

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 28360/2019

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

Date: 24 August 2022

In the matter between:

CASPER JACOBS KONSTRUKSIE CC

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

DE VOS AJ

INTRODUCTION

[1] The plaintiff seeks to enforce a contractual right contained in a construction agreement.¹ The agreement provides that the plaintiff must construct a police station

¹ The construction agreement consists of various agreements and clauses from agreements, that have been incorporated by agreement to create an agreement between the parties. In particular, the agreement consists of clauses contained in the following agreements: the JBCC Series 200 Preliminaries; the JBCC Series 200

for the defendant. The plaintiff is entitled, if it foresees a delay in the completion of the construction, to claim a revision of the completion date.

- [2] The project required the erection of a water tank. The defendant was to nominate a subcontractor to erect the water tank. The defendant failed to nominate a subcontractor which delayed the completion of the station.
- [3] The plaintiff seeks to revise the completion date as a result of the delay caused by the erection of the water tank. The result of being granted a revision is a monetary payment for each day the finalisation was delayed. The mischief behind this monetary claim is to compensate the constructor from losing money as a result of a delay caused by the defendant. If the defendant delays the construction, the plaintiff loses monies spent on renting equipment, paying salaries or being unable to take on other work.
- [4] The agreement sets out the methodology to be used to calculate the monies to be paid to the plaintiff. The methodology will be addressed below. When the methodology is applied, the plaintiff would be entitled to R 14 784,79 for every day that the contract is revised or extended.
- [5] The defendant had a similar contractual right, for every day the project is delayed as a result of the fault of the plaintiff, the defendant would be able to claim R 25 000. The monetary claim the plaintiff seeks to enforce in this case is the corollary of the defendant's late completion penalty fee.
- [6] The right to revise the completion date is conditional on the contractor providing the defendant with notice of the possible delay within 20 days of when the contractor "became aware or ought reasonably to have become aware" of the potential delay. This will be referred to as the "notice condition".
- [7] It is the notice condition which is the cause of the dispute between the parties. The parties agree that the plaintiff provided notice of the potential delay, but they disagree when the 20-days started. The plaintiff says it became aware of the potential delay on 2 September 2015 and provided notice within 20 working days on 30 September 2015. The defendant contends that the plaintiff ought to have become reasonably

aware of the potential delay much sooner. The defendant claims the plaintiff ought to have been aware on 9 December 2014 and ought to have given notice within 20 days.

- [8] If the plaintiff is correct, that it could only have become aware of the delay on 2 September 2015, then it has complied with the notice condition. The plaintiff would then be entitled to a revision of the completion date and to payment of just over R 14 000 a day for 322 days' delay which amounts to R 4 760 700.79.
- [9] If the defendant is correct, then the plaintiff did not comply with the notice condition, is not entitled to a revision of the contract date and does not get paid the monetary compensation.
- [10] The parties agree on the clauses of the contract, their interpretation and impact. The core issue in this case is when the plaintiff became aware (or ought to have become aware) of the potential delay. The case therefore turns on the facts.

FACTS

The contract

- [11] The defendant advertised bid number 19/1/9/36 TB (14) for the construction of a new police station in Mareetsane in North West. The bid was awarded to the plaintiff. On 17 September 2014 the parties entered into a written contract for the construction of the new police station for an amount of R 31 120 000.
- [12] The terms of the agreement are not in dispute. The plaintiff would commence construction a day after being given possession of the site and was to complete construction within 8 months. If the plaintiff failed to finalise the construction within this period, the plaintiff would pay penalties of R 25 000 per day.
- [13] The plaintiff can request a revision date for the completion. If such a revision is approved by the defendant it will adjust the contract value with just over R 14 000 a day. The circumstances under which the plaintiff can request a revision include the defendants failure to issue or the late issue of a contract instruction following a request from the plaintiff and a direct contractor ie a party appointed directly by the defendant (not the plaintiff) to do specialist work on-site prior to practical completion. If such a circumstance occurs, and this is the clause which is in play in this matter -

