IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE CIRCUIT LOCAL DIVISION, EAST LONDON)

Case No: EL459/15

5/6/2018

In the matter between:

AVENG GRINAKER **PLAINTIFF**

and

MEC DEPARTMENT OF HUMAN SETTLEMENTS **DEFENDANT**

JUDGMENT

MAGEZA AJ

[1] This is a claim brought by plaintiff against defendant for the payment of a sum of R3 038 972.00 reflected in an *'interim payment certificate'* issued and authorised by a principal agent, Mr Dennis Taylor for payment by defendant. The claim arises pursuant to a construction services bid awarded to plaintiff by the defendant for the rectification of defectively built homes in the Mount Ayliff Municipal area.

[2] For purposes of regulating the relationship between the parties to the project, two agreements were concluded and dated 21 June 2012 and these are collectively, the Joint Building Contractors Committee (JBCC) [2000] Agreement and a Funding Agreement. It is common cause that the JBCC Agreement is an industry standard building contract. The second document, the Funding Agreement, is a document generated by the department regulating various aspects relating to the provision of

housing. Mr Gregory Bradford, an engineer employed by plaintiff and Mr G. Sharpley as head of the department of human settlements (the defendant), respectively represented the plaintiff and the defendant and are signatories to both documents.

[3] The preface of the JBCC agreement denotes that the document is an industry agreement –

> *"…compiled in the interests of standardisation and portray(s) the consensus view of the Joint Building Contracts Committee of good practice and an equitable distribution of contractual risk. The document sets out a clear, balanced and enforceable set of procedures, rights and obligations, which when competently managed and administered, protect the employer, contractor and subcontractors alike…"*

[4] Important Clauses contained in the '*Definitions and Interpretation'* are set out and I enumerate some of these as follows -

Clause 1.1:

'Agreement' – "*means this JBCC Principal Agreement and other contract documents that together form the contract between the employer and contractor*".

'Payment Certificate' – "*means a document issued by the principal agent certifying the amount due and payable by the employer to the contractor or vice versa"*.

'Principal Agent' – *"means the person or entity appointed by the employer and named in the schedule".*

Clause 1.8:

"This agreement is the entire contract between the parties regarding the matters addressed in this agreement. No representations, terms, conditions or warranties not contained in this agreement shall be binding on the parties. No agreement or addendum varying, adding to, deleting or cancelling this agreement shall be effective unless reduced to writing and signed by the parties".

Clause 2.1:

"The objective of this agreement is the execution of and payment for the works for which there has been an offer by the contractor and an acceptance by the employer".

Clause 5.1:

"The employer shall appoint the principal agent as stated in the schedule. The employer warrants that:

5.1.1 The principal agent has full authority and obligation to act in terms of the agreement.

Clause 5.3:

"The principal agent shall be the only person who shall have the authority to bind the employer, except where agents issue contract instructions under the delegated authority in terms of 5.3.2. Without delegating from the above, the principal agent shall be the only person empowered to:

5.3.1 Issue contract instructions, except as provided for in terms of 5.3.2

5.3.2 Delegate to other agents, authority to issue contract instructions and perform such duties as may be required for specific aspects of the works, provided that the contractor is given notice of such delegation"

The role of the principal agent:

[5] It is generally accepted in the South African and International building industry that the Joint Building Contracts Committee (JBCC) - Principal Building Agreement makes provision for the contractual participation of various professional service providers within the construction industry including architects, engineers and quantity surveyors. It is an industry norm that the contract once concluded, constitutes an essential tool for organising and managing all risks, rights, duties, responsibilities of the co-contractors that may surface and affect parties involved in building works.

[6] The principal agent represents the employer, is not a party to the JBCC agreement and is a key independent professional role player with extensive authority to bind the employer. His or her role contributes to the strength or weakness of the

entire building project and manages the services of all consultants during project implementation, ensuring the best interests of the employer. The principal agent issues instructions on behalf of the employer (presumably in good faith) and binds the employer. In the course of the works the employer is not precluded from appointing other professionals for additional oversight.

[7] The employer warrants that the agent has full authority and the only person authorized to bind the employer and issues payment certificates each month. The employer is bound to pay to a contractor the amount certified by the principal agent within 21 Calender days.

Evidence of Mr Gregory Bradford on behalf of plaintiff:

[8] The only witness called on behalf of the plaintiff was Mr Bradford and he testified that sometime in 2012, the plaintiff responded to a general bid invitation to tender issued by the defendant for the rectification of defectively built houses totalling 700 hundred units in Mount Ayliff, district of the Alfred Nzo Municipality. The defects were a result of poor construction workmanship rendered.

[9] In the course of his evidence he stated that the bid price was an inclusive bid-price of R59 417 491.00 and implementation entailed that the works be assessed, re-measured, and inputs be quantified by a quantity surveyor. He explained the process by making reference to analogies including, *inter alia,* that the necessary amount of concrete was agreed and quoted at a price-rate per cubic meter and this also depended on the strength of the concrete and where it was to be utilised.

