THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 230/2019

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA **APPELLANT**

and

SBAHLE FIRE SERVICES CC **RESPONDENT**

Neutral citation: *Passenger Rail Agency of South Africa v Sbahle Fire Services CC* (230/2019) [2020] ZASCA 90 (4 August 2020)

Coram: PETSE DP, MBHA, MOCUMIE and DLODLO JJA and MABINDLA-BOQWANA AJA

Heard: 18 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 4 August 2020.

Summary: Contract – interpretation of agreement entered into between the appellant and the respondent in respect of which the respondent rendered fire and safety consultancy services to the appellant for a prescribed fee – whether the appellant breached the contract – whether the court a quo erred in dismissing the appellant's claim in reconvention.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Raulinga J sitting as court of first instance):

1 The appeal in relation to the second claim succeeds with costs, including costs consequent upon the employment of two counsel.
2 The appeal in relation to the claim in reconvention is dismissed.
3 The order of the court a quo is set aside to the extent reflected below and substituted with the following:

'The action in respect of the second claim is dismissed with costs.'

JUDGMENT

Dlodlo JA (Mbha JA concurring):

[1] Sbahle Fire Services CC (Sbahle), instituted action against Passenger Rail Agency of South Africa (PRASA) for payment of R1, 227 999.21 and R9 095 968.47 in respect of fire and safety consultancy services respectively, rendered to PRASA at the latter's Mabopane Bridge Development Project (the project) over the period from June 2010 to August 2013. On 15 October 2013, PRASA paid to Sbahle an amount of R2 034 938.19 for fire consultancy services rendered over the period June 2010 to November 2012. According to Sbahle, the amount paid by PRASA included the sum of R1, 227 999.21 which Sbahle had claimed for fire consultancy services. However, PRASA instituted a claim in reconvention wherein it claimed the repayment of the R2 034 938.19 it had paid to Sbahle.

[2] In view of the fact that the aforementioned payment effectively settled what Sbahle had claimed in claim 1, it did not proceed with that claim. It, however, persisted with claim 2. The latter claim is in respect of Safety Consultancy fees. Sbahle relied on

the clause of the agreement which it attached to the particulars of claim headed ‘fees’ read in conjunction with a letter written to Sbahle on behalf of PRASA dated 18 December 2018. The project for fire and safety consultancy was intended to commence on 2 January 2009 and was due for completion on 31 May 2010. At all relevant times, it was common cause that the project did not start on the scheduled date but that it was extended beyond 31 May 2010 to at least August 2013.

Background facts

[3] During 2008, PRASA embarked on the building of a bridge in a project known as ‘Mabopane Bridge Redevelopment Project.’ The necessary procurement processes were followed and on 18 December 2008, the Northern Gauteng Regional Tender Procurement Committee of PRASA appointed Sbahle as Fire and Safety Consultant for the project. Letters of appointment setting out the terms and conditions of the contract were addressed to Sbahle. The total fee of the project in respect of the fire consultancy services was fixed at R796 185.72 excluding value added tax (VAT) whilst the fee for the safety consultancy services was 5 per cent of the value of the project cost which was estimated at R134 million excluding VAT.

[4] Both contracts in respect of fire and safety consultancy services expressly provided that should the estimated project value decrease, the respective specified tariffs of the project costs should be applied to the final value. Alternatively, should the estimated project value increase, the services will be free until the completion of the project on 31 May 2010. As at 4 April 2011, PRASA had paid Sbahle a sum of R690 001.43 in respect of fire consultancy services. In respect of safety consultancy at the same date PRASA had paid the sum of R4 664 854.66 to Sbahle. The balance owed to Sbahle in respect of safety consultancy and fire consultancy services was R 1 232 607.84 and R 106 184.29 respectively.

[5] The parties differ in the interpretation of the contract. In respect of the safety consultancy services, PRASA contended that the total fee for the services rendered until the completion of project, regardless of the time period, was fixed at 5 per cent of the total costs of the project. Accordingly, PRASA contended that it had paid in full the

total amount of fees due and payable to Sbahle, regard being had to the fact that the project was not complete and still remained unfinished. PRASA's contention was that any further extension of time with a view to complete the project, did not bring about the change of contract price as indicated in respect of both the fire consultancy and the health and safety consultancy. In the of light of the disagreement on the interpretation of the contract between the parties, PRASA's submission before the Gauteng Division of the High Court, Pretoria (the high court), was that the court ought to determine this issue before the merits of the matter were dealt with.

[6] The clause in the agreement which must be interpreted is entitled 'fees' and reads:

'The client shall pay to the Consultant full remuneration for the performance by the Consultant of the services in accordance with this agreement. The fee shall, be deemed to be inclusive payment for the services and for all disbursement costs, expenses, overheads or profits of every kind incurred or to be earned by the Consultant in connection therewith. If the Consultant is required by the Client to provide material additional services by reason of any alterations, project extension or modifications to the project as required by the Client, then the Client shall pay to the Consultant additional amount in respect of the fee, commensurate with the additional services performed by the Consultant. However, should the extent of extra work or alterations that the same shall have been necessitated in whole or in part, by any negligent act, omission or default on the part of the Consultant, the Client will not pay to the Consultant additional amount in respect to the fee.'

The above clause must be read together with a letter from PRASA to Sbahle dated 18 December 2008. It reads as follows:

'We, Intersite Property Management Services (Pty) Ltd ("Intersite"), acting on behalf of SA Rail Commuter Corporation Limited ("SARCC"), have pleasure in confirming your appointment as fire consultant, with specific reference to your proposal dated 09 December 2008 and supplemented by the terms and conditions of this letter, the appointment shall, in relation to the above-mentioned project, entail:

1. The client will not entertain any extra fees claims unless he introduces a substantial or material change to the scope of the project.
2. The fee shall be paid in accordance with the agreed fee as per Annexure "A"

3. Should any ambiguity exist between this letter, and previous correspondence which has taken place in connection with your appointment as Fire Consultant for this Project, the terms and conditions of this letter shall take precedence.'