"Should such a circumstance occur which could, in the opinion of the plaintiff, cause a delay to practical completion the plaintiff shall give the employer a reasonable and timeous notice

of such a circumstance, take any reasonable practical steps to avoid or reduce the delay, and within 20 (twenty) working days from the date upon which the plaintiff became aware or ought reasonably to have become aware of the potential delay notify the employer of his intention to submit a claim for a revision of the date for practical completion or any previous revision thereof resulting from such delay, failing which the employer shall not consider such claim.²

- [14] The approval of a claim of revision results in a payment of just over R 14 000 per day to the plaintiff.

The construction

- [15] The commencement date of the contract was 12 November 2014 and the date for practical completion 13 July 2015. The defendant granted seven requests by the plaintiff for the revision of the date for practical completion.³ However, it is the plaintiff's claim for extension based on the water tank which caused the hiccup in this matter.

- [16] The erection of the water tank and stand, the lightning protection, the signage, the fire detection and the landscaping was to be undertaken by a subcontractor nominated by the defendant. This scope of the work will be referred to as the "erection of the water tank". The erection of the water tank was not work which was to be done by the plaintiff. However, if the subcontractor failed to erect the water tank in time, the plaintiff would not be able to complete its work in time.

- [17] The purpose of the water tank is to provide water to the station. It is only after the water tank had been erected that the plaintiff would be in a position to conduct the necessary tests to ensure that the police station's pipes that provides water and deals with sanitation was functional. From a safety perspective the erection of the water tank had to be completed to ensure that the station would be safe in the event of a fire. In short, the plaintiff could not obtain the necessary completion certification without the erection of the water tank.

² Principal Building Agreement clause 29.4.

³The First revised date: 21 August 2015; Second revised date: 24 August 2015; Third revised date: 3 September 2015; Fourth revised date: 25 September 2015; Fifth revised date: 6 October 2015; Sixth revised date: 9 October 2015; and Seventh revised date: 5 November 2015.

- [18] The first site meeting was on 11 November 2014. The minutes of this meeting indicates that the defendant "must enter into a sub-contract between main and subcontractors". The minutes of the second site meeting of 9 December 2014 show that the plaintiff started asking information about the water tank right off the bat. The minutes indicate that the plaintiff "inquired about drawings for the water and septic tanks, since it was not part of the drawings handed over". The drawings was to be sourced from the defendant and the task was allocated to specific officials of the defendant. Despite the erection of the water tank being the function of a subcontractor (to be nominated by the defendant) as early as the second site meeting, the plaintiff requested information regarding the water tank.
- [19] The 3 March 2015 minutes indicate that the defendant's consulting firm is busy with the design of the water tank stand. The "drawings should be ready to be issued at the next site visit". Again on 5 May 2015 there is a recording in the site meeting minute that the architect inquired about the drawings for the erection of the water tank. Again the obligation to provide this fell to the defendant.
- [20] On 7 July 2015 again there is a request for the submission of the documentation regarding the erection of the water tank "for tender purposes". The defendant required this documentation in order to obtain a nominated subcontractor.
- [21] Throughout, the minutes record, the defendant was to nominate the subcontractor to erect the water tank.
- [22] On 1 September 2015 the minutes indicate that "the appointment of a nominated subcontractor is awaited". The minute indicates that "the architect confirmed that he received notification of possible delay due to a lack of correct information regarding roads, paving and storm water. The architect is appointed by the defendant.
- [23] It was at this stage, after the site meeting of 1 September 2015 the plaintiff became aware that there may be a possible delay. Up and until this point, the plaintiff was awaiting the appointment of a nominated subcontractor to erect the water tank.
- [24] On 30 September 2015 the plaintiff lodged a notification of a possible delay as a result of the defendants' failure to appoint a nominated subcontractor for the erection of the water tank. The plaintiff foresaw the possibility that a delay on the part of the

defendant to appoint the said nominated subcontractors could cause a possible delay in future.

