorate the contractor's allowances for overheads and profit on prime cost amounts in the contract sum to the value of each item in terms of 32.10

32.12 The preliminaries amounts in the bills of quantities/lump sum document shall be paid and adjusted in terms of the JBCC Preliminaries alternatives selected by the contractor and stated in the schedule

32.13 Unless otherwise stated the contract value shall be adjusted according to CPAP using the information stated in the schedule

32.14 Where adjustments need to be measured on the site the contractor shall be given the opportunity to be present and shall be supplied with a copy of the measurement

32.15 The principal agent shall rectify all identified discrepancies, errors in description or quantity, or omission of items from the contract documents. Such rectification shall be treated as an adjustment to the contract value where there is a monetary implication”

[28] In determining the terms of a contract in relation to a dispute between the parties, the court needs to look at their intention from the words used in the context of the contract as a whole and its purpose and what it intended to achieve. See: KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) and Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016 (1) SA 518 (SCA).

[29] In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012

(4) SA 593 (SCA) at para 18 Wallis JA held that:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

Head office Overheads

[30] The plaintiff submitted that this claim was calculated using the Hudson Formula as set out in the H.S McKenzie’s fifth edition of The Law of Buildings and Engineering Contracts and Arbitration. The calculation was done as follows:

“5.25. The financial claim document submitted by the plaintiff informs the manner in which this claim was calculated. It stipulates the following:

'With reference to the Hudson Formula as set out in H.S McKenzie's fifth edition of The Law of Building and Engineering Contracts and Arbitration pages 51 to 54 attached for your convenience.

Our rates provide for the recovery of Head Office Overheads at a rate of 5.5%.

Based on the contract price of R47 667024.73 before contingencies, CPA and VAT, this amounts to R2 621 686.30 over a period of 9 months the contractor would recover an average of R291 298.47 per month.

With the Extension of Time claim, the contract period will extend by 15 months and therefore the contractor will only recover Head Office Overheads at a rate of R109 236.92 per month.

This equates to a shortfall of R182 061.55 per month for 15 months.

The contractor claims for compensation for the under recovery of Head Office Overheads
= R182 061.55 x 15 months”

[31] It was argued that as a result of the extension and delay there were additional expenses as the plaintiff had to be on site for a longer period. Further that the plaintiff had included the rate of 5,5% in the BOQ for head office overheads.

[32] In contention the defendant argued that this claim is not in line with the JBCC agreement and not provided for in the BOQ. The defendant’s case is that the plaintiff tendered its price for the work which included its profit which is the reason why the plaintiff was awarded the tender. When the work was increased the value of the contract increased as well and the adjustment was then based on the prices provided by the plaintiff in the BOQ. This claim according to the defendant is deemed to be included as a profit and priced as such in the BOQ. Therefore the plaintiff is not entitled to the amount claimed.

[33] During the evidence for the plaintiff, Webb testified that the extension of the contract resulted in expenses because it meant that the contractor would be on site longer. Further that the rate in the BOQ is derived from the rate build up which the defendant has no knowledge of how it is calculated. The defendant’s quantity surveyor could not deny or confirm that the plaintiff had included 5.5% in terms of his pricing and his rates for head office overheads. If then this issue of the plaintiff having included the 5.5% in the rate build up in the BOQ to provide for the head office overheads was accepted by the defendant, the plaintiff did suffer loss as a result of the extension of time delay. This therefore means the plaintiff is

entitled to the claim for head office overheads.

Idle Labour

[34] According to the plaintiff the labourers were employed to do work that included the operation of equipment and when the equipment stood idle the labourers could not work. The defendant had paid the plaintiff for the equipment that stood idle and as such it goes without saying that the idle labour should form part of that payment.

[35] The defendant's case herein is to the effect that the plaintiff failed to comply with clause 29.2 and 29.6 of the JBCC agreement in respect of idle labour. It was submitted that the plaintiff did not serve any notice on the Principal Agent or the defendant indicating the particulars of the delay, the extension of the period claimed and what the plaintiff did to mitigate the impact of the delay. As such the plaintiff cannot be entitled to the amount claimed for idle labour.

[36] It was not disputed that the defendant paid the plaintiff for the equipment that stood idle for extensive period of time due to time delays. The explanation by the plaintiff that there were labourers hired to operate the equipment is not unreasonable. There is no reason why the claim for idle labour should not be paid.

Provision for unplanned and unscheduled financial assistance to the project during the extension of time.

[37] Plaintiff's case is that as a result of the extension of the contract, there was interest paid in respect of the overdraft facility used to finance the project for the extended period. This claim therefore emanates from such interest paid. It was argued that as the defendant conceded that documentation in respect of an overdraft facility in the amount of R4 000 000-00 was submitted, that informs that the claim for interest for the extended period is proven.

[38] It was argued for the defendant that the contract was extended for 15 months and as such the contract value was increased as well. As the plaintiff failed to comply with clause 29.6 of the JBCC agreement it cannot claim any entitlement to the amount claimed under this claim. In essence the defendant's case is that the plaintiff failed to comply with the terms of the JBCC and produce proof that the delay claim was submitted within 60 working days. As such the plaintiff's

delay claim is deemed to be forfeited.

[39] The defendant conceded the documents submitted by the plaintiff that an amount of R4 million rand was obtained as overdraft facility for the contract. The contract time was extended and it goes without saying that the original overdraft amount would automatically increase and the plaintiff is entitled to such payment.

[40] The plaintiff has succeeded on a balance of probabilities to establish its entitlement to the claims relating to head office overheads, idle labour and provision for unplanned and unscheduled financial assistance. In relation to claim 2 the defendant conceded that the plaintiff is entitled to the said payment.

Costs

[41] I can find no reason why costs should not follow the result.

Order

[42] In the result the following order is made:

Claim 1:

1. The defendant is liable for:

1.1 Payment of an amount of R2 730 923.20, plus 14% VAT, in respect of Head Office Overheads;

1.2 Payment of an amount of R329 700.00, plus 14% VAT, in respect of Idle Labour;

1.3 Payment of an amount of R700 000.00, plus 14% VAT, in respect of unplanned and unscheduled financial assistance;

2. Interest on the aforesaid amounts at a rate of 15.5% per annum from date of claim to date of final payment; and

1. The defendant is liable for payment of an amount of R555 794.08 in respect of the retention amount due;

2. Interest on the aforesaid amounts at a rate of 15.5% per annum from date of claim to date of final payment.

3. Defendant is ordered to pay costs of suit.

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

APPEARANCES

DATE OF HEARING

: 19 MAY 2021

DATE OF JUDGMENT

: 19 AUGUST 2021

COUNSEL FOR THE PLAINTIFF : ADV KOTZE

COUNSEL FOR THE DEFENDANT : ADV MASILO

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