The pleadings

[7] In claim 1, Sbahle averred that on 18 December 2008 at Midrand, alternatively Pretoria, it concluded an agreement with PRASA in terms whereof it was appointed as the Fire Consultant in respect of the project. In concluding the agreement, Sbahle was represented by Mr David Khuzwayo (Mr Khuzwayo) and PRASA represented by Intersite Property Management Services (Intersite). Intersite was in turn duly represented by Mr Pheko Moatshe (Mr Moatshe).

[8] The agreement concerning claim 2 is alleged to have been concluded in December 2008. The express terms of the agreement that are relevant for purposes hereof and which Sbahle was contractually bound to perform entailed the following:

'(a) Compilation of a safety plan; (b) Assist in hazard identification and risk assessments; (c) Compilation and facilitation of a risk profile; (d) SHE specification; (e) Relating to guidelines within the disciplines of safety; (f) Site visits to assess and gather information for the compilation of audit reports; (g) Health and Safety Committee recommendations reviewing; (h) Quarterly site audits but not limited; (j) On-the-job health and safety awareness, etc; (k) To assist in compliance with the basic legal requirements including; (l) Continual reporting to ensure consistency between client and appointed contractors; (m) Health and Safety inspections; (n) Health and Safety Committee meetings; (o) To ensure a safe/health work environment; (p) Performing baseline health and safety audit to determine a degree of conformance within requirements of occupations health and safety; (q) Providing detailed written reports highlighting deviations found and suggestions for improvement/ rectification; (r) Providing assistance with any part of the safety and health program.'

Up to 31 May 2010, Sbahle was entitled to a fee of R5 897 462.50 excluding VAT. The additional terms were that fees would be deemed to be inclusive payment for services and for all disbursements, costs, expenses, overheads or profits of every kind incurred or to be earned by Sbahle in connection therewith. Importantly, the agreement provided that if Sbahle was required by PRASA to provide material additional services by reason of any alterations, project extension or modifications to the project as required by

PRASA, the latter would pay to Sbahle an additional amount in respect of the fees, commensurate with the additional services performed.

[9] However, should the extent of the extra work or alterations have been necessitated or come about as a result of default on the part of Sbahle, PRASA would not be liable to Sbahle for any additional amount in respect of the fees. It is averred that up to 31 May 2010, Sbahle was entitled to a total contract amount of R5 897 462.50 excluding VAT, over a period of 17 months payable in monthly tranches of R395 476.89 inclusive of VAT. Sbahle's contention was that PRASA breached the terms of the agreement by neglecting and/or failing to pay it for services rendered over the period June 2010 to May 2012. Sbahle had issued invoices for this period, but as at May 2012 the total amount of R9 095 968.47 was outstanding and remained due and payable.

[10] In its amended plea, PRASA admitted that the project had not been completed but it denied that Sbahle was still rendering services to it. PRASA pleaded that it did not, at any stage, request nor require Sbahle to provide any services or material additional services by reason of any alteration, project extension or any modifications thereof. It was specifically denied by PRASA that Sbahle was rendering the same services as it rendered before 31 May 2010. PRASA pleaded that Sbahle was entitled to and did render the same services after 31 May 2010 in accordance with the extended period up to 28 February 2012. According to the plea, the parties retained contractual prices which remained the same after the extended period.

[11] Pleading to the claim in reconvention, Sbahle stated that the payment was made in respect of the work done and services duly rendered by it to PRASA at the latter's instance and request. In effect, Sbahle pleaded that there was a legal obligation on PRASA to effect the payment and it was not made 'in bona fide but mistaken belief'.

Evidence

[12] The only evidence on record is that led by Sbahle. It called Mr Khuzwayo, who testified that Sbahle is a close corporation that renders services of safety and specifications and assists clients in sales and services of portable fire protection

designs and design layouts in fire protections. Mr Khuzwayo's testimony is that the nature of business Sbahle provides involves fire protection designing, installation, servicing as well as sales of all types of firefighting equipment. Mr Khuzwayo explained how Sbahle was appointed as consultant in relation to the project. He stated that Sbahle designed the protection system for the project. It was Mr Khuzwayo's evidence that Sbahle had an obligation to obtain the certificate of occupancy when the building was finished and the project was complete. It was Sbahle's responsibility to appoint a fire contractor, whose job was to install the fire protection system which Sbahle designed for the bridge. Mr Khuzwayo testified that Sbahle was employed to serve as an agent for the client in terms of health and safety. Sbahle had to make sure that the main contractor Siyavuna, adhered to all safety rules in the project. Siyavuna was appointed by PRASA to conduct the building work and Sbahle was appointed to supervise the main contractor's safety consultant who was on site on a full-time basis in terms of safety.

[13] Mr Khuzwayo's evidence was that Sbahle was responsible for devising safety and health specifications. It had to conduct a baseline assessment for PRASA, as the client. Sbahle also had to conduct a monthly audit and compile monthly reports in relation to safety. Nkambule and Associates was appointed as the project manager, represented by one Mr Ishmael Musiwa.

[14] Mr Khuzwayo testified that the project was scheduled to start in January 2009 and should have been completed on 31 May 2010. However, the project did not commence as scheduled. He stated that when Siyavuna, the main contractor, moved on site, numerous challenges faced the project, including the community wanting to dictate their own rates to the main contractor. Another cause of delay, according to Mr Khuzwayo was what he called the land issue on the western side where the bridge was supposed to land. The owner of that portion of land did not want the bridge on his property. As a result the architect had to change his designs. According to Mr Khuzwayo's testimony, this dispute impacted greatly on the project in that the architect had to take out a number of stalls meant to be on the Mabopane side and come up with a new concept altogether on the Mabopane side. According to

Mr Khuzwayo, the client also caused further delay when PRASA introduced new developments in the project. For example, PRASA requested a derailment wall to be built.