[25] The defendant did not respond. The defendant did not provide the plaintiff with instructions for the appointment of a nominated subcontractor for the erection of the water tank. On 29 October 2015 the plaintiff submitted a bid to tender for the construction of the water tank and stand.

[26] On 24 June 2016 the plaintiff notified the principal agent again of the said delay.

[27] Subsequently, the defendant awarded the tender to the plaintiff. However, the defendant's delay had stalled construction for more than a year. It was only on 2 November 2016 that the defendant instructed the plaintiff to erect the water tank. The plaintiff immediately jumped into action and on the same day, 2 November 2016 it placed the necessary orders for the erection of the water tank. However, due to the annual builders recess, the completion of the water tank and stand was delayed from 2 November 2016 until 9 January 2017.

[28] The manufacturing of the water tank and stand commenced in January 2017 and was delivered on 8 February 2017. The erection and lightning protection of the tank stand was completed on 15 March 2017, whereafter the plaintiff was in a position to install the pressure pump and start testing all plumbing and fire installations. The upshot of this is that the buildings and all installations were 100% complete and ready in November 2015 for practical completion, but it could not be achieved due to the outstanding nominated subcontractor's work.

The claim

[29] On 19 April 2017 the plaintiff was in a position to arrange for an inspection and approval of the fire installation. Consequently, 19 April 2017 was the date of practical completion. The certificate of practical and works completion was issued on 20 April 2017. On 24 April 2017 the plaintiff submitted its official claim for the extension of time for a period of 322 days.⁴ The plaintiff could only compile its claim once the work affected by the delay was completed in order to capture the extent of the delay and it was only on 19 April 2017 that the plaintiff was aware of the full extent of the delay.

⁴ In terms of clause 29.6 read with clauses 29.2, 32.12, 29.2.4, 29.6.2 and 29.6.3 of the PBA.

The official claim by the plaintiff dated 24 April 2017 was received by the defendant within 60 working days of 19 April 2017.

- [30] During or about June 2018 the defendant rejected the plaintiff's claim for a revision of the date of practical completion.

The defence

- [31] The defendant's only defence was that the plaintiff was not entitled to a revision of the date of practical completion. The defendant's plea provides -

"6. The defendant pleads that the plaintiff should reasonably have become aware at the second site meeting on 9 December 2014 that the date of practical completion would become delayed. (Plea par 6)

7. Had the plaintiff acted diligently and reasonably, the plaintiff should have notified the defendant within 20 working days from 9 December 2014 of its intention to request a revision of the date of practical completion."

- [32] The defence is that the plaintiff did not notify the defendant in time of the delay. The day on which the plaintiff ought to become aware was on 9 December 2014. The defendant has hemmed itself into this date of 9 December 2014, in its pleadings.

The evidence led at trial

- [33] Two witnesses testified. The first was Mr Jacobs from the plaintiff. The second was Col N'Khomazi for the defendant.

- [34] Mr Jacobs testified that 9 December 2014 was the second site meeting. The construction was in its infancy. He testified that it was in the beginning of the project and the plaintiff was busy with mass earthworks and construction of the platforms on which the buildings had to be erected. At that stage, no information regarding the water tank and stand was available to the plaintiff. The only information he had was that a PC amount for the water tank and stand of R65 000 (Item 8 page 22 in the Bill of Quantities) was allowed. He could not have, at the site meeting of 9 December 2014, foreseen a delay in the appointment of a nominated subcontractor. It was too early in the project and there was no basis for him to assume that the defendant would not nominate a contractor in time.

- [35] Mr Jacobs further testified that from the second site meeting the plaintiff regularly asked for information regarding the tank and stand. This is clear from the minutes of the site and technical meetings.

