



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA**

Case Number: **15518/2019**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: /NO
(3) REVISED: YES
DATE: 22 July 2022
SIGNATURE: *JANSE VAN NIEUWENHUIZEN J*

In the matter between:

PENGI CONSULTING ENGINEERS & LAND

SURVEYORS

Plaintiff

and

MINISTER OF WATER AND SANITATION

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] The plaintiff's action emanates from engineering services it rendered to the defendant on a project known as the Emergency Upgrade of Thukela Goedertrouw Transfer Scheme: Contract WP 0485-WET ("the project") in Kwa-Zulu Natal.

- [2] The plaintiff's claim is based on an oral contract *alternatively* unjustified enrichment.
- [3] The defendant defended the matter and also filed a counterclaim in terms of which it seeks an order that, in the event of the court finding that an oral agreement was concluded between the parties, the agreement be declared invalid in terms of section 172 (1) (a) of the Constitution.

Oral contract

Plaintiff's case

- [4] Mr Msengi ("Msengi"), a civil engineer and director of the plaintiff, Pengi Consulting Engineers and Land Surveyors ("Pengi"), testified that he was contacted by a certain Mr Muneka ("Muneka") on or about 30 November 2017. Muneka indicated that he was an officer in the defendant department ("the department") and that the department wishes to utilise the plaintiff's expertise on the project.
- [5] The parties met on 1 December 2017 to discuss the details of the project. During the meeting Muneka explained that he was not registered with the Engineering Council of South Africa and thus not qualified to act as the independent engineer on the project. The department, furthermore, lacked the capacity and competence required for the project.
- [6] Muneka told Msengi that Pengi must be able to commence with the work immediately. When Msengi asked Muneka what Pengi's involvement would be, Muneka answered that Pengi will be appointed as Employer's Agent and to provide the department with technical support. The department expected

Pengi to inspect AECON's work and to review and advise on AECON's designs. AECON was the contractor on the project.

[7] As a result, an agreement in the following terms were reached:

7.1 Pengi was appointed as an independent engineer for the purposes of being the departments' agent on the project and/or to act on behalf of the department;

7.2 the date of commencement of the agreement was 1 December 2017 and would thereafter continue for the duration of the project with an additional 12 month defects period;

7.3 the services to be rendered by Pengi included project supervision / adjudication as well as technical support for the review of all design services which included the following stages:

7.3.1 inception;

7.3.2 concept and viability;

7.3.3 design and development;

7.3.4 documentation and procurement;

7.3.5 contract and administration; and

7.3.6 close out;

7.4 the contract price was R 15 million.

- [8] In confirmation of the aforesaid appointment, Muneka send a letter dated 4 December 2017 to Mr G Truyens ("Truyens"), AECONS's project manager. on the project.
- [9] The services of the plaintiff were urgently needed and to this end a certificate to access the project site was issued by Muneka on 6 December 2017 to Pengi for the period 1 December 2017 to 31 March 2020.
- [10] In pursuance of Pengi's obligations in terms of the contract, Msengi attended a senior management meeting on 22 January 2018. The meeting was chaired by the Deputy Director – General of the department, Zandile Makhathini ("the DDG) and attended by officials of the department and employees of AECON. From the minutes of the meeting, it is clear that Pengi received instructions to perform certain work within a certain time frame.
- [11] Under the heading Claim 1, Pengi was allocated six out of the seven tasks. These tasks had to be finalised by 24 January 2018. In addition, and under the heading Other matters of concern, the following was minuted:

"Understanding of re-measurable contract and approval of BOQ.

A discussion was held regarding the nature of the contract and that currently there is not an approved BOQ which is required to administer the contract. ZM (Zandile Makhathini, the DDG) stated that although she does not agree with a re-measurable turnkey project that is the contract that has been signed and as such the BOQ needs to be approved in order to re-measure the Works. Pengi Consulting to review the BOQ and C&V report and provide approval by 2 February.

Monthly progress to be verified and approval of the Statement provided at site level. When the IPA arrives at DWS H/O there should be no stoppage or further verification required prior to the processing of the relevant invoices."

