IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 2547/2019

In the matter between:

RAZZMATAZZ CIVIL (PTY) LTD	First Plaintiff
CIVIL TECH CONSTRUCTION CC	Second Plaintiff

And

THE MEC: FREE STATE PROVINCIAL GOVERNMENT: DEPARTMENT OF POLICE, ROADS AND TRANSPORT	Defendant

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HEARD ON:	17 & 19 MAY 2023 WRITTEN HEADS OF ARGUMENT DELIVERED ON 02, 19 & 22 JUNE 2023
JUDGMENT BY:	DANISO, J
DELIVERED ON:	06 OCTOBER 2023

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[1] The plaintiffs as a joint venture (the JV) sued the defendant (the MEC) for idle construction equipment and Occupational Health and Safety costs (the OHS costs) arising from the suspension of the construction Works relating to the contract concluded by the parties on 06 or 13 September 2016.

[2] In terms of the contract:[1]

2.1. the JV was awarded a tender to upgrade the gravel road between Schonkenville and Koppies in the Free State for a contract amount of R185 132 183.80 including VAT;

2.2. the contract was to endure for a period of 36 months from 06 September 2016 to 19 November 2019;

2.3. the JV would be entitled to invoice the MEC for work performed and expenses incurred on a monthly basis;

2.4. the MEC agreed to remunerate the plaintiffs within 30 days of receipt of the invoices (clause 6.10.6.2 of the GCC); and

2.5. Mol Pro Consulting (Pty) Ltd was appointed as the MEC's Agent and Engineer.

[3] It is common cause that the construction site was handed over to the JV on 3 October 2016. On 04 October 2016 the JV was instructed by the MEC's Engineer not to establish site (setup on the construction site in preparation of construction) to avoid unnecessary costs and claims for standing time due to the looming litigation that was threatened by an aggrieved bidder, Raubex Construction (Pty) Ltd (Raubex).[2] On 11 October 2016 the JV was instructed to establish site but not to commence with the Works.

[4] On 24 October 2016, Raubex launched an urgent application in this court under case number 5075/2016 seeking an interdict to prohibit the construction Works pending review proceedings that Raubex intended to institute to set aside the award of the tender to the JV.

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[1] The copy of the appointment letter dated 6 September 2016 is attached as Annexure "A" on the particulars of claim. The relevant Conditions are embodied in the General Conditions of Contract for Construction Works (the GCC) second edition 2010 and in the Standard Specifications Document (Colto) as Annexures "B" and "C".
[2] Page 13 of Exhibit "C" is a copy of a letter from the MEC to the JV in that regard.

[5] Raubex's application was opposed by the MEC whilst the JV elected to abide by the court's decision. An invoice for the sum of R5 783 931.36 was subsequently presented to the defendants on 26 October 2016. The invoice was paid on 07 December 2017.

[6] On 01 November 2016, the construction Works were suspended by the MEC's Engineer in terms of clause 5.11.1 of the GCC pending the litigation (the first suspension). On 03 November 2016 the interdict was granted by agreement between Raubex and MEC.

[7] On 07 November 2016 the JV notified the MEC in terms of clause 5.11.2 of the GCC of its intention to claim for an extension of time and compensation for standing costs as contemplated in clause 10.1 of the GCC. The MEC responded on 30 November 2016 by disputing the applicability of the clauses relied upon by the JV and averred that the claim will not be honoured. The JV was instructed to de-establish from the construction site. The dispute was ultimately referred to the Dispute Adjudication Board.

[8] Raubex's application was subsequently withdrawn on 11 August 2017. The JV's claims submitted on 06 April 2017 and 13 October 2017 were dishonoured essentially on the grounds that the JV had breached the terms of the contract therefore disentitled from claiming damages it incurred as a result. The referral to the Dispute Adjudication Board did not yield the desired results for the JV.

[9] It was on 15 September 2017 that the JV was informed that the suspension has been lifted and that they may resume with the construction Works however, on 19 October 2017 the construction Works were suspended yet again and only uplifted approximately a month later on 22 November 2017 (the second suspension). The JV's claim in respect of the second suspension was accepted and the JV was compensated accordingly.

[10] In the particulars of claim, the JV claims an amount of R47 878 658.50 computed at para 22 as follows:

*"22.1. The costs of non-productive plant and/or construction equipment resulting from the suspension of the contract in the amount of **R48, 565,919.19** inclusive of Value Added Tax hereto appended marked "E" minus the amount of **R2,090, 540.15** inclusive of Value Added Tax that was already granted by the adjudication committee.*

*22.2. The costs associated with time related costs in terms of Health and safety and Environmental Management Plan in accordance with the bill of quantities resulting from the suspension of the contract, in the amount of **R828, 000.00** inclusive of Value Added Tax."*

23.1 In addition, the JV is entitled to payment in the amount of R575 279.46 in terms of Clause 6.10.6.2 of the GCC, in terms of Uncertified Payment Certificate 1 it rendered to the Engineer on 26 October 2016. This payment certificate associated with costs was incurred for its initial site establishment and was only paid by the Defendant on 7 December 2017."

[11] The JV contends that in terms of clause 5.11.2 of the GCC it is entitled to its proven additional delay related costs caused by idle construction equipment and OHS costs consequent to the delay.

[12] The claim is resisted essentially on the ground that the JV is seeking damages resulting from the suspension of the construction Works but has failed to adduce any evidence to prove the damages it allegedly sustained. The suspension came about as a result of a court interdict which amounts to a supervening impossibility with an effect of *vis major* therefore, the MEC's performance is excused.

[13] Mr Stewart James Fletcher (Fletcher) is a civil Engineer employed by the first plaintiff as a project manager. He gave evidence in support of the JV's claim whilst the MEC led the evidence of its chief civil Engineer and project manager Mr Tholang John Mosianedi (Mosianedi) and Mr Stuart John Riddle (Riddle) an expert in construction management. The summary of the evidence proffered by the witnesses follows hereunder.