[15] Mr Khuzwayo testified that PRASA also wanted 265 extra stalls to be built on the eastern side as none were going to be built on the western side. Mr Khuzwayo testified further that there was a sudden realisation on the part of PRASA that there was a need to build its offices underneath the bridge. All this work, according to Mr Khuzwayo, was never catered for in the initial project and the main contractor had to complete it. Sbahle's work was to assist the main contractor in terms of safety and that it had to be present wherever the main contractor was, to ensure there was safety. Mr Khuzwayo was specifically asked how the fact that the project was not complete by 31 May 2010 would have impacted on services rendered by Sbahle. His answer was that Sbahle's services were ongoing and as long as the main contractor was on site, Sbahle was always required to be there on behalf of PRASA as the client. Mr Khuzwayo testified that Sbahle's services started in January 2009 and went on until November 2012. The latter date is when the main contractor left the Mabopane site.

[16] It was Mr Khuzwayo's evidence that the sum of R6 591 281.64 mentioned as fees for safety consultation for a period of 19 months represented fees for the additional work or services which Sbahle rendered to the project. According to Mr Khuzwayo, this was broken down for PRASA so that it would understand what Sbahle was claiming. Mr Khuzwayo was asked how he calculated the abovementioned amount. His explanation was that Sbahle was employed to be in the project for 17 months and it had to agree on a lump sum of R5.8 million. He explained that, however, from June 2010 to January 2012, the amount for fire consultancy for the period of 19 months amounted to R889 854.54. The latter amount, according to Mr Khuzwayo, represented time that Sbahle spent on rendering services without being paid for additional services rendered.

[17] Mr Khuzwayo testified that when the time specified in respect of the contract expired, he raised the issue with the PRASA project manager stating 'my time is about to be finished, what are we doing? Are we packing and going or what?' But PRASA's

project manager replied, ‘nobody is leaving here. Go back to your contract. That contract does allow for extension’. Mr Khuzwayo told the high court that he was referred to the alleged relevant clause in the contract. He emphasised that the claim was based on extra work done from June 2010 until November 2012. When he was asked specifically to define extra work, Mr Khuzwayo said it had to be borne in mind that the scope changed. The change of the scope did not reduce the work but in fact it meant extra work because the design had to change as a consequence of the variations introduced to the original design of the building. PRASA was the one that wanted extra stalls to be built and that, according to Mr Khuzwayo was not provided for in the original design. Also, the bridge was supposed to land at a certain place on the eastern side, the Mabopane side.

[18] Mr Khuzwayo was asked to produce the original design and instruction from PRASA stating that Sbahle should redesign the works. In response, he stated the following:

‘We all did our design as per that architectural concept. As we were busy with those designs then the client said I have got a problem with the land issue. [The architect was requested to reduce the bridge]. Now that had an impact on all of us who had already started designing as per architect’s sizes. Now you have got to come up with the new design which is going to fit the new specification or the new architectural concept. That is extra because you have already been given the drawings with all the dimensions and all of a sudden that changes. When that changes it impacts on your design. Then the client . . . when the client instructed the architect to change the width of the bridge that was affecting us as well. Because we all had to wait for the architect to come up with the new design.’

[19] Mr Khuzwayo testified that it was his view that PRASA anticipated that the project may not be finished on the proposed date and time and that is the reason why they inserted a clause in the contract which states that ‘if the consultant is required by the client to provide material additional services by reason of any alterations, project extension or modifications to the project as required by the client, then the client shall pay to the consultant additional amount in respect of the fee, commensurate with the additional services performed by the consultant’. That clause refers to extra payment to

Sbahle only if it was required by PRASA to continue. In Mr Khuzwayo's view, Sbahle was required or instructed by PRASA to continue in the project. In clarification, the court asked Mr Khuzwayo whether Sbahle was not instructed by PRASA to continue in the project. If that was so, that would have naturally affected the amount, as an extra payment ought to have been made for the work that was to be conducted as a result of the extension by PRASA and the necessity to change the design. Mr Khuzwayo confirmed what was put to him. On being asked by the counsel representing PRASA why must he be paid extra money - outside the contract, Mr Khuzwayo answered as follows:

'Remember our type of work especially the safety one depends on the main contractor, the existence of the main contractor on site allowed us to be there. We do not build the wall. We audit the health and safety inspections for the main contractor at all times. We do risk assessment on site as the main contractor is continuing to work on site.'

The high court

[20] The high court found that it was clear from the wording of the agreement that the parties agreed that PRASA would pay to Sbahle amounts in respect of the fee commensurate with additional services performed. The high court relied on *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646G in concluding that the language used in the agreement, its purpose, scope, background and the context is such that it confirms the nature of the transaction between the parties as it appears from the entire contract. The high court found that Sbahle rendered the same services as it had done up to and including 31 May 2010 and up to at least 28 February 2012. It found that the further services were an extension of services contracted for and Sbahle was integrally involved with the project. As far as the amount claimed by PRASA in the claim in reconvention is concerned, the high court found that PRASA made payment to Sbahle pursuant to the latter's invoice for the said amount in respect of Fire Consultancy Services. The high court found Mr Khuzwayo to be a credible witness and therefore found in his favour. The appeal, against the high court's judgment, is with the leave of this court.

Discussion

[21] It is convenient to begin with the claim in reconvention instituted by PRASA. PRASA requires that the amount of R2 034 938.19 paid back to it on the basis that it paid the same to Sbahle in error. It is common cause that Sbahle had issued an invoice for this amount in respect of the fire consultancy services it rendered in the project in terms of its contractual obligations. According to Mr Khuzwayo, the invoice relating to this sum of money was issued at the request of PRASA. His evidence in this regard was not at all contested. It is undisputed that prior to the institution of the claim in reconvention, PRASA never demanded that this amount be paid back to it, nor did it ever contend that payment was made in error. Importantly, PRASA led no evidence in this regard.

[22] The high court found correctly that PRASA could not succeed with its claim in reconvention. The claim in reconvention was therefore rightly dismissed. The undisputed fact that Sbahle was paid on a contractual basis, as it contended, further required that at the very least, the official of PRASA who made the payment, should have explained why the payment was made. PRASA's failure to call a witness in this regard therefore justified negative inference. See in the latter regard *Gleneagles Farm Dairy v Schoombee* 1949 (1) SA 830 (A)*; SOS Kinderdorf International v Effie Lentin Architects* 1993 (2) SA 481 (NM) at 489G-J. In order to succeed with a claim for the repayment of money paid *sine causa,* the party claiming payment carries the onus of proving the requirements of the applicable enrichment claim ie the *condictio indebiti*. See in this regard *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A) at 224; *Senwes Ltd and Others v Jan van Heerden and Sons CC and Others* [2007] 3 ALL SA 24 (SCA). In addition, it must be shown that payment was made in the bona fide and reasonable belief that it was owed. See in this regard *ABSA Bank Ltd v Leech and Others* 2001 (4) SA 132 (SCA).