“Approval of the C&V Report

GT explained that the design component and ultimately the completion of the construction phase are starting to be affected by lack of approvals and decisions from the department’s technical team. ZM requested that Pengi makes this a priority. CM assured the meeting that all reviews and approvals would be completed by 2 February 2018.”

- [12] Msengi was also referred to a letter dated 24 January 2018, which letter was emailed to Muneka on even date. The letter is in response to an opinion that was sought by Muneka. It transpired that the request for an opinion actually originated from AECON and that Muneka forwarded Msengi’s response on the department’s letterhead and under his own name to AECON.
- [13] Lastly, Msengi was referred to a letter addressed by the DDG to AECON on 12 February 2018. The introductory portion of the letter informed AECON that the department had recommended Pengi to undertake the duties of the Independent Engineer. The scope of work is defined as: *“Project Adjudication and technical support for review of all design services which includes the following stages: Inception, Concept and viability, design and procurement, contract administration.”*
- [14] The letter set out the scope of Pengi’s duties in detail and in respect of payment, the following was recorded:

“4. Further note that Pengi Consulting Engineers & Land Surveyors will be paid in accordance to the principles set out by Gazette No. 39480 Engineering Professions Act (46/2000): Guidelines for services and process for estimating fees for persons registered in terms of the Engineering Professions Act. The all-inclusive Professional Costs will

be as per statutory percentage fee scale (Refer to 4.3.2 Category M) but will not exceed the amount."

[15] A summary of agreed fees plus site supervision follows, to wit:

Item	Gazette Ref	Description	Amount
1.	3.3.6 (1)	Inception Stage (5%)	R 495 668, 90
2.	3.3.6 (2)	Concept and Viability Stage 2 (25%)	R 2 477 844, 61
3.	3.3.6 (3)	Design Development Stage 3 (25%)	R 2 477 844, 61
4.	3.3.6 (4)	Documentation Stage 4 (15%)	R 1 486 706, 71
5.	3.3.6 (5)	Contract Administration Stage 5 (25%)	R 2 477 8 44, 61
6.	3.3.6 (6)	Close Out Stage 6 (5%)	R 495 668, 90
6.	3.3.2	Construction Monitoring	R 3 246 516, 70
Sub Total			R 13 157 894, 73
14% VAT			R 1 842 195, 26
GRAND TOTAL			R15 000 000, 00

[16] In pursuance of Pengi's duties, Msengi attended at the offices of Triyans, a representative of AECON on 20 December 2017. Triyans presented an overview of the project and as the project was at inception stage, a large volume of documents was given to Msengi to work through. Once Msengi and his team had perused the documents they had to report to Munera.

[17] Msengi testified that Pengi was satisfied with the technical side of the inception stage.

[18] During January / February 2018, Msengi, Mr Sibuyi ("Sibuyi"), Pengi's project leader on the project and an engineer in Pengi's employment held a meeting

with AECON. At the meeting the concept and viability (CMV) of the project was discussed. Pengi had to give its approval of the CMV for the project to move to the next stage.

[19] Several site meetings were thereafter attended by Pengi's team. Msengi explained that Pengi did level 3 supervision, which entailed that its engineers were on site every day to work with the employees of the department.

[20] On 10 July 2018 Pengi presented its first invoice to the department for payment. The invoice was not paid and upon enquiries made by Msengi, he was told that payment is delayed because the department did not have a budget for the project. Msengi was, however, given the assurance that the department is busy finalising the payment processes and that Pengi will be paid in due course.

[21] The invoice remained unpaid. On 28 September 2018 Pengi presented its second invoice. No payment was, however, forthcoming and when Msengi enquired as to when payment will be made, he was told that the department does not have a contract with Pengi and that Pengi must leave the site.

[22] Pengi's two engineers that were on site daily, were refused access to the site and their internet access was cut off.

[23] Pengi accepted the termination of the contract and left the site.

[24] With reference to the amount claimed by Pengi, Msengi testified that R 8 940 681, 80 was in respect of fees due and payable to Pengi for the services it rendered and the further amount of R 6 059 381, 20 is in respect of future loss of income.

