REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

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

[redacted]

CASE NO: 2849/2020

In the matter between:

KPMM ROADS & EARTHWORKS PROJECTS PTY) LTD PLAINTIFF

And

POLOKWANE LOCAL MUNICIPALITY DEFENDANT

JUDGMENT

MULLER J:

[1] The plaintiff instituted action for a declaratory order that a purported notice of cancellation of a contract entered into between the parties is invalid and that the contract is in full force and effect. The defendant pleaded and instituted five counter-claims for the recovery of damages.

[2] The plaintiff served an exception against counter-claims 2, 3, 4 and 5. The parties will be referred to as the plaintiff and the defendant.

[3] The defendant *inter alia* pleaded that the contract was validly cancelled. It is common cause that the parties entered into a contract subsequent to a bidding process for the upgrading of the Nelson Mandela IRPTS Trunk Route and the construction of civil works for the Depot station and day time layover facility. A service level agreement was entered into between the parties.

[4] In respect of the counter-claims the defendant pleaded (in paragraph 27) that the contract was entered into on the basis of the following facts:

> "27.1 The Agreement between the parties forms part of the Defendant's project to establish a Rapid Bus Transport Service in the city of Polokwane ("the Project").
>
> 27.2 Apart from the Plaintiff the Defendant entered into construction contracts with *inter alia* the following other contractors to carry out the Project.
>
> 27.2.1 NJR Projects have been contracted to construct the superstructure of the Depot.
>
> 27.2.2 Matakanye Construction have been contracted to construct a superstructure of the CBD Station.

27.3 The plaintiff had to perform the civil works in respect of the Depot, Stations and the Daytime Layover Facility in respect of the Nelson Mandela IRPTS trunk route.

27.4 The aforesaid civil works had to be completed before the other contractors, NJR Projects and Matakanye Construction, could commence with the construction of the superstructures of the Depot and the CBD Station which construction had to commence on 1 July 2019.

27.5 The Project was to be funded from the Public Transport Network Grant received by the Defendant from the National Department of Transport. Money allocated to the defendant in terms of the aforesaid Grant and not being spent during the applicable financial year is forfeited by the defendant.

27.6 Should the plaintiff fail to complete the aforementioned civil works by the agreed termination date of 30 June 2019 the Defendant would not be able to spend the full amount allocated in terms of the aforesaid G2019 and would as a result forfeit part of the Grant to it during the financial year 2018/2019 and would as a result forfeit part of the Grant in an amount equal to the amount it could not spend."

[5] The defendant proceeded to plead that the plaintiff breached the agreement by assigning parts of the contract to other contractors; abandoning the site by stopping all work on the site from 10 October 2019 until 10 February 2020; suspending the progress of works for more than fourteen days; failing to proceed with the works in accordance with the approved programme; failing to complete by the agreed extended date of 30 June 2019; failing to carry out the works in accordance with the contract; failing to submit acceptable performance security in respect of the works despite a request for such security.

[6] In counter-claim 2, the defendant pleaded that due to the failure to complete the civil works by 30 June 2019 a delay was caused in the implementation of the contract for the construction of the Depot by NJR Projects and the construction of the CDB Station by Matakanye Construction from 1 July 2019 to 1 July 2020. As a result of the delay, extra time related costs were incurred in the amount of R4081 731.79 and R1 650151.65 respectively. As a further result of the delay the contract price for the construction of the Depot and the contract price in respect of the CBD Station escalated with 4,6% in the amount of R1 045 781.25 in respect of the Depot and R1 136 617.54 in respect of the CBD Station.

[7] In counter-claim 4 it is alleged that the failure caused by the delay resulted in incurring costs in retaining professional supervisory services of the engineer

who supervised the execution of the contract for the period 1 July 2019 to 3 March 2020 in the amount of R1 514 300.00 and in counter–claim 5 the defendant alleged that as a result of the failure to complete the works on 30 June 2019 the defendant was unable to spend the full amount allocated to it in terms of the Grant received from the National Department of Transport during the financial year 2018/2019. The defendant has failed to spend R55 984 733.13 on the Project.