[23] As a general requirement for the *condictio indebiti*, the error that gave rise to the payment must not have been an inexcusable error. In order to make a determination, regard must be had to the particular circumstances wherein the payment occurred. The court is called upon to exercise a value judgment. It is of course inappropriate to refine

the test of whether judicial exculpation is justified. The authorities state that a mistake should have been neither 'heedless nor farfetched', that it should not have been based on 'gross ignorance' and that it should have been neither 'slack nor studied'. See in this regard *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (SCA); *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme* [2017] ZASCA 116; 2018 (1) SA 513 (SCA). It is of importance to stress that the error must be reasonable, meaning that it must be excusable in the circumstances of the case. See, *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue supra; Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* [2008] ZASCA 127; 2009 (1) SA 196 (SCA) paras 23 to 29. There was no evidence from PRASA whatsoever before the court explaining why the payment was allegedly made in error nor why it was a reasonable mistake.

[24] I am of the view that the evidence of Mr Khuzwayo was not at all intended to aid interpretation in this matter. Apart from testifying in order to prove claim 2 of Sbahle, the evidence also provided the relevant background and context of the agreement and the working relationship between Sbahle and PRASA in the project.

[25] An argument was advanced on behalf of PRASA that each agreement set out a contractual price agreed upon between the parties. The prices were set out in the respective agreements. The submission continued thus:

'In terms thereof the parties agreed that for fire consultancy services the respondent would be paid a sum of R796 185.72 exclusive of vat. For health and safety services the respondent would be paid an amount of equivalent to 5% of the project value (this turned out to be the sum of R5 897 462.50 exclusive of vat) for the whole project.'

According to PRASA the abovementioned amounts were fixed and in the event of the project increasing in value, the services were to be free and in the event of a decrease in value the amount payable would be calculated on the decreased value. Effectively, PRASA's argument means there would never be an increase to the amounts agreed to. The other submission put forth by PRASA which must be dealt with in this judgment is the following:

‘Our submission is that the extension of time in the construction industry does not amount to a change in the scope of work, let alone material additional services . . . there were no written instructions to the respondents to incur any costs in regard to the project.’

PRASA’s contention is that there was an aborted attempt to reach an agreement made on 24 January 2012 when Sbahle suggested that for the period June 2010 to January 2012, it was owed R6 591 281.64 for health and safety consultancy and R889 854.55 for the fire consultancy inclusive of VAT. PRASA stated that it rejected the proposal on the basis that these amounts were exorbitantly high. However, PRASA made a counter offer in an amount of R1,5 million in settlement of Sbahle’s claim for R6,5 million in respect of safety consultancy, which Sbahle rejected. PRASA submits that Sbahle failed to establish or to prove its case.

[26] The context in which the contract was concluded, the wording of the contract and, to the extent necessary, the contra proferentem rule, ought to be considered in the process of interpretation. It is commonplace that the context includes the subsequent conduct of the parties which would indicate how they understood their contract. See in this regard *Unica Iron and Steel (Pty) Ltd v Mirchandani* [2015] ZASCA 150; 2016 (2) SA 307 (SCA) para 21. It is trite that in order to arrive at the common intention of the parties, the contract must be interpreted as a whole. See *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C; *Bothma–Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12.

[27] It is not wrong to have regard to the background and context in the interpretation of an agreement. It also does not equate to making a contract for parties. Taking cognisance of the background and context entails that the document must be read in context and regard must be had to the purpose and the relevant provisions thereof in order to ascertain the intention of the parties. See in this regards *Endumeni Municipality supra* at 603F-604D; *Ekhurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA); *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA); *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018]

ZASCA 176; [2019] 1 All SA 291 (SCA). The reason why the court seeks the common intention of the parties from the wording of the contract is because that wording as agreed between them remains mutual to them. If the words speak with sufficient clarity it must be taken as expressing the parties' common intention. See *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 624 G-625B.

[28] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at 603F-604D, this court stated the following regarding the interpretation of contract, document, legislation or some statutory instrument (para 18):

'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production . . . The "inevitable point of departure is the language of the provision itself'', read in context and having regard to the purpose of the provision and the background to the preparation and productivity of the document.'

The interpretation process is always an objective exercise. Furthermore an approach leading to an 'insensible or unbusinesslike result' or a result undermining the apparent purpose of the document, must be avoided

[29] The second agreement upon which claim 2 is founded, is contained in the particulars of claim and the amended plea. The terms of the second agreement relevant for the purpose of this judgment are the following:

'2.5 The said consultant will also be required to assist the contractor and the client in drawing up a comprehensive construction site plan. This plan shall be reported at all the site meetings and at any other time when required by the client.

3. The client will not entertain any extra fees claims unless he introduces a substantial or material change to the scope of the project.

. . .

The fee shall, be deemed to be inclusive payment for the services and for all disbursements, costs, expenses, overheads or profits of every kind incurred or to be earned by the consultants in connection therewith. If the consultant is required by the client to provide material additional services by reason of any alterations, project extension or modifications to the project as required by the client, then the client shall pay to the consultant additional amounts in respect of the fee, commensurate with the additional services performed by the consultant.'

The 'Consultant' is Sbahle and the 'Client' refers to PRASA. Sbahle's claim 2 of R9 095 968.47 together with interest and costs places reliance on allegations set out earlier in this judgment. The project was not completed on the anticipated contractual completion date, 31 May 2010. It was still not complete as at date of summons, but Sbahle was still rendering services to PRASA. It cannot be denied that the extension of the project was not necessitated in whole or in part by a negligent act, omission or default on the part of Sbahle. The agreement provides expressly that if Sbahle is required by PRASA to provide material additional services, inter alia, by reason of alterations, project extension or modifications of the project, then PRASA shall pay Sbahle additional amounts in respect of the fee commensurate with additional services performed by Sbahle. It remains undisputed that Sbahle rendered the same services up to and including 31 May 2010 and as from June 2010 to at least August 2013.