[25] The department's version will be dealt with *infra*. An aspect that was, however, relevant during cross-examination, was the computation of Pengi's claim. It was put to Msengi that Pengi has not provided any proof that the services claimed for, were rendered.

[26] Pengi's invoice details is as follows:

	Description	% Work done	Amount
1.	Inception Stage (5%)	100%	R 495 668, 90
2.	Concept and Viability		
	Stage (25%)	100%	R 2 477 844, 61
3.	Design Development		
	Stage (15%)	60%	R 1 486 706, 71
4.	Documentation Stage		
	(15%)	35%	R 520 347, 35
5.	Contract Administration		
	and Inception (25%)	50%	R 1 238 922, 25
6.	Close Out and As		
	Built Drawings (5%)	0%	R 0.00
7.	Additional Duties for site		
	plus supervision plus		
	other Special Services		
	and Disbursements	50%	R 1 623 258, 35
	Subtotal		R 7 842 648 , 07
	Plus 15% VAT		R 1 079 970, 73
	Grand Total		R 8 940 618, 80.

- [27] With reference to the amount claimed in respect of the inception stage, Msengi explained that the inception stage was completed and given to the department. Msengi, further, explained that the concept and viability stage could not have proceeded without the finalisation of the inception stage.
- [28] In respect of the concept and viability stage, Msengi testified that a concept and viability report was finalised and submitted to the department.
- [29] Insofar as the design development stage is concerned, Msengi explained that Pengi did not do the design, but was appointed to review the design.
- [30] It was denied on behalf of the department that Pengi rendered any services in respect of the documentation and procurement stage as well as the contract administration stage. Mr Msengi confirmed that the percentage claimed in respect of the two items represent the services that were rendered in respect thereof.
- [31] Msengi emphasised that the fees charged were prescribed in the Government Gazette and agreed upon by the parties, which agreement is recorded in the letter of the DDG dated 19 February 2018.
- [32] Mr Sibuyi, a professional engineer with almost 40 years' experience in the profession testified next. Sibuyi was employed by Pengi and was appointed as the project leader on the project.
- [33] Sibuyi was referred to the minutes of a Commencement / Start-Up Meeting held on 1 March 2018, which meeting was chaired by him. Sibuyi explained that when he arrived on site, there were no formal site hand-over documents and that he called the meeting to rectify the situation. The minutes contain

detailed information in respect of the various aspects and stages of the project.

[34] Sibuyi confirmed that he executed his duties in terms of the agreement between the parties by *inter alia* appointing site staff, to wit, Blaster Kapisa (“Kapisa”) as resident engineer and James Edeldast as assistant resident engineer.

[35] The two engineers managed the day to day running of the project and reported directly to him.

[36] Further proof that was discovered by Pengi in respect of the work it performed on the project, includes:

36.1 a letter dated 9 March 2018 from Msengi to Truyens in respect of auto closing spherical ball valves;

36.2 a letter dated 13 March 2018 from Msengi to Truyens in respect of isolation valves;

36.3 an email dated 14 March 2018 from Kapisa to Mkile Ntobeko, the department’s representative (Ntobeko) in respect of a proposed rerouting;

36.4 an email dated 22 March 2018 from Kapisa to Ntobeko in respect of standard details, P&IDs and Flow Meter Chambers and a further email on the same day wherein Kapisa requested the drawings for reinforcement details from Ntobeko; and

36.5 an email dated 19 April 2018 from Kapisa to Mark Harris from AECON in respect of an inspection report.

[37] Mr Edeldast ("Edeldast") was Pengi's third and last witness. Edeldast testified that he has a national diploma in civil engineering and some 20 years' experience in design work. Edeldast was appointed on 1 January 2018 by Pengi as assistant resident engineer on the project. He worked with Kapisa in managing the project and they also did quality and quantities control.

[38] In order to perform their duties, the department allocated a site office and internet access to them. Edelgast and Kapisa were on site from 7:00 until 17:00 / 18:00 and attended meetings with the department's officials on Mondays.

[39] They rented accommodation in Greytown and commuted to the site in order to fulfil their duties. Edelgast testified that the officials of the department were not full time on site, but visited the site from time to time, as they had other projects to attend to.