[10] The agreed format was that brick-work or block-work would be 140mm or 110mm and plaintiff priced the same assessing (together with the principal agent), product needs for the project and together (jointly) priced each in line with the Bill of Quantities, a tool that yields estimated figures. Each item would then be priced at a rate. This included pricing windows and other items required to produce the correct result in all the 700 houses to be rectified.

[11] The commencement date provided for in the agreement was 15 March 2012 and, although this was the case, based on an earlier agreement between the parties,

plaintiff commenced the works (earlier than contemplated) in October 2011. He explained that the Bill of Quantities is a working document which generally reflected an 'over or under' estimate re-measurable and reconciled at the end the project or contract term.

[12] At page 118 (A5) and 152 (A39) Clause 42.4.3 of the JBCC Agreement [page 151 of the bundle] (A38) states 42.4.3 Bill of Quantities, state measuring system, standard system of measuring building works, 6th Edition. This is a standard measuring system using square blocks. A5 of the bundle deals with the definition of the stage of completion as being – [Final completion page 118 (Heading)] – *"...the stage of completion where, in the opinion of the principal agent, works are free of defects".*

[13] At page 131 under clause 5 – employers agents - 5.3.1 states *'the principal agent shall be the only person who shall have the authority to bind the employer, except where agents issue contract instructions under delegated authority. The agent is the state's fully authorised representative on site* – See (5.1 and 5.1.1). See also page 125, (A12) in bundle and **15.2.1#** (denotes government project).

[14] He testified that from commencement of the works, plaintiff was not afforded possession of the site because there were people in occupation of some of the defective properties and it was defendant's contractual duty to ensure people were timeously moved from the site. The defendant also failed to provide a transition camp for those in occupation as undertaken in the rectification agreement. This naturally caused delay in the substantive commencement and implementation of the project in line with the agreement.

[15] At page 132 (A19) clause 26, the contract makes provision as follows– Final Completion – *"A certificate of final completion issued in terms of clause 26.0 shall be conclusive evidence as to the sufficiency of the works and the contractor's obligations in terms of 2.0 and 15.0 have been fulfilled other than for latent defects."* # At page 146 (A33) clause 26.6 also provides that – *"A certificate of final completion issued in terms of 26.0 shall be prima facie evidence as to the sufficiency of the works and that the contractor's obligations in terms of 2.0 and 15.0 have been fulfilled other than for latent defects".*

[16] Once the certificate is correctly signed, Clause 26 on page 132 read with 146 and 26.6, the certificate of completion shall constitute proof that contractual obligations have been fulfilled. The certificate is issued by the principal agent. At page 31 Plaintiff's trial bundle- exhibit 'A', is copy of the document is signed by Plaintiff; Mr Dennis Taylor as principal agent; Mr Pikwa of the Mount Ayliff Municipality; Also signed on behalf of Human Settlements by a Mr Beja.

[17] At para 29.2# State provision, are the circumstances for which the contractor is entitled to revision of the date for practical completion and for which revision, the principal agent shall adjust the contract value in terms of clause 32.1.2 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."*

[18] Para 29.3 deals with *"Further circumstances for which the contractor is entitled to 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 reasonably not have been anticipated or provided for*."

[19] Mr Bradford testified that the result would be that the contractor is entitled to revision of the date for practical completion caused by any other reason beyond the contractor's reasonable control that could reasonably not have been anticipated and provided for. He stated by way of illustration that if the company has a big building team, it costs a lot of money daily to retain and provide accommodation and to pay wages/salaries. He stated that in this case, defendant failed to do what it was supposed to do. Ultimately this, according to him, was what this trial was about.

[20] At page 134 of the bundle (A21), clause 31 deals with interim payment. The provision states: *"The principal agent shall issue an interim payment certificate every month until the issue of the final payment certificate. The payment certificate shall be based on a valuation prepared within seven calendar days before the stated date in the schedule which may for a nil or negative amount."*

[21] He further testified that the administration and effecting of payments was done by the defendant – The Eastern Cape Department of Human Settlements - through its Kokstad offices. Throughout the project, that office would verify the work done and then convey reports to the defendant's East London head office which would then

make the payment. The principal agent issued all the monthly payment certificates. The principal agent had two employees of its own on site monitoring the works. Payments in terms of the JBCC contract were to be made by defendant within 21 days. All the monthly payment certificates were paid by the defendant.

