REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **46599/2015**

29/11/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

29/11/2016
SIGNATURE DATE

In the matter between:

SUPERWAY CONSTRUCTION (PTY) LTD APPLICANT

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY RESPONDENT

J U D G M E N T

MALI J

[1] The applicant being a company duly registered and incorporated as such in accordance with the relevant laws of the Republic of South Africa, seeks a declaratory order confirming its entitlement to the

extension of time to the contract completion date and an adjustment to contract value consequent upon labour disruption.

[2] The respondent is a municipality established as such in accordance with Section 2 of the Local Government Municipal Systems Act 32 of 2000.

[3] It is common cause that on 13 September 2011 the parties concluded a written contract ("the contract") wherein the applicant had to attend to certain detailed works, comprising of the upgrading of Maunde Street between Quagga and Khoza Roads in Pretoria.

[4] The contract obligations were contained in the following documents:

[4.1] General Conditions of Contract ("GCC");

[4.2] Contract Data;

[4.3] Pricing Data;

[4.4] Scope of Work and

[4.5] Site Information.

[5] Some of the clauses of the GCC are as follows:

[5.1] The employment of conventional and labour intensive construction methods to complete the work.

[5.2] The crucial clause forming the subject matter of this application is clause 42 reading *"42 EXTENSION OF TIME FOR COMPLETION"*

"42.1 Subject to any requirement in the Scope of Work as to the completion of any portion of the Permanent Works before completion of the whole, the whole of the Works shall be completed within the time stated in the Contract Data calculated from the Commencement Date.

42.2 If circumstances of any kind whatsoever which may occur be such as fairly to entitle the Contractor to an extension of time for the completion of the Works or any portion thereof, the Engineer shall grant the Contractor, on a claim in accordance with Clause 48, 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.

42.3 Without limiting the generality of Clause 42.2, the circumstances referred to in that Clause include:

42.3.1 The amount and nature of additional work,

42.3.2 Abnormal climatic conditions,

42.3.3 Any failure or delay on the part of the Employer or his agents, employees or other contractors (not being employed by the Contractor) in due performance of any obligations as are reasonably necessary to enable the Works to proceed,

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

42.3.5 Any disruption of labour which is entirely beyond the Contractor's control."

[6] It is not in dispute that from 2 October until 20 October 2012 in respect of the Maunde Street Project the community members embarked on a protest relating to the labour rates. The said labour rates were being paid to members of the community, who have been employed by the applicant. The local labour and/ or employees of the applicant joined the protest action and embarked on a strike action, resulting to the applicant's inability to perform within the contract period during the standing time.

[7] On 3 October 2012 the applicant duly notified the respondent through the Engineer of the strike action. The notification reads as follows:

"Dear Sir/ Madam

[It] has been discussed in previous meetings and we are now facing a problem regarding the labour on the Maunde Street Project. The workers started an illegal strike on Tuesday the 2nd October 2012. The local labour are insisting on being paid rates that are higher than the agreed SPWP rates as allowed in the contract document, Clause C.3.3.33.1.1.1.-1.2 When they started throwing rocks and becoming more violent I was forced to call the police to escort my people off site safely. I then returned to the site today to negotiate with them but was told in no uncertain terms that the strike will continue until the issue is resolved. I therefore urge you to consider moving the planned meeting of 09 October 2012 to an earlier date. As long as this strike continues we are unable to do any work as it is impossible to guarantee the safety of our people, and other resources.

With reference to the above, and in accordance with Clause 48 of General Conditions of Contract for Construction Works (2004) (First Edition), we hereby notify you of our intention to claim standing time until the issue is resolved, as contemplated in Clause 42, and specifically 42.3.5.

42.3.5 'Any disruption of labour which is entirely beyond the contractor's control'.

Yours Sincerely"

[8] Pursuant to the above and further exchanges of correspondence between the Engineer contractually appointed by the respondent and the applicant; on 30 November 2012 the Engineer rejected the applicant's claim. The basis of rejection was that the Employer (Respondent) did not delay or interrupt the works. The Engineer further confirmed that the strike was a result of the Contractor not remunerating the labourers according to the minimum wage rates as promulgated.

[9] Finally the matter was taken for adjudication. There are two issues which served before the Adjudicator (Claim 1): extension of time and costs due to delays caused by the protest and strike action. (Claim 2): extension of time for increased scope of works).

[10] The adjudicator dismissed the applicant's claim for extension of time. According to the adjudicator the clauses of the contract were unambiguous that the whole of the Works, without exceptions, was to be construed by conventional methods; therefore the workers had to be remunerated as such. The local labour force was paid a wage of R100.00 per day which equates to R12.50 per hour for eight (8) hours.

[11] The decision by the Adjudicator at page 160 of the paginated pages paragraph 2.1.28 - 2.1.29 reads as follows:

"The contractor confirmed at the hearing that it was paying the local labour at less than the minimum wage rate for conventional work. Having regard to the fact that the strike was settled at a wage rate equivalent to R17.00 per hour, which was less than the prescribed minimum wage for conventional work at the time of R20.50 per hour, the strike would have been averted had the Contractor complied with the Contract."