[40] The department informed them in September 2018 that they are no longer part of the project and had to leave the site, which they did.

Defendant's case

[41] In order to traverse the evidence of Pengi's witnesses, Muneka and Mr Xolani Mdletsa ("Mdletsa") were called to testify on behalf of the department.

[42] In essence Muneka denied that he, on behalf of the department, entered into an oral agreement with Msengi, the representative of Pengi. Muneka testified

that in terms of the contract between the department and AECON read with the General Conditions of Contract for Construction Works as issued by the South African Institution of Civil Engineering, Third Edition (2015) an independent engineer for the project could only be appointed by the parties jointly. Muneka, furthermore, stated that he was not empowered to enter into a contract with Pengi. It was only the Director-General of the Department that had the capacity to enter into contracts on behalf of the department.

[43] It was also not possible in terms of the contract between the department and AECON to appoint Pengi as Employer's agent, because the contract provided that an employee of the department must be appointed as Employer's agent.

[44] When Muneka was confronted with the contents of the letter dated 4 December 2017, in which he informed AECON that Pengi was appointed by the department as the department's independent engineer, he stated that the letter was only a recommendation to appoint Pengi.

[45] I pause to mention that the contents of the letter do not support Muneka's version. The letter reads as follows:

"Subject: APPOINTMENT OF THE INDEPENDENT ENGINEER

*This letter serves to inform AECON that Department of water and sanitation (DWS) **will** use Pengi Consulting Engineers (PCE) as **our** Independent Engineer. It's for the **duration of the works plus an additional year of for 12 months defects period.**"* (own emphasis)

[46] When asked to explain the issuing of the access certificate, Muneka stated that the department was under pressure to commence with the project and

therefore it was urgent for Pengi to access the site to familiarise itself with the project and to obtain information. Muneka was adamant that the granting of access to the site was not proof that Pengi was appointed by the department.

[47] Noteworthy is the fact that the certificate issued by Muneka to Pengi, granted access to Pengi for the total period of the project and thus confirms the contents of the letter of 4 December 2017 quoted *supra*.

[48] Muneka was, furthermore, referred to an email he had send to the officials of the department and AECON on 16 January 2018. The contents read as follows:

*“May I request that Peng consultants be copied in all instructions, circular of project documents and emails. Official work done by Pengi will be done through instructions from DWS. This is for **our** Independent engineer to be aware of the project.”* (own emphasis)

[49] Muneka, once again, stated that he was under pressure and further stated that Pengi had to be aware of *“these things”*.

[50] In respect of the letter by the DDG to AECON on 19 February 2018, Muneka stated that the letter only recommended Pengi as the department’s choice for the appointment of an independent engineer.

[51] The letter, however, does not merely *“recommend”* Pengi, but give precise details in respect of the scope of work and the contract price. One would not expect to find such details in a letter that contains a mere recommendation.

[52] When confronted with the contents of the minutes of the management meeting on 22 January 2018, Muneka agreed that work was allocated to Pengi, but stated that it was on the understanding that AECON will consent to Pengi's appointment as independent engineer. Muneka further stated that the minutes were prepared by AECON and did not reflect all the items that were discussed at the meeting. An important issue that was, according to Muneka, discussed was the undertaking by Mr Green from AECON that the appointment of Pengi will be fast-tracked.

[53] This explanation is in stark contrast with the following item in the minutes:

"Appointment of an Independent Engineer/Adjudicator

The benefits of having an Independent adjudicator appointed for the duration of the project were explained by JS and agreed to by the department. CM of Pengi consulting to continue working with SAICE to get appointment made."

[54] The department's confusion in respect of the capacity in which Pengi was appointed, appears clearly from a letter of AECON dated 2 March 2018:

"3. Based on a site meeting that took place on 1 March 2018, we understand that it is the Department's intention that Pengi Consulting provides technical support services to the Department in relation to the Project. More specifically, the services which are envisaged for Pengi Consulting are similar to the services envisaged for the Employer's Agent in the Agreement.