[22] He testified that the State clauses are subject to 5.1.2 (page 144 - (A31) *"In terms of the clauses listed hereunder, the employer has retained its authority and has not given a mandate to the principal agent. The employer shall sign all documents in relation to clauses 19.2; 20.1; 20.7; 26.2.1; 26.3.1; 29.1; 29.2; 29.4.1; 29.4.3; 29.7; 29.8; 32.1; 32.6.1; 32.6.2; up to 32.6.3; 32.1.5; and 34.3. Copies of the signed document shall be provided to the principal agent."* Clause 32.5 provides for contract value adjustment.

[23] Provision 32.5 allowed for instances *"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."* These include instances of default by the employer. The principal agent had to be timeously advised.

[24] He stated that the document referred to herein as "the funding agreement" and which document he was made to sign subsequent to the award had not been referred to in the bid invitation at the time of advertising and later award. The funding agreement was only produced by the defendant after they had started to do the work and after the JBCC agreement had been signed.

[25] Following the completion of the works, the principal agent wrote to the department on 6 May 2013 to inform it of the 'extension of time' claim caused by the delays in the Mount Ayliff project. The letter refers to 'preliminaries and general costings' and was addressed to Mr Beja of the defendant. Mr Bradford said they had worked well with Mr Beja throughout the contract. The concluding advice of the principal agent in the letter to the defendant reads:

> *"… We have examined the claim in detail and advise in terms of clause 29.7 that the client reduce the same to 80 working days as their contract period had been revised to the 3rd of March 2013 after claim number two. In accordance*

with such finding we hereby advise that the date of Practical Completion be extended to the 3rd of July 2013. The contract sum shall be adjusted by R3 038 972.00 as calculated below. Time related P&G's R9 496 789.56 divided by 250 working days = R37 987.15 per working day. Therefore R37 987.15 x 80 days = R3 038 972 adjusted contracted value."

[26] Subsequent to the claim and supporting documents being submitted to Mr Dulani (the regional director of human settlements) in and around October 2014, there were delays in the settlement thereof. The impasse remained unresolved even after numerous back and forth efforts between defendant and plaintiff, following which plaintiff's attorneys made demand for payment on 28 January 2015. A string of emails resulted and were exchanged between plaintiff's attorneys and the defendant. Plaintiff's attorneys received a response from Provincial Treasury office advising that the said office was in consultation with the department to resolve the matter.

[27] In February 2015 plaintiff received a telephone call from defendant's East London finance department offices for a representative of the plaintiff to go in and sign a payment certificate. Mr Bradford said this was standard practice before a payment was done and finally transmitted. He went and signed the certificate of payment and authorisation certificate for the amount of the extension of claim of more R *R3 038 972*. Ms Lokwe and Mr Beja were there representing defendant and he was told by them that payment would be made in a few days.

[28] Payment was not made. Instead plaintiff's attorneys received another letter indicating that the department was still looking into the matter. This letter was signed by a Mr Mbiza. The matter was taken up again by plaintiff's attorneys with the Provincial Treasury and that office firmly advised that payment would be made no later than the following Friday 27 February 2015. In the communication the plaintiff was also informed that the department had been advised to effect payment by the 27 February 2015. The payment never came through.

[29] Cross-examined by Ms Norman for the defendant, it was put to Mr Bradford that the invoice submitted had made no reference to standing time for delays. It was put to Mr Bradford that the invoice was worded as a clam for work done less, retention in an amount of R3 038 972.00. He explained that the certificate 32 complies with how valuation of the works is undertaken and that what is valued are extensions of time,

variations etc. He responded that when submitting construction work related invoices, there is nowhere where there is a heading *"invoice for standing time".*

[30] Mr Bradford confirmed that the claim was indeed for non-payment of an *'extension of time claim'* and monies due to plaintiff for standing time. Counsel pointed out that nowhere in the Summons and Declaration is the claim stated to be for 'standing time' but was instead specified as a claim for work done. Plaintiff agreed and stated that the annexure describes the precise nature of the detail for which the payment is sought. Defendant's counsel objected to this and put it to the witness that nowhere in the annexure was this spelt out clearly. The detail specifies *'Certificate number 32, value for work executed is R3 038 972.00'.*

[31] Ms Norman cross-examined Mr Bradford at length and covered the entire background that had been dealt with by Mr Bradford in so far as the history of the commencement of the contract; the availing of site occupation and the nature of the stand-off between the department and plaintiff in initially refusing to sign the funding agreement.

[32] One lucid starting point is that defendant's counsel in cross-examination was emphatic about in the defence's view, was that the payment for delay-claim; standing time and/or P's and G's was impermissible and fell outside of the ambit of the principal agent to approve. The view expressed was that all the principal agent could do in these circumstances would be to submit the claim but that final approval was the prerogative of the department. The intimation in cross-examination was clearly that the funding agreement, as detailed in clause 6.1.6 was decisive with regards to approval of payment and that, what the clause contemplated was the Head of Department – Mr Sharpley alone who could approve such a claim. In addition to the aforegoing, it was very evident throughout cross-examination that the defendant was suspicious given the delay of a year and the manner and nature of the narration surrounding the premise on which the claim was submitted.