[8] It is contended that the facts set out in paragraph 27 to which reference have been made above render the counterclaims vague and embarrassing in that, (a) none of the facts referred to conditions in the written agreement; and (b) the appointment of the plaintiff was not subject to or in conjunction with either NJR Projects or Matakanye Construction; (c) the contract was not subject to the Public Transport Network Grant being spent in a specific financial year.

[9] Clause 26 of the service level agreement contains a provision that the contract is the sole record of the agreement and that no party shall be bound by any express or implied term, representation, warranty, promise or like, not recorded in the said contract. The agreement superseded and replaced all prior commitments or representations whether oral or written between the parties.

[10] The allegations in paragraph 27 cannot be divorced from the exceptions in respect of counter-claims 2, 3, 4 and 5. Save for counter-claim 1, the remainder counter-claims are premised on the averments made in paragraph 27.

[11] As far as counter-claims 2 and 3 are concerned, the exceptions are that the two counterclaims are vague and embarrassing, alternatively lack averments to sustain a cause of action due to the failure to set out how the damages are calculated and further that the damages are too remote to result from the breach of contract.

[12] The exception to counter-claim 4 is that the defendant was contractually obliged to retain the professional services of an engineer up until the date of cancellation which was 3 March 2020. The claim of R1 514 300.00 is for the costs in retaining the services of the engineer for the period 1 July 2019 to 3 March 2020 which is at odds with the contractual terms of the agreement between the parties.

[13] The exception to counter-claim 5 is that the non-use of the budgeted amount does not result in a loss. Both counter-claims 4 and 5 is bad in law and lack averments to sustain a cause of action.

[14] The defendant claims special damages in counterclaims 2 to 5 for losses sustained as a result of breach of contract on the basis of the averments

contained in paragraph 27. It is a fundamental rule of our law that damages for breach of contract, is that the sufferer should be placed in the position he/she would have occupied had the contract been properly performed, as far as it can be done by the payment of money and without undue hardship to the defaulting party.[1] In *Holmdene Brickworks*, Corbett JA (as he was then) explained:

> "To ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage (*ibid.*) and, in addition, the defaulting party's liability is limited in terms of broad principles of causation and remoteness to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract the parties actually or presumptively contemplated that they would probably result from its breach...The two limbs, (a) and (b), of the above-stated limitation upon the defaulting party's liability for damages correspond closely to the well-known two rules in the English case of *Hadley v Baxendale*, 156 ER 145.."

[1] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 687C; *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) 875; *Svorinic and Others v Biggs* 1985 (2) SA 573 (T) 577B.

[15] I pause to also draw attention to *North & Son (Pty) Ltd v Albertyn*[2] where the plaintiff claimed loss of income. Van Blerk JA stated:

> "Die vergoeding wat hier ge-eis word is ten opsigte van skade met die oog op die bestaan van spesiale omstandighede. 'n Vergoedingsplig rus op die verweerder slegs as ten tyde van die aangaan van die ooreenkoms dit redelikerwys gesê kan word dat die partye *sodanige skade werklik in gedagte gehad het, of dat dit redelikerwys veronderstel kan word dat hul dit kon verwag het as 'n waarskynlike gevolg van 'n breuk van die ooreenkoms* (*Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 op bl 22, en *Lavery & Co Ltd v Jungheinrich* 1931 AD 156 op bl 169), of soos APPELREGTER WESSELS in laasgenoemde saak op bl 175 sê,
>
> "These special damages can, however, only be recovered if it is clear that both parties and not one party only knew of the special circumstances and that if it can reasonably be inferred that the contract was entered into with a view to these special circumstances (Pothier, sec 162)".
>
> Dit is derhalwe nodig dat in die deklerasie beweer word dat verweerder kennis gedra het van die spesiale omstandighede en dat die ooreenkoms op grond daarvan gesluit was." (The emphasis is mine).