ISSUE

[12] The matter turns on the interpretation of clause 42 of the Contract, in particular clause 42.3.5 (see *supra*) dealing with the disruption of labour. The ensuing question is whether the adjudicator was correct to dismiss the applicant's claim of extension of time because the applicant could have avoided or averted the strike action, had it complied with the contractual rates for payment of the local labour.

LAW

[13] In **TRANSNET LTD T/A NATIONAL PORTS AUTHORITY v OWNER OF MV SNOW CRYSTAL**[1] Scott JA stated:

"[28] ... As a general rule impossibility of performance brought about by vis major or casus fortuitus will excuse performance of a contract. But it will not always do so. In each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of

[1] 2008 (4) SA 111 (SCA)

the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'.[2] *The rule will not avail a defendant if the impossibility is self-created;*[3] *nor will it avail the defendant if the impossibility is due to his or her fault.*[4] *Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant.*[5]"

[14] In **KING SABATA DALINDYEBO MUNICIPALITY v LANDMARK MTHATHA (PTY) LTD & ANOTHER**[6] ("KSD") the following is stated at page 18:

"[28] ...That has become unnecessary in view of the finding that the impossibility was self-created. It follows that the general rule that impossibility of performance brought about by vis major or casus fortuitous will excuse performance of a contract does not avail the Municipality in this case. The appeal against the finding of the court below relating to the defence of supervening impossibility must accordingly fail."

[15] In **NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY**[7] ("Endumeni") at paragraphs [18]-[19], it was held

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[2] Per Stratford J in *Herman v Shapiro & Co* 1926 TPD 367 at 373 quoted with approval in *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (SCA) at 1206D-E.
[3] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) paras 23-25).
[4] *MacDuff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 601.
[5] *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982(1) SA 398 (A) at 442B-443F.
[6] (136/11) 2013 ZA SCA 91
[7] 2012 (4) SA 593 SCA

that, in interpreting a contract, the court must have regard to the language of the clause as well as the purpose for which it was agreed. The SCA further stated:

"*[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used.*[8] *Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the apparent* ***purpose*** *(own emphasis) of the provision and the context in which it occurs will be important guides to the correct interpretation An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.*"

ANALYSIS

[16] There is no quarrel as to the purpose of clause 42.2 of the GCC that it was to grant extension of time to the applicant in the event that the delay was caused by something beyond the control of the applicant. The question is whether the strike was beyond the applicant's control as submitted by the applicant.

[8] That they must be available on the language used is clear. *S v Zuma and others* 1995 (2) SA 642 (CC) paras 17 and 18. As Kentridge AJ pointed out any other approach is divination rather than interpretation.

[17] According to the applicant's notice of 3 October 2012 the applicant stated that the local labour force are insisting on being paid rates that are higher that the agreed rates, and that the strike was illegal.

[18] From the adjudicator's report it appears that the issue of payment of incorrect wage rate was as a result of misinterpretation of the contract between the parties. At paragraph 2.1.27 of the adjudicator's report the following is stated:

"From the aforegoing I conclude that, notwithstanding the cover page of the tender Document and the extensive provisions in the contract document relating to the use of labour intensive methods on this contract, which may have mislead the reader as it apparently mislead both the Employer and the Contractor, the contract de facto provides that the whole of the Works without exception, was to be construed by conventional methods".

[19] At page 159 of the paginated bundle in the adjudicator's report the following is stated:

*"2.1.21 Notwithstanding the content of the front cover page to the tender bid (**"EXPANDED PUBLIC WORKS PROGRAMME CONTRIBUTING TO A NATION AT WORK"**) OWN INSERTION the provisions of the contract which regulate the use of local labour intensive construction work are set out in the following:*

2.1.21.1 Clause C3.1.1 which states;

> *The employer's objective are to deliver public infrastructure using labour intensive methods. The works in this contract are to be executed by using both conventional construction and labour intensive construction methods according to the Special Public Works programme (SPWP).*
>
> *Works earmarked for Labour Intensive construction methods will be numbered with a prefix "LI' in the bill of quantities to distinguish them from conventional construction works. Such work shall be constructed using local workers who are temporarily employed in terms of the project specifications. (Emphasis added).*

2.1.21.2 Clause C3.1.2 which states, inter alia;

> *Conventional and labour intensive construction methods (LIC) will be employed to complete the work, with the Engineer ruling on the method to be used (Emphasis added).*

2.1.23 The parties confirmed that no items in the Price Schedule were numbered with the prefix LI. (Appendix A – question 3.3) and it was not suggested that the Engineer had instructed that labour intensive methods were to be used on any works.

2.1.24 *On the contrary, the Employer/Engineer, in answer to question 4.1 (Appendix A) replied, inter alia,*

The Contract is clear that work earmarked for the Maunde Street contract to be executed on a labour intensive construction method is numbered with a prefix "LI" in the Price Schedule, to distinguish them from conventional construction works. The "LI" numbered items shall be constructed accordingly. The Contractor has failed to adhere to this requirement in its submission as it refers in its submission to EPWP related works, which is not applicable to this Contract.