Evidence of Mr Boyd Madikizela

[33] Mr Boyd Madikizela is employed by defendant as its legal advisor and his functions include, *inter alia*, providing legal opinions to the Head of Department, Mr

Sharpley. He said his work was *"… mainly just to brief the KPA's, drafting contracts, legal opinions to the CEO and HOD".*

[34] In leading his evidence, counsel referred the witness to page 6 of the JBCC Agreement and enquired from the witness who within the department signs agreements on behalf of the department and he said, *"the appointing officer and the accounting officer as the head of department"*.

[35] Counsel asked the witness - (p 218 – 219 of record) –

> *"… Why it is necessary that payments that are made in terms of this project should be made in terms of the price that has been tendered for and accepted and that the price cannot be adjusted, without the head of the department sanctioning that?". The witness replied:*
>
> *"Thank you. What happens is that the mandate for delivering housing communities is obtained from section 26 of the Constitution. That gives the right to adequate housing within available resources. From that section 26 the legislature created a piece of legislation called the Housing Act, which mandates the Minister to come up with the housing laws and housing court on how housing delivery will be done. So, it is that housing court therefore that says the MEC, when releasing the money pay instrument and this instrument used there was the rural housing instrument. When the MEC is releasing that money for the housing project there must be a funding agreement that specifies how the funds will be released. So, the approval of the project is done by the executive authority who is the MEC…*
>
> *So that instrument stipulates one, firstly the budget that the Minister must utilise under the rural housing policy and that is called the quantum and that quantum is an amount that specifies that each beneficiary of a subsidy from government must get so much and the amount is the same for all beneficiaries and it is fixed…"*

[36] Mr Madikizela then set out numerous processes that had to do with the defendant's own internal arrangements on diverse matters surrounding beneficiaries and how they qualify for subsidies. He testified that he drafted the funding agreement in this matter and had met with Mr Bradford. He denied that he had threatened Mr Bradford to ensure that he signed the funding agreement. He referred to adjustments which must be made where a contract price changes.

[37] The appointment letter was provided in September 2011. He said the contract value and price is fixed and cannot be adjusted midstream and only the accounting officer could do so and approve a contract variation exercise through what he termed an addendum to the contract. This precluded the payment of the final invoice submitted since no adjustment of the contract price had been made and could not have been possible.

[38] He and Mr Mbiza (department legal advisor who also testified and confirmed his evidence) had no capacity to do a contract value adjustment because the Public Finance Management Act devolves this capacity on the accounting officer Mr Sharpley as head of the department.

[39] Mr Sharpley also testified and confirmed that he is the defendant department's accounting officer responsible for payment approvals in the project. He was presented a memorandum prepared on 16 October 2014 by his departmental officials recommending payment of R3 038 972.00 to plaintiff. He said he declined approval of the claim on the basis that the contract concerned did not make provision for the stated payment.

[40] He conceded that Mr Dlulani of his department and the principal agent had recommended payment. Mr Galahitiyawa also did not have authority to pay amounts beyond R2 000 000.00. All amounts in excess of R2 000 000.00 had to be approved by him. The principal agent ought to have applied for an adjustment to the contract for additional funding which he had not done.

<u>Evidence of Mr Suresh Galahitiyawa</u>

[41] Mr Galahitiyawa said in evidence that he is Chief Director for Project Management and Quality Assurance and he can sign for up to R2 500 000.00 He said the powers to approve are with the accounting officer, Mr Sharpley. He however admitted that he had made recommendations to the Chief Financial Officer to pay the claim.

[42] The reason stated why the claim was not paid by the accounting officer was because such a claim was not provided for in the contract. All this, despite the fact that letters exchanged within the department and the plaintiff directly and through their legal representatives as well as the provincial treasury department endorsed approval and payment of the claim.

Evidence of Mr Dennis Taylor - the Principal Agent:

[43] The principal agent Dennis Taylor is a Quantity Surveyor and he confirmed that although the contract provided for the rectification of 700 units at a total contract price of R59 417 000, those capable of rectification amounted to 651 units. The remainder had to be destroyed due to these having been impermissibly built on a flood buffer zone and were consequently removed from the scope of the works. Although the contract price was R59 417 000, only R52 535 000 was paid on the basis of payment certificates issued for all undisputed work done. A difference of R7m remained.

[44] He testified that despite the contract being a rectification type contract, some of the properties had to be built from scratch and yet some had to be totally destroyed and not rectified. He said in his evidence (p562) *"So it wasn't a fault of Grinaker that they didn't complete the whole thing, they were removed through negotiations with the Department…"*

[45] He said he was the principal agent appointed to administer the contract on behalf of the department. During cross-examination, Mr Mtshabe drew his attention to page 99 of the funding agreement at 'A64' and 'A65'. 6.1 thereof provides as follows:

> *"6.1 The Contractor shall be paid the contract price in Clause 5.1 above strictly in terms of the HSS progress payment system as encapsulated in the National*

Housing Code, as amended, from time to time by the Minister of Human Settlements.