[30] The truth is that up to 31 May 2010, Sbahle became entitled to a total contract fee of R5 897 462.50 excluding VAT over a period of 17 months at a monthly rate of R346 909.56 exclusive of VAT. Sbahle was not paid as per the contract. Consequently, it contended that PRASA's conduct in neglecting or failing to pay for its services rendered over the period June 2010 to February 2012, amounted to a breach of the terms of the agreement between them. This contention cannot be faulted. PRASA's denial that Sbahle was rendering a service to it, is beyond my comprehension. According to PRASA's plea, Sbahle only rendered such services beyond 31 May 2010 by virtue of an extended period up to 28 February 2012. What is surprising is that PRASA appears to adopt the attitude that Sbahle was required to render a service free of charge for a period of approximately 19 months.

[31] In addition, it must be borne in mind that Sbahle did not simply continue on its own to render services beyond 31 May 2010. According to Mr Khuzwayo's undisputed testimony, the issue was raised with PRASA's manager. Mr Khuzwayo approached the manager and asked him pertinently as follows:

'My time is about to be finished what are we doing? Are we packing and going or what?'

It is common cause that PRASA's manager said 'nobody is leaving here. Go back to your contract, read your contract'. When Mr Khuzwayo responded and said '. . . it is telling me that my time is going to be over on 31 May 2010', the manager referred Mr Khuzwayo to the relevant clause saying 'that contract does allow for an extension'. It is Mr Khuzwayo's undisputed evidence as summarised above that he then enquired about the extra work. Mr Khuzwayo was told by Mr Sindane (the project manager for PRASA at the time) that the contract covers everything and Mr Sindane reportedly read the very same clause to Mr Khuzwayo.

[32] It is not without significance that PRASA called no witnesses and presented no version in opposition to the version presented by Mr Khuzwayo. Strangely, no further evidence was led and no version was put to Mr Khuzwayo in respect of PRASA's pleaded version that the parties agreed to extend the contractual period from 31 May 2010 to August 2013 subject to the original contract price remaining the same. In my view, based on common cause facts, the pleadings and Mr Khuzwayo's uncontested evidence, Sbahle was entitled to be remunerated for the services rendered after 31 May 2010 as expressly provided for in the first and second agreements. Undoubtedly, additional services were required by PRASA and they were rendered by Sbahle for a substantially extended period of time.

[33] In my view, the ordinary grammatical meaning of the contract provision relevant to the matter at hand is clear and unambiguous. The aforementioned is underpinned by the context in which the words are used. The truth is that Sbahle rendered time-based services. Such services were required to be rendered by Sbahle as long as the project was ongoing. The agreements provided a mechanism in terms whereof Sbahle would be remunerated if the project was extended for a substantial period of time. Indeed 'material additional services' must be interpreted within the aforementioned context. It is

not conceivable that PRASA would expect Sbahle to render services free of charge from June 2010 to at least August 2013. That is a period of approximately 2 years. *Jaga v Dönges NO & another, Bhana v Dönges NO & another* 1950 (4) SA 653 (A) at 602H and *Sassoon Confirming and Acceptance Co supra* at 646C are authorities for the proposition that context relates to context within the contract as well as the wider context relating to background evidence. Mr Khuzwayo testified to all the necessary background evidence.

[34] I have set out above the clause dealing with fees. Of importance is the portion that reads:

'If the consultant is required by the client to provide material additional services by reason of any alterations, project extension or modifications to the project as required by the client, then the client shall pay the consultant additional amount in respect of the fee, commensurate with the additional services performed by the consultant.'

[35] Mr Khuzwayo's undisputed evidence is that PRASA changed the scope of the project in the manner fully set out in the evidence summarised above. There were additional stalls and PRASA offices etc that had to be built; there were additional ticket offices to be built as well. Any interpretation that says all this did not amount to additional services brought about by reason of alterations, project extension or modifications to the project required by PRASA, would militate against the reality. Significantly, PRASA does not deny that it required all these additional alterations, project extensions or modifications. The truth is that all of the above certainly necessitated extra services to be rendered by Sbahle. It also caused or contributed largely to the project not being completed by 31 May 2010 as originally scheduled. It is clear that the extent of the extra work or alterations was not at all necessitated 'in whole or in part' by any negligent act, omission or default on the part of Sbahle. The fact is that if this was as a result of Sbahle's fault, negligence or omission, then clearly in terms of this clause PRASA would be absolved from paying Sbahle additional amount in respect of the fees. At the risk of repetition, the words used in the second agreement are clear and from them the intention of the parties is ascertainable. I am unable to agree with PRASA's contention that whereas the project was intended to be completed by

31 May 2010 any further extension of time with a view to complete it, did not bring about the change of the contract price in respect of the health and safety consultancy. This fails to take account of all additional additions, alterations or modifications to the project brought about by PRASA. The change in the fee structure is provided for in the agreement as set out above. This cannot be ignored.

[36] The question of fees owed to Sbahle did not simply arise when summons was issued and served on PRASA. The parties were aware about the additional fees due to Sbahle. On 24 January 2012, Sbahle wrote to PRASA and set out fees owed to it. I quote hereunder the last portion of that letter:

'Fees owed from June 2010 to January 2012 = R6591 281.64 for consultation period 19 months, from June 2010 to January 2012 = R889 854.55 for fire consultation period 19 months. The above calculated fees are for the extra work done after the expiring date for the contract (May 2010) and they exclude 7% increase for the project extension of time. All fees are vat exclusive. We trust that the above is in order and should there be any need for clarification, please contact myself.'