[16] The exception to the allegations in paragraph 27 only, is misconceived. In the present case the defendant understandably pleaded the facts in paragraph 27 to overcome remoteness of loss to be able to recover damages which the

---

[2] 1962 (2) SA 212 (A) 215A.

parties actually contemplated when the contract was concluded. Counsel for the plaintiff argued that the words "on the basis of" are objectionable. It takes a too narrow view of the essential requirements for a claim for special damages. No conclusion of law is pleaded in paragraph 27. The facts which both parties were actually aware of at the time the contract was concluded, are pleaded. Those facts are neither terms nor conditions contained in the agreement, but are the facts outside of the contract that the parties were aware of when the contract was concluded. It is not sinister for the plaintiff to have knowledge that the civil works it is required to perform are an integral part of a host of other work to be performed by contractors who had been procured by the defendant for the completion of the project. Indeed, it would have been surprising if the plaintiff had not been aware that certain work are earmarked to be done by other contractors. It cannot be objectionable to plead those facts. The exception to paragraph 27 should be dismissed.

[17] The question that arises is whether the damages claimed were within the contemplation of the parties at the time the contract was concluded or were reasonably foreseen by them. A plaintiff may only recover those damages for loss which the plaintiff despite reasonable precautions could not prevent. It is unfair and unequitable to hold the plaintiff liable for special consequences which could not have been in the contemplation of the plaintiff when the contract was

entered into.[3] A plaintiff must, therefore, plead what the nature of the damages were which they have contemplated or have reasonably foreseen but could not prevent.

[18] The averments in paragraph 27, if considered in isolation, are not a cause of action but rather a precursor to be connected and in conjuction with the averments in counter-claims 2, 3, 4 and 5 to complete the causes of action for the recovery of the special damages claimed. In *Safer Clothing Industries (Pty) Ltd v Worcester Textiles (Pty) Ltd*[4] Corbett J (as he then was) referred with approval to *Beck on Pleadings* 2nd ed at 44, that stated:

> "When special damages are claimed for breach of contract the question may arise whether such damages are not too remote. This question depends on whether or not, at the time the contract was entered into, such damages could fairly be said to be within the contemplation of the parties as a consequence of breach of contract. It is necessary in the declaration to allege that such damages were in the contemplation of the parties at the time the contract was entered into and that the failure to do so would render the declaration excipiable. An allegation that the defendant had knowledge of certain circumstances is not sufficient. There must in addition be an allegation that the contract was entered into on the basis that the plaintiff would suffer the damages alleged in the event of the breach."

[3] *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1, 22.
[4] 1965 (2) SA 424 (C) 428D-E, 429D.

[18] No averments were made in respect of the latter requirement mentioned above, that the parties actually contemplated or have reasonably foreseen at the time the contract was concluded or that the contract was entered into on the basis that the defendant would suffer the damages alleged to have been suffered in the event of the breach. The absence of these essential allegations, in my view, render the counter-claims vague and embarrassing. The exceptions, although directed at each of the claims, nevertheless affects all the causes of action in respect of which special damages are claimed and therefore goes to the whole of the pleading.[5]

[19] The exception raised against counter-claims 2, 3, 4 and 5 must succeed on that ground.

[20] I do believe that sufficient facts were pleaded for the plaintiff to be able to plead in relation to the quantum of damages claimed in counter-claim 2 and 3.

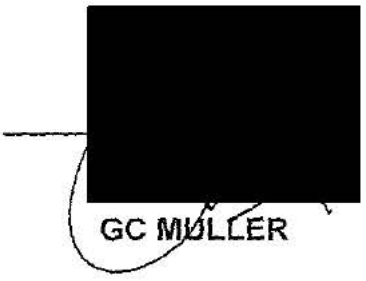
ORDER

1. The exception to paragraph 27 is dismissed.
2. The exceptions to counter-claims 2, 3, 4 and 5 succeed with costs.
3. The counter-claims of the defendant are set aside.

---

[5] *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) 899G; *Venter and Others NNO v Barritt; Venter and Others v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) par 10-11.

4. The defendant is granted leave to file amended counter-claims within 15 days, if so advised.



GC MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES

1. For the Plaintiff	: Adv CM Rip
2. For the Defendant	: Adv JAL Pretorius
3. Date judgment reserved	: 25 July 2022
4. Date judgment delivered	: 11 August 2022