6.1.1 Payments to the Contractor shall be made in terms of milestones actually achieved on the housing units and the Department shall not pay for materials inside."

[46] With reference to 'milestones', Mr Taylor said although he could not recall with precision, these included surface beds and wall plates, roofs and then finishes. He was (as he put it) "not 100% sure" that these were the only components of 'milestones'.

[47] He acknowledged that in paragraph 6.1.6 of the funding agreement reads – *"A payment claimed by the Contractor becomes valid when it has been accepted and certified by the Department."* He was, simultaneously with this provision, referred to Clause 29 of the JBCC agreement at 'A29' on page 133 -

Clause 29.2# reads –

"The circumstances for which the contractor is entitled to a revision of the date of Practical Completion of which the revision of the Principal Agent shall adjust the contract value in terms of 32.12 are delays to the Practical Completion caused by:

29.2.1 failure to give possession of the site to the Contractor."

[48] Mr Mtshabe then put it to him that the plaintiff's claim in this matter was for standing time (not for work done). In answer to a question whether he knew of any stage when the defendant had failed to give possession of the site to plaintiff, his answer was – *"The client failed to give possession of the site to the Contractor"* (P566 of record)

[49] Mr Mtshabe emphasised that plaintiff's claim was for standing time. He emphasised in cross-examination that although this was the case, the claim was presented by the principal agent and plaintiff and motivated as follows: –

> *'In accordance with such findings, we hereby advise that the date for Practical Completion be extended to the 3rd July 2013. The contract sum shall be adjusted by R3 038 972.00 as calculated below. Time related P&G's is R9 496 789.00. R.56m plus 250 working days = R 987.15 per working day. Therefore R37 987.15 X 80 days = R3 038 972.00 adjusted contract value.*

It was thereafter accepted by both that it was the principal agent's proposal that the Practical Completion date be adjusted by 80 days.

[50] Mr Mtshabe questioned this basis of computing the calculation and emphasised that the nomenclature used (page 569 of record) was: –

> *"… the claim according to them, their case is that they are claiming for standing time. Maybe you will say in technical words it's preliminaries, but the case has always been that standing time and to that extent was delayed or refused to give them possession as in October 2011".*

[51] Mr Taylor agreed with this broad supposition of how the adjustment was intended to be implemented. In attempting to provide a more expansive answer to the question as to how the adjustment was to be trenched with definitive clarity (taking into account the JBCC read with the funding agreement, the principal agent's answer and comment was the following (p571 of record) –

> *"These documents are not always – you can't just look at that, you can't just look at them and say this is how it works. How I would view the adjustment of the contract value is an adjustment of preliminaries. And we didn't at that stage require an overall adjustment of the contract value because we were still within the overall contract value. We just needed an adjustment of the preliminaries which didn't, because the other houses had been removed, now we didn't go over the R59m. So, to add another R3m to the contract value didn't make sense at the time. It still didn't make sense to me."*

[52] At p577 of the record - line 15, - Mr Taylor acknowledged that he had no authority to adjust the agreed contract value to accommodate a recommended claim, but (I quote) –

> *"… what I can do is I make a recommendation to the Department for the approval of the same in terms of the JBCC Certificate".*

He agreed with Mr Mtshabe that in certificate 32, the contested payment was for those reasons reflected thereon as being '*for work done on the above project'.*

[53] He explained clearly that in extended engagements with Mr Bradford for plaintiff, Mr Beja for the defendant and other officials of the defendant, they would put through this recommendation based on additional preliminaries. He admitted that the recommendation still required approval by the department, but that prior to that happening, they all knew and were told that "*it would not move unless (we) certified it as a Payment Certificate…knowing it still had to be approved, so we never had anything in the Certificate other than the P & G's".*

[54] He said this whole process was done by him to meet the financial consequence of the delays occasioned to the plaintiff. Following this mutually agreed path and once the submission was made, the department appointed people to take the recommendation through the process for approval.

[55] When it was suggested to him that work had not been done his answer was –

> *"The work, if it was approved, if this Certificate and recommendation is approved by the Department, then the work is done. If it's not approved, then*

the work is not done because the value created – it's difficult, I understand that when you're not involved in the Construction Industry and the Industry – it's difficult to differentiate between this panelling that we're seeing over here and preliminaries. The one creates something that you can see...so understand that there's a work done scenario and then there's a preliminaries element that is also running there at the same time. And it's not a tangible thing. This document, the whole Department set-up make it easy like in a normal contract, in a normal JBCC contract where we're running a project with the – not Human Settlements, where there's no milestones and all of that – this process is a lot easier because you just certify the amounts – once it's been approved you can certify and it goes off because the work has been done. The time has been expended on site."