- [36] Mr Jacobs testified that he regularly requested information relating to the erection of the water tank. He had no basis to anticipate or foretell that the defendant would not appoint a subcontractor in time.
- [37] Mr Jacobs further testified that even if a nominated subcontractor had been appointed as late as the beginning of September 2015 the plaintiff would still have been able to complete its work in time. In other words, there would have been no need to extend the contract had the defendant responded to Mr Jacob's notification of the potential delay.
- [38] The defendant cross-examined Mr Jacobs on the conclusion that he ought to have foreseen the delay at an earlier stage. However, Mr Jacobs was not provided with any factual basis on which he ought to have been aware at an earlier stage. Mr Jacobs repeatedly denied the conclusion being presented to him that he ought to have known at an earlier stage. Vitally, during cross-examination no positive version or basis for the 9 December 2014 date was provided by the defendant.
- [39] The defendant called one witness, ie Col J N'Khomazi. Col N'Khomzai is currently the Chief Quantity Surveyor for SAPS. This was not a position he held at the relevant time. Col N'Khomazi did not attend any of the site or technical meetings and was only involved in making recommendations to the Bid Adjudication Committee of the defendant.
- [40] Centrally, Col N'Khomazi testified that he had no factual basis upon which he could positively state that the plaintiff should reasonable have foreseen a delay on 9 December 2014.
- [41] Col N'Komazi's evidence was that the plaintiff was given the scope of work and ought to have, based on the scope, been able to know from the outset that the project would not be completed on time. When asked how the plaintiff should have known the defendant would not appoint a subcontractor in time Col N'Khomazi 's evidence is that the plaintiff ought to have known that from the outset.
- [42] Col N'Khomazi was asked whether there was any indication, at the meeting of 9 December 2015 that the defendant would not appoint the subcontractor. Col N'Khomazi conceded that there was no such indication as at 9 December 2015. Instead, it was Mr N'Khomazi's evidence that the plaintiff "knew fully well what we had

to do" as soon as he had received the scope of work and as the construction of the water tank was not a new issue, Mr Jacobs could have known from the start.

[43] The cross-examination of Col N'Khomazi is instructive:

Rossouw SC: Did Mr Jacobs know that the SAPS would not appoint a contractor in time?

Col N'Khomazi: He knew what it was necessary to complete the contract.

...

Rossouw SC: At 9 December 2014, there is not one iota of a suggestion that the defendant would not nominate the subcontractor?

Col N'Khomazi: Yes

[44] Col N'Khomazi provided no factual basis to dispute the plaintiff's version and repeatedly stated that the plaintiff ought to have known when he signed the agreement that the project would not be completed on time. No factual basis for this conclusion was provided.

CONSIDERATION

[45] It is not disputed that the delay was mainly caused by the delay of the erection of the water, which was critical to complete construction, because the remaining work could only be executed after completion of the water tank. It is also common cause that this delay was the result of the defendant's failure to timeously nominate a subcontractor. The question then is when should the plaintiff have become aware of the consequent delay caused by the failure to nominate the subcontractor.

[46] The plaintiff's evidence was that it could not have known earlier than September 2015. It certainly could not have known at the second site meeting when construction was in its infancy. It was too soon in the construction project to know that the defendant would fail to appoint a subcontractor.

[47] In addition, had the defendant responded to the plaintiff's notification of a possible delay in time, the project would have been completed without the need for an extension.

[48] The cross-examination of Mr Jacobs consisted of repeating the conclusion that he ought to have known by December 2014 without providing any basis for this stance. Mr Jacobs evidence stands substantially uncontested.