Annexure 21

The Employer confirms that no particular item was labelled as "LI" in the price schedule, hence conventional construction methods are applicable to the entire works.

The Contractor has disregarded this clear directive

2.1.25 *To the extent that the contract could be considered to be ambiguous in regard to what work, if any, was to be contructed using labour intensive methods clause 3.1 of the Genersl Conditions of Contract provides that;*

If an ambiguity or discrepancy between the documents is found the Engineer shall issue any necessary clarification or instruction.

2.1.28 The Contractor confirmed at the hearing that it was paying the labour at less than the minimum wage rate for conventional work.

2.1.29 Having regard to the fact that the strike was settled at a wage rate equivalent to R17-00 per hour, which was less than the prescribed minimum wage for conventional work at the time of R20.50 per hour, the strike would have been averted had the Contractor complied with the Contract."

[20] It was submitted on behalf of the applicant that the amount of rates to be paid to local labour was not clear from the contract until the determination was made by the adjudicator. The applicant could not have known that it was paying the correct or incorrect rates. The applicant does not dispute that the strike terminated when it paid the local labour R17.00 per hour, a rate lower than R18.00 per hour allegedly agreed upon between the parties.

[21] It was further submitted on behalf of the applicant that the strike was unprotected and was in the circumstances an unlawful and/or illegal strike, therefore an action beyond its control. It was argued that the applicant was not in a position to control unlawful conduct and that the workers would have approached the applicant to request an increase.

[22] I cannot agree with the above. It is evident in reading together of all documents consisting the terms of contract that there was a stipulated

contractual amount which the applicant omitted to pay the local labour. It was not for the workers to beg the applicant for what was rightfully theirs; a regulated wage rate as at the time. Furthermore the Sectorial Determination 2: Civil Engineering Sector, published in the Government Gazette No: 35658 of 4 September 2012 clearly demonstrates that the applicant paid less than what is legally prescribed.

[23] As alluded in Endumeni *supra*, in interpreting a contract, the court must have regard to the language of the clause as well as the purpose for which it was agreed. In the present matter the language of the contract makes it clear that the workers were engaged in labour intensive construction work. In this regard see Clause C3.1.1 in paragraph 19 *supra*.

[24] Despite the applicant's argument that it was not clear about the payment provisions, it was the responsibility of the applicant to ensure that the correct wage rates were paid. The contract provided for the consultation of an Engineer in the case of ambiguity. There is nothing placed before the court that the applicant sought clarity from the Engineer.

[25] As alluded above the applicant knew as early as on the first day of the strike that it was about disputed wage rates. In my view it was an opportunity for the applicant to seek clarity from the Engineer, instead

the applicant issued notification within a period of a day of the strike to claim for the standing time.

[26] The important issue is whether the workers were correctly paid by the applicant; now it is known that the answer is in the negative. Even if both parties were under the impression that they were correct in their interpretation, as to how and why they missed the correct interpretation is irrelevant. The mystery that both parties didn't set the correct wage rates; and that the workers managed to find out the correct wage rates and then embarked on a strike is more than telling. The conclusion is that it was possible to discern the applicable rates from the contract and other documents pertaining to the agreement between the parties.

[27] It is undisputed that the applicant was paying the correct wage rates in other sites to the workers who were undertaking the same responsibilities. This makes it clear that there was nothing mysterious about how the employees found out about the correct rates. Obviously the applicant knew the correct wage rates to pay. The applicant's counter argument to the above is that the issue of what is happening in another site is irrelevant. It is probable true that if the employees in all the sites were uniformly paid correct wage rates the strike would have been averted or if the strike occurred whilst the uniform payments were in place there would be some benefit of doubt towards the interpretation of the contract.

[28] The applicant's submission that the local labour force embarked on a strike because they were influenced by the community members who started the civil unrest is misplaced. It is common cause that the reason for the strike by the local labour force, whom was under the applicant's control was due to underpayment of wages. I am inclined to follow the KSD reasoning in paragraph 14 *supra*. I cannot help but to find that the impossibility to perform was self created on the part of the applicant.

[29] Having regard to the above it has been overwhelmingly proven that the strike was within the control of the applicant and it could therefore have averted the strike by paying the correct wage rates from the onset. In the event I find that the Adjudicator was correct in dismissing the applicant's claim for the extension of time.

[30] In the result the following order is made;

[30.1] The application is dismissed with costs.

N.P. MALI

JUDGE OF THE HIGH COURT

Counsel for the Applicant:	Adv. Daniels
Instructed by:	FRESE MOLL & PARTNERS
Counsel for the Respondent:	Adv. Motepe
Instructed by:	KUNENE RAMAPALA BOTHA ATTORNEYS
Date of hearing :	27 July 2016
Date of Judgment:	29 November 2016