4. As you will recall, AECON raised various concerns, during the negotiation of the Agreement, in relation to the position of the Department that the Employer's Agent should be an employee of DWS and not an independent third party expert. After various discussions, it

was ultimately agreed that the Employer's Agent role be fulfilled by an employee of the Department – but subject thereto that an independent and objective person be jointly appointed by the Parties to act as an Independent Engineer. More specifically, the Agreement provides that the Independent Engineer will be required to rule on any disputes between the Department and AECON in relation to a determination by the Employers 'Agent.

5. *We have already agreed with the Department that Adv Hubert Thompson will fulfil the role of an Independent Engineer. We also wish to emphasise that the role of the Independent Engineer is very specific, narrow and regulated in detail in the Agreement. More specifically, the Parties have agreed (in clause 3A of the Contract Data) that the Independent Engineer:*

- a. should be impartial and objective;*
- b. shall be a person acceptable to both Parties; and*
- c. shall be solely responsible to consider any dispute between the Parties if the Contractor is dissatisfied by a decision of the Employer's Agent.*

.....

7. *We note that the Department envisages that Pengi Consulting should perform, amongst other things, project adjudication and technical support in relation to the design services of the Project. Kindly note that these envisaged services are in line with the services which are required to be performed by the Employer's Agent within the meaning of the Agreement.*

.....

9. *The Contractor does not have an objection if Pengi Consulting be appointed by the Department to perform technical support services to the Department. Similarly, the Contractor would not object if Pengi*

Consulting acts as Employer's Agent within the meaning of the Agreement. However, the Contractor does not agree to the appointment of Pengi Consultants as Independent Engineer within the meaning of the Agreement.

10. *In addition, should Pengi Consulting be appointed as service provider for technical support and or as Employer's Agent, the Contractor would like to understand who will be responsible to remunerate Pengi Consulting. Kindly take note that the Contractor did not budget for these costs in its price.*
11. *Accordingly, should the Department request that its technical support service provider be paid directly by the Contractor, the Contractor would first required the following:*
 - a. *That the parties enter into good faith discussions to discuss increases to the price as these costs were not included in the price of the Contractor;*
 - b. *That the preferred service provider be screened, and be approved, pursuant to the Contractor's internal due diligence procedures.*
12. *Please let us know if you would like amplification on any of the issues raised."*

[55] Muneka's only response to the contents of the letter was that Pengi was informed at the end of March 2018 that they will not be appointed as Independent Engineer on the project.

[56] When asked to explain why Pengi would do all the work if there was no agreement between the parties, Muneka responded that Pengi did the work

well knowing that AECON has not consented to their appointment and that they would not be paid for the work if AECON did not consent to their appointment. I pause to mention, that this version was never put to Msengi.

[57] During cross-examination Muneka had difficulty in explaining:

57.1 why he used the words “*will use Pengi*” in the 4 December 2017 letter to AECON, if Pengi was not already appointed at that stage; and

57.2 why he stated in the 16 January 2018 email to AECON that “*Official work done by Pengi will be done **through instructions** from DWS. This is four **our** Independent Engineer*”, if Pengi was at that stage not already been appointed by the department.

[58] With reference to paragraph 4 of the letter dated 19 February 2018, where it is stated that Pengi “*will be paid*”, Muneka agreed with Mr Mpshe SC, counsel for Pengi, that one would only state that you will pay a person, if that person has already been appointed.

[59] Munera was referred to the contents of an email Kapisa send to Mark Harris from AECON on 19 April 2018, to wit:

“*Hi Mark*

The results presented in your Contractor’s report are unacceptable. Only test results by an accredited laboratory (on their letter head) should be presented. Also where are the test results for the material that you are compacting as G5??

Please make clarifications on this thread and make proper submissions.”