- [49] The defendant provided no factual or logical basis to state that the plaintiff ought to have known of this failure at the second site meeting of 9 December 2014. Col N'Khomazi was repeatedly given an opportunity to provide a factual basis for the defendant's position. No such factual basis was forthcoming. The defendants could point to no fact or even an inference on which it could be held that the plaintiff ought to have known at the meeting of 9 December 2014. Rather, the Colonel repeated the subjective conclusion that the plaintiff ought to have known at the conclusion of the contract.
- [50] Not only did Col N'Khomazi's evidence provide no factual basis to support the defendant's pleaded case, but in fact his evidence contradicted the pleaded case. Col N'Khomazi's evidence was that the plaintiff ought to have known, not on 9 December 2014, but in fact when the contract was concluded.
- [51] The plaintiff's evidence was consistent and unchallenged, it became aware of the potential delay in September 2015 and provided notice within 20 working days of the potential delay. Had the defendant responded to this timeously - and not waited a year to nominate a subcontractor - there would have been no delay and no penalties to be paid.

METHODOLOGY

- [52] The agreement provides the parties with options on how the plaintiff will be compensated if the completion date is to be revised. One option is that the constructor must prove the actual loss suffered as a result of the delay. However, the option chosen by the parties⁵ in this case, was that the plaintiff would be paid an agreed amount calculated as a percentage of the preliminaries.
- [53] The method of calculation of the amount to be paid to the plaintiff is provided in the agreement. In the Form of Offer and Acceptance (read with clause 10 of the Preliminary JBCC) the preliminaries is determined to have a time value of R 2 365 565.61. The specific option chosen to calculate the monetary claim provides that the preliminaries is to be divided by the days worked. The days worked must be the actual days contracted to work, ie excluding holidays, weekends and national builders' holidays, for the duration of the contract. The total days worked (in terms of the

⁵ See clause 10.2.: Option A of the JBCC Series 200 - Preliminaries

contract not in terms of the extension) over the relevant period is 160 days. The preliminaries (R 2 365 565.61) divided by the days to be worked (160) results in an amount of R 14 784.78 which represents the payment per day for the extension of the contract.

[54] The completion date is to be extended by 322 days at R 14 784.87 per day which provides a total of R 4 760 700.79.

[55] The defendant did not dispute this methodology.

[56] The Court asked counsel whether there is anything in the contract or in the case law that would permit the court to deviate from the cold application of this methodology. It was pointed out that not only had the parties agreed to this clause, but had in fact chosen it from several other options available in the pro forma JBCC contract.

COSTS

[57] The issue of costs must be considered in circumstances where the defendant's witness did not provide a defence in line with the defence's plea and had no knowledge of the relevant events. The defendant had, from the outset, no defence and no witness to corroborate its case.

[58] It must have been apparent to the defendant that it had no defence for quite some time, certainly as early as when the matter was mediated. Not only did this result in wasted court time, but the plaintiff had to reopen its case when the defendant located a witness only after the close of the plaintiff's case.

[59] The Court is entitled to indicate its dissatisfaction with the abuse of public funds to defend a matter where the defendant fails to provide a proper defence and where this was apparent to the defendant prior to the commencement of the trial.

CONCLUSION

[60] In the premises, the plaintiff is entitled to claim for an extension of time in respect of Claim no 8 of 322 days for the period 9 November 2016 until 19 April 2017, ie the date of practical completion.

ORDER

[61] In the result, the following order is granted:

1. The defendant be ordered to grant the plaintiff an extension of time in respect of Claim no 8 of 322 days for the period 9 November 2016 to 19 April 2017 as envisaged in the written agreement entered into between the parties on 17 September 2014;
2. Payment of the amount of R 4 760 700.79 plus VAT;
3. Interest on the amount of R 4 760 700.79 at the legally prescribed rate calculated from the date of service of the summons to the date of payment;
4. Costs of suit, including the costs of senior counsel, on an attorney and client scale.



I de Vos

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:

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Instructed by:

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Instructed by:

State Attorney, Lucky Nkuna

Date of the hearing:

3 August, 5 August and 19 August 2022

Date of judgment:

24 August 2022