[56] He goes on to say -

"But on this one you've got to try and put it into the milestones and remembering that they've already lost preliminaries because the project value has got smaller, and in those milestones is already preliminaries which they are not asking for back. Under normal circumstances they would actually get those preliminaries back because the contract period hasn't got smaller, they're still going to be there for the same amount of time…."

[57] When asked by Mr Mtshabe what he had based the payment certificate on, he explained –

"I based my Payment Certificates on the value of the recommended preliminaries that were waiting for approval." (page 582 of record).

[58] He was again asked where these recommended preliminaries were since they were not annexed, he pointed out that his prepared recommendations had been

annexed and consisted in a breakdown; schedule; a recommendation for additional preliminaries and so on … to the back of the certificate. Counsel for Plaintiff assisted and pointed out that these were reflected in Exhibit 'A10' and 'A11'. The witness throughout continued to refer to the following - *"The payment related to the preliminaries included in his recommendation."*

[59] It was pointed out that the final rejection of the head of department was phrased as follows:

> *"Not approved.* ***The quantum does not have an allocation for standing time.*** *If the QS and the Contractor considered the Municipality as liable, then they should claim from the Municipality. Legal must respond."*

[60] When he was asked to expand on what constituted *'preliminaries and generals'* in the contract he said these relate *'to various aspects'* of the costs of construction such as cement, bricks and more preliminaries and generals. He agreed that these are an integral part of value on site including management and staff and everything that goes to creating a house is also part of an essential creation of value. He agreed in cross-examination that during the 80 days accounted reflected on the payment certificate, in order to execute the works by plaintiff, preliminaries and generals were being incurred. He said these occur throughout the delay and extended period.

[61] He said the contractual obligation was on defendant to give 'vacant occupation' of the site on 14 October 2011 in line with a pre-determined scheme of works or plan for how the works were to be conducted. If the properties were occupied and no arrangement for their being vacated, then there cannot be possession of the site.

[62] Mr Taylor said in the 80 days without work being done these were incurred from the 14 October 2011 when the obligation to give possession of the site arose. Defendant was informed from the very onset in a letter by Buckland in which he wrote-

"We advise you of delays due to beneficiaries not vacating their old houses thus preventing us from demolishing the houses which form part of our contract."

[63] These delays are also recorded as required by the JBCC contract in detail in site minutes of all the parties including the witnesses who testified for defendant. This was also accompanied by a Bill of Quantities prepared (at the time) by plaintiff and is exhibit "A".

[64] The Bill of Quantities was prepared by his office and in rectification projects where there are uncertainties, this Bill of Quantities is susceptible to change due to inherent uncertainties about the condition of the houses and what is necessary to restore them to sound superstructures.

[65] He said there are always changes to a rectification project and when the parties in this agreement entered into the contract, it was anticipated there would always be adjustments 'up and down' occurring, something quite usual in these rectification contracts given the unavoidable uncertainties. He referred to administering rectification contracts as a difficult exercise, in comparison to green field sites and virgin projects.

[66] He went on to say most of what will be needed or required will always be subject to ongoing change and negotiation. When on site you (at times) find other inputs and work changes, things are not static. In your Bill of Quantities, you may have provided for 1000 cubic meters when you actually need 1500.

[67] In concluding this contract, both parties appreciated was the contract value but it was subject to adjustment, it had to be that way. The contract value was not written in stone.

[68] *"There's three sets of preliminaries, fixed; value and time. (a) fixed is not adjustable at all; (b) value preliminaries that increase if contract goes over the budgeted figure; (c) time preliminaries vary in terms of time spent on site – they are adjusted if you are there for – if the contract period was initially 9 months and it now becomes 10 months and it was not a fault of the contractor or the various clauses, then they are entitled to adjustment of the contract value. In terms of the P&G's they*

are entitled to claim that with costs. They are entitled to claim the time related preliminaries only and they are entitled to claim for that. Did I make sense or not" (page 594)

[69] 'Site establishment' - 'Value preliminaries have to do with the actual issues relating to the work', 'time related are other management and other incurred costs in keeping the contract going, running the contract so to speak.'

Observations:

The argument that authority to sign off payment rests on the head of department:

[70] The argument advanced by the defendant is that clause 6.1.6 and 5.1.2 of the funding agreement precludes approval of payment of the invoice by the principal agent and that only the head of department, Mr Sharpley was permitted to do so. Clause 6.1.6 of the agreement provides –

"A payment claim by a Contractor becomes a valid claim when it has been accepted and certified by the Department." (my underlining).

[71] It was argued by Ms Norman that this is so because Mr Sharpley is the accounting officer within the department. In addition, it was argued that this was evident from the fact that he signed the agreement for and on behalf of the department.