The letter was signed on behalf of Sbahle by David Khuzwayo. I mention that at that stage PRASA accepted that there had been extension of the project and that extra work was done even after the expiry of the contemplated date of completion of the project. PRASA did not dispute or deny that it changed the scope of the project by introducing alterations, additions and modifications to the project. PRASA accepted that it owed money to Sbahle. The dispute was only about how much exactly was owing. This comes out clearly from PRASA's response to Sbahle's letter dated 24 January 2012. PRASA, instead of contending as it now does that no fees were due and owing to Sbahle, accepted it owed Sbahle, but was merely concerned about the amount. Consequently, it made a counter offer to rather pay Sbahle an amount of R1.5 Million as a settlement instead of what was claimed. PRASA's letter dated 28 March 2012. Paragraph 2 thereof reads as follows:

'After studying the request for proposal fee review, in line with the numerous extension of time granted to the contractor as a result of circumstances beyond the contractor's control, I hereby recommend that the professional team be compensated as follows:

1. Project Management Services R2.5Million

2. POS. Mahiatsi Tumelo R2.7Million
3. Structural and Civil Engineers: MEC (including re design work) R1.5Million.
4. Electrical Engineers R1.2Million

. . .

Health and Safety Consultants: *Sbahle fee is exorbitantly high and not market related –1.5 Million is proposed instead of the R6.5Million being claimed*. It is evident that the professional team is currently discouraged since the period of the project extended beyond their anticipated completion dates and that they have depleted the resources for this project. We confirm that no more extensions of fees will be entertained and that all will be held responsible for performance.' (My emphasis.)

[37] The stance adopted by PRASA at the hearing of this matter before the high court and on appeal is new. This new stance now says in effect 'yes there was an extension of completion time, yes there was additional work necessitated by alterations, modifications and additional extra stalls to be built, new and additional offices to be built and additional ticket offices to built etc but Sbahle will not or is not entitled to be paid any sum of money apart from what was paid up to and including 31 May 2010'. In other words, despite an extension of the time period within which the project was scheduled to be finalised and despite what necessitated the extension, there shall be no payment to Sbahle. I ask rhetorically, why? The contract is clear on this. Sbahle must be compensated with an amount in respect of fees commensurate with the additional services performed. Any argument to the effect that Sbahle must have been instructed in writing has no substance at all. Apart from the fact that this was never even pleaded, it was not even raised in argument nor even referred to in the judgment of the high court. In my view, it is advanced for no reason other than as a last-ditch attempt to deprive Sbahle of what has been proved to be due to it.

[38] I have mentioned above that by accepting the version presented by Mr Khuzwayo, the high court effectively found him to be a credible witness whose evidence could be relied upon. PRASA omitted to present any evidence in rebuttal. It is trite that an appeal court must be reluctant to disturb findings of character by a trial Judge, who was steeped in the atmosphere of a trial and had the advantage of seeing

and hearing the witness. Such findings are only overturned if there is a clear misdirection or the trial court's findings are clearly erroneous. See *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706; *S v Francis* 1991 (1) SACR 198 (A) at 204C-E. The above approach has consistently been followed by this Court and the Constitutional Court. In *S T v CT* [2018] ZASCA 73; 2018 (5) SA 479 (SCA) para 26, this Court stated the following:

'In *Makate v Vodacom (Pty) Ltd* the Constitutional Court, in reaffirming the trite principles outlined in *Dhlumayo*, quoted the following dictum of Lord Wright in *Powell & Wife v Streatham Nursing Home:*

"Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case".' (Citation omitted.)

I have no reason to disturb the findings of the high court. In the circumstances, the appeal falls to be dismissed.

[39] For the aforesaid reasons, I would have dismissed the appeal with costs, including costs occasioned by the employment of two counsel.

_____

DV DLODLO

JUDGE OF APPEAL

Mabindla-Boqwana AJA (Petse DP and Mocumie JA concurring):

Introduction

[40] I have read the judgment of my brother Dlodlo JA. For the reasons set out below, I find myself unable to agree with his decision in regard to the outcome of this appeal. In my view, the appeal in respect of Sbahle's second claim should succeed with costs.

However, I agree that the appeal in regard to the claim in reconvention must fail. Such a claim was correctly dismissed by the court a quo.

[41] The issue which arises for determination in the appeal before us is whether PRASA breached the contract it entered into with Sbahle in respect of the safety consultancy services and is consequently liable for the amount claimed by Sbahle.

[42] To answer this question one must look at the terms of the agreement, and, in particular, whether those terms were satisfied for the purposes of the claim. Sbahle contends that by virtue of the project not having been completed on 31 May 2010 and extended to May 2012 (although in evidence Mr Khuzwayo alleged that the claim was up to November 2012 when the main contractor left the site), it was entitled to payment in respect of the additional months as it continued to render the same services to PRASA for such additional months. It based its claim on the clause in the contract which stated that if PRASA required it to provide additional material services, PRASA would be liable to pay additional amounts proportionate to the additional services performed.

[43] For its part, PRASA contended that not only were additional services not required, they were not performed as borne out by the pleadings and Mr Khuzwayo's evidence, and that the agreed extension of time (up to 28 February 2012) was merely given in order to enable Sbahle and the main contractor to complete their work for which they were fully paid (something not to be confused with increasing the scope of work) in accordance with the terms of the parties' contract.

[44] Accordingly, it is necessary at the outset to put matters in proper perspective by reiterating two aspects that bear on what is central to this appeal. First, the fate of this appeal hinges on the interpretation of the agreement upon which Sbahle relies for its claim. Thus, it is trite that its interpretation, as is the case with any document, is a matter for the court and not a witness who testifies in regard to the content of the document. Secondly, the fact that PRASA called no witnesses is not relevant insofar as the interpretation of the parties' contract is concerned whose terms were after all common cause between the parties.

[45] The issue will be better understood against the brief facts which I find necessary to highlight, in view of the variances on certain aspects between Dlodlo JA and myself. Save to that limited extent, I agree with the background and evidence as expounded by Dlodlo JA in his judgment. I accordingly will not repeat same.