- [60] Mr Mpshe asked Munerk to explain how it was possible that Pengi's engineers still did work on 19 April 2018, if Pengi was told at the end of March 2018 that they will not be appointed. Munera could not provide any explanation for the clear contradiction in his evidence.
- [61] Muneka was also referred to the minutes of the second and third site meetings that were respectively held on 19 March 2018 and 16 April 2018. On the front page of the minutes, Pengi is still described as *“Employer's Technical Support”* and from the minutes it is clear that Kapisa attended the meeting in such capacity. Muneka could not explain why Pengi attended the 16 April 2018 meeting when their services, according to Muneka, was already terminated at the end of March 2018.
- [62] In respect of the second site meeting, which was chaired by Kapisa, Mr Mpshe wanted to know why Pengi was still allowed to do work at that stage, when the department already knew that AECON does not agree to Pengi's appointment as Independent Engineer. Muneka replied that, in view of AECON's earlier undertaking to appoint Pengi, the department was still seeking clarity on the issue.
- [63] I pause to mention, that the department did not present any evidence of their response to AECON's letter.
- [64] When it was pointed out to Muneka that the letter from AECON dated 2 March 2018 did not tell the department to terminate Pengi's appointment, Muneka agreed.

[65] Mdletsa's evidence did not take the matter any further.

Discussion

[66] In analysing the evidence presented on behalf of the parties, it is clear that the evidence pertaining to the conclusion of the oral agreement is irreconcilable. The approach to be followed when faced with two irreconcilable versions, has been formulated in *Stellenbosch Farmers' Winery Group Ltd and another v Martelle et Cie and Others* 2003 (1) SA 1 (sca) at par [5] as follows:

"..... The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former,

the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

- [67] Bearing the aforesaid in mind, I proceed to analyse the evidence of the respective witnesses.
- [68] Msengi, Sibuyi and Edelgast were impressive witnesses who did not contradict themselves during evidence. Their evidence is, furthermore, in all respects confirmed by the documentary proof.
- [69] The same cannot be said of Muneka's evidence. Muneka was visibly uncomfortable in the witness stand. His evidence was in all material respects contradicted by the documentary proof. Muneka's feeble attempt to justify the letters and emails written by him is wholly unsatisfactory. The contents of his various letters and emails speak for themselves and his attempt to attribute a different meaning to the contents thereof is disingenuous.
- [70] Insofar as his evidence differ from that of Pengi's witnesses, I have no hesitation in rejecting his evidence.
- [71] The evidence established that the department did not have the necessary expertise to manage the project and that it required the professional engineering services of Pengi. It, however, seems, that both Muneka and the DDG, were under the mistaken impression that Pengi's appointment will be financed from the project costs. The impression Muneka attempted to create that Pengi was *recommended* by the department as their preferred Independent Engineer is convincingly dispelled by the documentary evidence. Both Muneka and the DDG were present at the meeting on 22 January 2018 where the appointment of an Independent Engineer/Adjudicator was discussed. It is common cause that advocate Thompson was appointed to the position by agreement between the department and AECON.

- [72] The fact that the contract between the department and AECON provided that an employee of the department will be appointed as Employer's Agent apparently only dawned on the department upon receipt of AECON's letter on 2 March 2018. AECON did not object to the appointment but made it clear that Pengi's fees will not be paid from the contract amount.
- [73] Notwithstanding the aforesaid, Pengi's services were retained by the department until the end of September 2018. The most probable reason for the termination of Pengi's services is the reason advanced by the department when Msengi enquired in respect of the payment of the first invoice, to wit the department did not have a budget to pay Pengi.
- [74] Muneka's version that Pengi would render services at no costs for a period of eight months, is far-fetched and rejected. Muneka's inability to explain why Pengi would continue to render services until the end of September 2018, when it was allegedly informed at the end of March 2018 that it will not be appointed, is significant. Muneka could not explain the anomaly because Pengi's services were clearly only terminated at the end of September 2018.
- [75] It is highly improbably that Msengi, a registered engineer, will send invoices in July and September 2018, if he knew that Pengi did not have a contract with the department.
- [76] In the result, I am satisfied that Pengi proofed on a balance of probabilities that an oral agreement was concluded between Pengi and the department on the terms contained in the letter dated 19 February 2018 by the DDG.

COUNTERCLAIM

- [77] In view of the aforesaid finding, the department's counterclaim must be considered.