[72] The view advanced by the defendant is premised on its own interpretation of the contractual provision relied upon and this Court has a duty to consider the rules relating to the interpretation of contracts. The fundamental consideration in determining the terms of a written contract or the interpretation of wording in a clause is to discern the intention of the parties from the words used in the context of the document as a whole. This exercise must take into account the factual matrix surrounding the conclusion of the agreement and its purpose or (where relevant) the mischief it was intended to address. See (*KPMG Chartered Accountants (SA) v*

Securefin Ltd and Another 2009 (4) SA 399 (SCA) at para 39 and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016(1) SA 518 (SCA) at paras 27, 28, 30 and 35).

[73] Since at least *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979(1) SA 195 (A) at 202C and *List v Jungers* 1979 (3) SA 106 (A) at 118G-H the Supreme Court of Appeal and its predecessor have stated that one considers the contentious words by having regard to their context in relation to the contract as a whole and by taking into account the nature and purpose of the contract. While there have been some hiccups along the way, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 Wallis JA said:

> *'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 businesslike 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.'*

[74] In Novartis South africa (Pty) Ltd v Maphil Trading (Pty) Ltd
Neutral Citation: Novartis v Maphil (20229/2014) [2015] ZASCA 111 (3 September 2015), Lewis JA stated the following:

"… The passage cited from the judgment of Wallis JA in *Endumeni* summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Novartis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paras 10 to 12 and in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paras 24 and 25. A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[75] In the present matter, nowhere in its plea does the defendant aver that the approval had been declined for lack of approval by the 'head of department'. Moreover, in its plea, defendant does not deny that the payment certificate was issued by the principal agent as the department's representative and authorised agent. The defendant warranted at the outset that the principal agent had the authority to bind the defendant and defendant must have anticipated that plaintiff would act on that representation.

[76] The funding agreement was drawn up by the department and no specific stipulation is provided for in either the definition clause nor in the body of the funding agreement to this effect. I have also not been referred to any other decision of like nature despite the fact the department no doubt has undertaken numerous such rectification work on many defectively built projects throughout the country. Put differently, there is no explicit reference that payments could only be approved solely by the head of department.

[77] There were numerous other prior claims submitted by the contractor for payment under the agreement. These were and paid by the defendant and in none of these was the approval function reserved for the head of department.

[78] Although this issue was advanced quite robustly throughout the trial both in cross-examination and in argument, I was not presented with demonstrable evidence that this has ordinarily been the case in rectification projects. What the Court was presented with is that various line managers within the department signed off on the disputed payment and it will be evident in this judgment that effectively everyone did so, save for the head of department. Treasury, the overall guardian of the public purse and the enforcer of all procurement compliance with oversight over all national and provincial departments and state-owned entities saw no impediment and anticipated the claim being met.

[79] Treasury remitted the letter after conducting internal investigations around the reasons for the delay and communicated with all the housing department officials and was satisfied there were no impediments to effecting payment. If the regulations required that only the head of department must sign each such payment in matters of this nature Treasury was best placed to raise that from the onset. That never took place.

Claim for Standing Time or Preliminaries and Generals:

[80] Upon delay occurring in terms of Clause 29.2, inter alia, for the failure to give possession of the site to the contractor, the contractor shall give the principal agent notice of such circumstance and within twenty days notify the principal agent of its intention to submit a claim. Clause 29.2 and Clause 5.1.2 provide that where the employer is in default of giving possession of the site to the contractor, the contractor shall be entitled to a revision of the date of practical completion and adjustment of contract value in terms of Clause 32.12 and the principal agent shall adjust the contract value. The preliminaries and generals in the Bill of Quantities shall be paid and adjusted as per selected alternatives in Schedule. (my underlining)

[81] Christie's 'The Law of Contract in South Africa' - 6th edition - at (page 366) points out that: *"The standard clause in building or engineering contracts making the architect's or engineer's final certificate conclusive evidence of the sufficiency and value of the works is not contrary to public policy. Nor is it contrary to public policy for the contractor to enforce such a certificate that is known to be inaccurate, as the owner*

or employer may have a remedy against his architect or engineer whose duty it was to protect his interests." – See also Ocean Diners (Pty) Ltd v Golden Hill Construction CC 1993 (3) SA 331 (A) 342E-343D.