[46] On 18 December 2018, PRASA entered into two separate written agreements with Sbahle. In respect of the first agreement, Sbahle would provide fire consultancy services for the Mabopane Bridge Redevelopment project (the project). The total fee for this agreement was R796 185.72. This agreement formed the basis of claim 1 in the particulars of claim which Sbahle no longer persisted with, as it was found to have been fully compensated as part of the payment in the amount of R2 034 938.19 made by PRASA to it on 15 October 2013. A letter embodying the terms of the first agreement was attached to the particulars of claim.

[47] As to the second agreement, which is the subject of this appeal, Sbahle was appointed as safety consultants in respect of the same project. This agreement formed the basis of claim 2 wherein an amount of R9 095 968.47 was claimed. Interestingly, Sbahle did not annex the full agreement in this respect to its particulars of claim. The complete copy of the second agreement with terms material to the determination of this claim, only emerged as an annexure to the plea and counterclaim. The total fee for this agreement would be 5 percent of the project which equated to R5 897 462.50. The terms contained in the complete copy of the agreement are crucial as it shall become clearer shortly. Both agreements were effective from 2 January 2009 to 31 May 2010. The averments in relation to both agreements in the particulars of claim are almost identical. As mentioned by my colleague, Sbahle obtained judgment in the court a quo in its favour in relation to claim 2.

Analysis

[48] The principles applicable to interpreting an agreement are trite. I will therefore not repeat them save to mention that, the point of departure is the language in the document read in context and taking into account the purpose of the provision and the

background to the preparation and production of the document.[1] In addition, the clauses in the agreement must not be read in isolation; the agreement must be taken as a whole.

[49] The material terms and conditions (in the second agreement) central to the dispute between the parties were that:

'…

3. The Client will not entertain any extra fee claims unless he *introduces* a *substantial or material change to the scope of the Project*.
4. The fee shall be paid in accordance with the agreed fee as per Annexure "A"

…

8. The client will not be liable *for any costs incurred* by yourselves through whatsoever cause except where the Client has *specifically instructed you in writing to incur same*. All fee claims applicable for the undertaking of this work are to be addressed with Intersite Property Management Services (Pty) Ltd.

…

FEES

The Client shall pay to the Consultant as full remuneration for the performance by the Consultant of the Services in accordance with this Agreement.

The Fee shall, be deemed to be *inclusive payment for the Services and for all disbursements*, *costs*, *expenses*, overheads or profits of every kind incurred or to be earned by the Consultant in connection therewith.

If the Consultant is required by the Client to provide material additional Services by reason of any alterations, project extension or modifications to the Project as required by the Client, then the Client shall pay to the Consultant additional amount in respect of the Fee, commensurate with the additional services performed by the Consultant.

However, should the extent of extra work or alterations that the same shall have been necessitated in whole or in part, by any negligent act, omission or default on the part of the Consultant, the Client will not pay to the consultant additional amount in respect to the fee

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

The total fee for Consultant's services on the above project is based on Annexure 'A'.

ANNEXURE A

Service : Safety Consultant
Total Fee (excl. VAT): 5% of the Project Costs. Effective date is 2nd January 2009 until Contractual Completion date: 31 May 2010.

Should the estimated project value decrease the tariff of 5% of the project costs will be applied on final value and should the estimated project value increase the services will be free until the completion of the project, 31 May 2010.

The fees initially will be fixed based on the costs of works as agreed to by the client in terms of the aforementioned principle.' (Emphasis added.)

[50] In order for a breach of contract to have been established, Sbahle would have had to show: (i) that PRASA *introduced* a substantial or material change to the scope of the project in terms of clause 3; (ii) that PRASA *had instructed it in writing to incur such costs* claimed as required in clause 8; and (iii) that PRASA *required it to provide material additional services* as per the fees section of the contract and that the fee claimed *was commensurate* with the material additional services. (Emphasis added.) The terms of the agreement are clear and unambiguous. Such terms or requirements must be assessed as against the pleadings and the evidence.

[51] It is common cause that Sbahle only pleaded that it rendered the *'same services as it rendered up to and including 31 May 2010*.' It did not plead: (a) that it was required to perform material additional services by PRASA (b) the nature and scope of those services, (c) that it performed those additional services, and (d) that the additional amount claimed is commensurate with the services performed, ie material additional services.

[52] The only relevant evidence led by Mr Khuzwayo was that the project encountered a number of problems which caused a delay. These included demands

made by the community who wanted to dictate their own terms to the main contractor; the land owner who did not want the bridge to land on his property; requests made by PRASA for further developments, namely, construction of a derailment wall, extra stalls on the western side of the bridge as well as offices to be built underneath the bridge. Because of these changes, so went Mr Khuzwayo's evidence, the architect had to change the design of the project, which also meant the rest of the project team (including Sbahle) had to come up with a new design to fit the new architectural concept.

[53] The first problem that arises from Mr Khuzwayo's testimony is that the alleged additional work he recounted related only to the work that had to be performed by the main contractor, he failed to specify the material additional services that Sbahle was required to perform. All he could say was that Sbahle had to be with, monitor and supervise the main contractor to ensure that it complied with health and safety standards at all times during the project. Mr Khuzwayo was asked by PRASA's counsel during the trial to produce the original design, the letter with instructions from PRASA to redesign and the changed design, so as to ascertain the nature and the extent of change in scope of the original work. He failed to do so.

[54] The redesign would, in any event, obviously have been done prior to 31 May 2010. Sbahle's claim is for work done beyond that period. It is also not clear whether such redesign pertained to the fire consultancy or safety consultancy services.

[55] The second problem is that Mr Khuzwayo was not able to point to any specific instruction given in writing to incur additional costs as required in clause 8 of the second agreement. This is an important pre-condition for PRASA's liability. All Mr Khuzwayo could say was that when the time for the project was about to expire, he raised the issue with PRASA's manager in the following terms: 'My time is about to be finished. What are we doing? Are we packing and going or what?' The manager said in response: 'Nobody is leaving here. Go back to your contract. Read your contract' According to Mr Khuzwayo he then said to the manager: 'I know. It is telling me that my

time is going to be over on 31 May 2010.' The manager then replied: 'That contract does allow for an extension.'