[78] The department's counter claim is based on the following allegations:

- "7. *In terms of section 217(1) of the constitution and the SCM Policy of the Department of Water and Sanitation, contracting of service providers such as the Plaintiff can only be made subject to a bidding that is transparent, competitive, fair and cost-effective.*
8. *No such bidding was conducted in the alleged appointment of the Plaintiff.*
9. *In addition, and in terms of paragraph 12.2.6 of the SCM Policy, no Professional Service Provider will provide any services until a contract is signed. No such contract was signed between the Plaintiff and the Defendant.*
10. *Consequently, the alleged agreement is irregular and ought to be declared invalid in terms of section 172(1)(a) of the Constitution."*

[79] The evidence established that the oral agreement between the parties is in conflict with both the provisions of section 217(1) of the Constitution and paragraph 12.2.6 of the Supply Chain Management Policy of the department.

[80] In the result and in terms of section 172(1)(a) of the Constitution, the department is entitled to an order declaring the agreement invalid.

[81] A remedy that is just and equitable in the circumstances should then be considered in terms of section 172(1)(b) of the Constitution.

[82] In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 SA 331 CC, the Constitutional Court held as follows at para [104] and [105]:

[104] When the Municipality took the view that the Reeston contract was invalid, the implementation of the contract had commenced and was continuing. The Municipality was content for the respondent to complete the contract (building low-cost houses) to the benefit of the Municipality and residents of Reeston. It was common cause that the work has been practically completed.

[105] In these circumstances, justice and equity dictate that the Municipality should not benefit from its own undue delay and in allowing the respondent to proceed to perform in terms of the contract. I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to that the respondent might have been entitled. It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement."

[83] In *casu* the department was more than willing to utilise the services of Pengi until the end of September 2018. Had the department not raised the invalidity defence for the first time in its plea and counter claim, Pengi would have been entitled to payment for the services it rendered in terms of the agreement.

[84] I find the conduct of the department despicable, to say the least. It would be a travesty of justice to allow the department to utilise the professional engineering services of Pengi without paying a cent for the services rendered.

[85] The services pertained to a water crisis that had to be resolved urgently and Pengi's services no doubt benefitted the community in the area where the services were rendered.

[86] In the result, I am of the view a just and equitable order would dictate that the agreement by the parties should not be set aside.

[87] The question as to how much fees Pengi is entitled to remains.

- [88] I am satisfied on the evidence that Pengi rendered the services in respect of the inception stage. This much is clear from the emails that were exchanged between Pengi's employees and the employees of AECON.
- [89] In respect of the concept and viability stage, Msengi testified that a concept and viability report was submitted to the department. Although the report was not presented in evidence, Mr Manchu, counsel for the department, did not deny the existence of the report during his cross-examination of Msengi.
- [90] It is clear from Msengi's evidence and the emails that were exchanged between the parties, that Pengi did review the work done by AECON.
- [91] I am, however, unable to determine on the evidence how much of the design development work was done. The same applies to the documentation stage, the work performed in respect of contract administration and the additional duties special services and expenses.
- [92] In the result, I am satisfied that Pengi has established on a balance of probabilities that it has rendered services in the amount of R 2 973 513, 51.

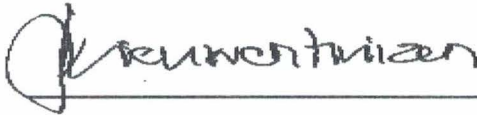
COSTS

- [93] Although Pengi was unsuccessful in its claim due to the validity point raised by the department in its counter claim and in order to express my dismay with the conduct of the department, no cost order will be granted in respect of the counterclaim.

ORDER

The following order is issued:

1. The agreement concluded between the plaintiff and defendant is declared invalid.
2. The defendant is ordered to pay to the plaintiff an amount of of R 2 973 513, 51.
3. The defendant is ordered to pay interest on the aforesaid amount at a rate of 7, 25% per annum from date of judgment to date of payment.
4. No order as to costs.



N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

31 May 2022, 1 – 3 June 2022, 6 June 2022

DATE DELIVERED PER COVID19 DIRECTIVES:

22 July 2022

APPEARANCES

For the Plaintiff: Advocate M Mpshe SC
Advocate F Mzilikazi

Instructed by: Baloyi-Ntsako Attorneys

For the Defendant: Advocate T Manchu
Advocate M Mpakanyane

Instructed by: The State Attorney