[82] Relying on the aforegoing decision in Harlequin Duck Properties 204 (Pty) Ltd v Fieldgate 2006 (3) SA 456 (C) 465F, Davis J went on to state that: *"In short, it does not appear that the law as cited by Mr Oosthuizen supports the contention that the particular architect's clause is invalid. Secondly, to the extent that it is valid, the test is whether the architect applied himself properly to the determination. Nothing on the facts which were raised by the respondents indicates to the contrary."*

[83] In so far as the basis for the claim, the defendant clearly viewed the payment certificate submitted with suspicion. In cross-examination, Ms Norman succinctly put this in argument as follows:

> *"…That is not how payment certificates are put in. In his evidence (principal agent) payment certificates, all of them, all of those that have been approved and paid were for milestones. All of them. So that is his evidence and then this one in particular, then he says, I would like to take M'Lord to that particular page where he says they decided, they wanted to put this thing through the system so that it can get paid. Now that is where the contention of the invalidity of the payment certificate about the invoice is premised, because you issue a payment certificate, you value the work, you issue a payment certificate after you value the work. You don't wait a year later and you come up with a plan as to how do you put this thing through the system to get it approved and then you issue a payment certificate. That is the nub of the criticism of the payment certificate and it doesn't mean that because he is implementing agent that criticism cannot be levelled and also because he had no authority to adjust the value…"*

[84] In my view it didn't matter whether the figure computed as Standing Time or Preliminaries and Generals or other technical description, it was clear that the intention was to accommodate largely and materially for the delays which occurred, not due to plaintiff's fault, following the difficulties acknowledged by the defendant's area managers to have occurred beyond the control of the plaintiff and as a result of the

failure to provide meaningful and functional access to the site. Mr Taylor alluded at length in his evidence with regards the basis he employed to issue the payment certificate for the final certificate. The principal agent had the full authority to issue the certificate.

[85] In addition, the defendant did not demonstrate a necessity that the contract price would be exceeded by the approval of the claim. There existed sufficient funding to meet the plaintiff's claim without the necessity to adjust the contract price as testified to by the department officials Mr Mbiza; Galaharasity and Sharpley. Mr Taylor made the approval in circumstances where the budget had not been depleted.

Overriding authority of the principal agent:

[86] The Principal Agent represents the employer, is not a party to the JBCC agreement and is a key independent professional role player. His or her role contributes to the strength or weakness of the entire building project and he/she manages the services of all consultants during project implementation ensuring the best interests also of the employer. The principal agent issues instructions on behalf of the employer (presumably in good faith) and binds the employer.

[87] The authority of the principal agent to authorise payment and bind his principal is not in dispute. This authority extends to approval of the payments constituting what is termed in the industry 'Standing Time'. The JBCC Agreement provides that the defendant herein as employer cannot dispute or refuse to honour the obligation to pay an interim certificate issued by its principal agent. That obligation resulting from a payment certificate creates a separate obligation and cause of action, independent of the contract.

Liquid Claim:

[89] The plaintiff's claim is for the payment of a sum of money due and evidenced in a certificate issued by the principal agent. Defendant is obliged to pay certificates for payment issued by principal agent and such a payment certificate is a liquid

document. See – Randcon (Natal) Ltd v Florida Twin Estates) Pty) Ltd 1973(4) SA 181 (D) at 185 D.

[90] In Joob Joob Investments (Pty) Ltd v Stocks Mavundla ZEK Joint Venture 2009(5) SA 1 (SCA) at para [27]:

> *"*Gorven AJ *pointed out, with reference to* Randcon (Natal) (Pty) Ltd v Florida Twin Estates Ltd 1973(4) SA 181 (D) at 183 H – 184 H *that a final payment certificate is treated as a liquid document since it is issued by the employer's agent, with the consequence that the employer is in the same position as if it would have been if it had itself signed an acknowledgement of debt in favour of the contractor. Relying further on the* Randcon *case (supra) at 186G – 188G, the learned Judge held that similar reasoning applied to interim certificates. The certificate thus embodies an obligation on the part of the employer to pay the amount contained therein and it gives rise to a new cause of action subject to the terms of the contract. It is regarded as the equivalent of cash."*

[91] Clause 29.2 and Clause 5.1.2 provide that where Defendant is in default of giving possession of the site to plaintiff shall be entitled to a revision of the date of practical completion and adjustment of contract value in terms of clause 32.12 the principal agent shall adjust the contract value.

[92] The preliminaries amount in the Bill of Quantities shall be paid and adjusted as per selected alternatives in Schedule. Upon delay occurring in terms of Clause 29.2, inter alia, for the failure to give possession of the site to the Plaintiff then the Plaintiff shall give the principal agent notice of such circumstance and, within twenty days, notify the principal agent of its intention to submit a claim.

[93] I am unable to find that only the head of the department, Mr Sharpley could approve the payments to the contractors. The funding agreement only requires that the department must approve and does not prescribe that it be the 'head of department'.

[94] The order I issue is the following:

[94.1] The claim succeeds and defendant is to pay to the plaintiff the sum of R3 038 972.00 together with interest calculated at the legal rate of interest from 13 November 2014 to date of payment.

[94.2] Defendant is to pay the costs herein on a party and party scale.

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MAGEZA AJ

Heard:	07 February 2018
Delivered:	05 June 2018
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