[56] Beyond this conversation it is clear that no written instruction was given to Sbahle to incur costs as required in clause 8. Counsel for Sbahle submitted that clause 8 refers to '*costs*' as opposed to '*fees*' and the pre-condition relating to written instructions only pertained to '*disbursements*' or '*expenses*' incurred by Sbahle and not fees. This argument is contradicted by what is contained in the unnumbered second paragraph under the heading 'FEES'. In this paragraph it is clearly stated that '[t]he Fee shall, be deemed to be inclusive [of] payment for the Services and for all *disbursements, costs, expenses*, overheads or profits of every kind incurred or to be earned by the Consultant in connection therewith.' (Emphasis added.)

[57] Sbahle regrettably cannot get past the requirements in clause 8 of the agreement. Clearly, in terms of this clause it should have procured written instructions before incurring any costs for 'additional services'. Instructively, the conversation with the manager does not refer to change in scope of work or provision of material additional services. All it refers to is the extension which the manager stated was 'allowed' by the contract, which seems to be consistent with what is alleged in the particulars of claim that during the extended period Sbahle rendered the 'same services as it rendered up to and including 31 May 2010'.

[58] I note my colleague's reference to Mr Khuzwayo's evidence in relation to 'extra work' that needed to be performed. The issue, however, is whether Sbahle was instructed in writing by PRASA to render additional 'material' services, and if so whether the amount claimed is commensurate with such additional work, as mentioned above. Mr Khuzwayo's evidence did not satisfy these requirements. It is also telling that he could not produce the new designs he supposedly prepared along with the other requested documents.

[59] An intriguing point, overlooked by the court a quo, is that the additional services performed had to be 'material'. It was, accordingly, not sufficient for Mr Khuzwayo to

merely mention that Sbahle performed ‘extra work’. In my view, over and above specifying the additional work that Sbahle was required and instructed to perform in writing (which he failed to do), Mr Khuzwayo had to demonstrate that such work was ‘material’. Had this critical fact been established, Sbahle would, in addition, bear the onus to demonstrate that the amount claimed was commensurate with the additional services rendered. On a conspectus of the evidence, Sbahle came nowhere near to establishing any one of these crucial facts. Sbahle’s failure to do so must ineluctably lead to the conclusion that the case against PRASA was not proved.

[60] Sbahle referred to an internal memorandum of PRASA dated 12 March 2012, which recommended that an amount of R1,5 million be paid to Sbahle instead of the R6,5 million it claimed. Apart from the fact that the memorandum is an internal document, it does not record any agreement nor can it be equated to an acknowledgement of an agreement or written instructions for Sbahle to incur costs for additional services. It simply recommends compensation to be paid to the professional team (including Sbahle) for the extension of time. It does not refer to compensation for material change in scope of work or additional services. On a fair reading thereof, the memorandum amounts to no more than PRASA’s attempt to resolve a dispute that had arisen between the parties amicably.

[61] A brief comment to illustrate the difference between the two scenarios will suffice. It seems to me that the second agreement countenanced a situation where the client would introduce substantial or material change to the scope of the project within the duration of the agreement. The extension of the scope of the agreement may not necessarily result in the extension of time. Time may also be extended for the same services to be rendered within an extended period. Mr Khuzwayo seemed to conflate the two scenarios. Delays in themselves do not necessarily amount to additional work.

[62] The contract in this case stated that the client would be liable for an additional amount when it introduced ‘substantial’ change in scope of work. Furthermore, payment of any additional amount incurred would have had to be measured with the additional work done to determine if it was commensurate with such work. It seems to me, the

agreement made a special provision for payment of fees in relation to additional services. This is because in respect of the total fee of the project the agreement expressly provides that such will be based on Annexure 'A'. In contrast, when it came to additional work, such work had to be costed to determine whether it was commensurate with the additional services performed by Sbahle. It is clear therefore that a special fee dispensation was envisaged in respect of additional work.

[63] Notably, the project commenced some seven months later than it was scheduled. Mr Khuzwayo confirmed that it was 53 percent complete when Sbahle left the site. Notwithstanding that, the full contractual amount was paid. The formula employed in Annexure 'A' was based on the contract being completed on the specific date of 31 May 2010. The unsuccessful attempt to negotiate a further fee in relation to the safety consultancy services is, in my view, indicative of the fact that any amount above the fees agreed to in the contract would have had to be a subject of negotiations. It was not covered by the agreement as it stood.

[64] In sum, the contract is clear that PRASA would only be liable for an extra fee if, it introduced significant or material changes to the scope of work, instructed Sbahle in writing to incur costs for such additional work and payment of the additional amount would be commensurate with the work done. Not only was compliance with these pre-conditions not pleaded, no evidence was led in this regard. To underscore this point, it bears emphasising that the basis of PRASA's case is not new, its defence has always been founded on the fact that PRASA at no stage instructed or required Sbahle in writing to undertake material additional services. This issue and the relevant clauses were pertinently raised by PRASA's counsel in the course of Mr Khuzwayo's cross-examination.

[65] Sbahle, therefore, failed to discharge its onus. The court a quo erred in finding that it did. For those reasons, I am of the view that to this extent the appeal should succeed. So far as costs are concerned, I am satisfied that PRASA is entitled to its costs as it has achieved substantial success on appeal.

[66] It remains to address one final issue. Counsel for Sbahle submitted that it would be iniquitous for Sbahle to perform work for many months to PRASA's benefit without being paid for its services. The finding in this judgment does not suggest that Sbahle should not be compensated for its services, if any. It may be that it has a remedy, but such remedy does not lie under the second agreement it relied upon in its action. It possibly can have a competent claim on a different cause of action. However, for present purposes Sbahle based its claim on contract, consequently, the facts pleaded and the evidence led had to be construed in light of the parameters of the said contract.

[67] For the aforegoing reasons, the following order is made:

1 The appeal in relation to the second claim succeeds with costs, including costs consequent upon the employment of two counsel.

2 The appeal in relation to the claim in reconvention is dismissed.

3 The order of the court a quo is set aside to the extent reflected below and substituted with the following:

'The action in respect of the second claim is dismissed with costs.'

_____

N P MABINDLA-BOQWANA

ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant:	M Gwala SC (with him M Machete)
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