[14] Mr Fletcher testified that pursuant to the conclusion of the contract, the JV concluded a lease agreement with an entity named Razzmatazz Trading and Investment 19 (Pty) Ltd for the duration of the contract in terms of which JV

hired construction equipment for the performance of the construction Works[3] and in terms of the contract, the JV was also required to ensure that health and safety measures were in place upon the establishment of site.

[15] As a result of the suspension of the Works, the construction equipment and the labour of the salaried personnel including those overseeing health and safety requirements stood idle resulting in the JV incurring additional delay related costs. These additional costs are provided for in the contract.

[16] It was his testimony that at all material times hereto the MEC was aware of the presence of the construction equipment on site including the employees.[4] In order to minimise the financial implication for the MEC, the JV tried to mitigate its losses. Letters were sent to other companies in the construction industry regarding all the equipment available to rent and by also moving some of the equipment to another site but due financial challenges experienced in the construction industry at that time not all the equipment was rented out and due to lack of space at the JV's premises, the remaining equipment could also not be accommodated.

[17] Under cross-examination, he denied that the cause of the suspension of the construction Works was as a result of a court interdict because the instruction to suspend the Works was given before the court order in any event, in terms of the contract the JV is entitled to be paid for its standing time costs occasioned by to the suspension of the construction Works on the instruction of the MEC's Engineer.

[18] All the construction equipment that was established on site was necessary and required for the work to be done and despite the suspension of the construction Works, the JV was still obligated to pay the rentals in terms of the lease agreement and also the salaries of the personnel overseeing the OHS requirements namely: compiling health and safety files, medicals and insurances as provided for in the contract therefore, the claim is not premised

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[3] Exhibit "A" is a copy of the lease agreement signed on 16 September 2016. The rental payable is about R65 217.50 per day.

[4] Page 30 of Exhibit "C" is a letter dated 16 November 2016 addressed to the MEC in that regard.

on a breach of the contract. He was not in possession of the proof of payment of the HOS related costs. He also stated the rentals of the construction equipment were still not paid, the account is in arrears as the JV had no funds to pay the rentals.

[19] He confirmed that pursuant to the suspension of Works, the contract was extended by a year as compensation for the delay occasioned by the suspension not related to the court interdict. An amount of R2 593 560.00 (excluding VAT) was also paid to the JV in respect of idle construction equipment.

[20] According to Mosianedi and Riddle, the cause of the suspension of Works is attributable to the court interdict therefore the MEC is not liable for the costs in that regard that aside, the MEC can only be liable to pay for the equipment that was needed. The equipment brought by the JV on site was not only unnecessary it was also excessive.

[21] Mosianedi also pointed out that "establishment of a site" only refers to ablution facilities, carports and electrical supplies it has nothing to do with all the construction equipment that the JV had brought on site. He told the court that he visited the construction site at least once a month from 15 September 2016 including during the suspension period and what he observed were mainly trucks, low beds and transporting equipment which were absolutely not necessary to be there at least until required and needed. With regard to personnel, the JV only needed a team of three (3) people only including the surveyor.

[22] During cross-examination Mosianedi stated that the JV was informed in writing that they must remove the plant from site so that the MEC would not be liable for the costs in that regard. When it was put to him that the JV did not have such a letter, his response what that the letter was in his laptop. He went on to concede that pursuant to the suspension instructions on 4 October 2016, nothing more was done or said to the JV regarding the construction equipment on site. He reasoned that it was not the responsibility of the MEC to keep on reminding the JV to remove its construction equipment and whilst there was no

law preventing the JV from bringing and keeping its construction equipment onto the site the MEC can only be liable to pay for the equipment that was needed and that is what this what Colto also provides. He also said the JV was not entitled to remove the equipment from the construction site without his permission. He also said he could not tell them to remove it because it was not known when litigation will be finalized. Another reason he offered was that it would have been costly if the JV had to leave the site and then return. They were hoping that the litigation will be resolved sooner. He could not recall that the experts said the JV was entitled to standing costs for that period.

[23] With regard to the provisions of Colto, it was put to him that it makes reference to "all equipment" must be brought onto the construction site, his response was that a contract can be amended.

[24] The quantum claimed by the JV was disputed because the invoices submitted were unbundled they had to be verified. That has since been done.

[25] Riddle compiled the joint minutes[5] with Mr Errol Tate on 4 May 2023 in terms of which, the experts agreed that since the MEC was the cause of the delay between the date of the withdrawal of the interdict and the date on which the JV was instructed to proceed with the construction work the standing time costs incurred during that period would be for the MEC's account. Any additional claims related thereto would constitute double payment.

[26] He testified that in terms of the parties' tender programme the equipment that was established on site by the JV was excessive. They had about thirty (30) trucks, excavating equipment and TLB on site when only three (3) tipper trucks would have been sufficient and this is due to the fact that the JV was first required to survey the road before undertaking any construction for at least six (6) weeks. Personnel on site was also unnecessary at that stage.

[5] Exhibit "I" page 40.

[27] His cross-examination revealed that Riddle did not even go to the construction site. He admitted that he did not physically observe the equipment but took into account what was contained in the tender documents.

[28] Thus is in short the summary of the facts before this court.

[29] Having regard to the *viva voce* and the documentary evidence (Exhibit "A" to "I") presented by the respective parties, I am not persuaded that the MEC has delivered a meritorious defence to the JV's claim.

[30] As correctly argued in the JV's written heads, the facts of this matter are generally of common cause and with regard to the disputed facts, the version proffered by the JV is to be preferred as opposed to the MEC's version for the reason that, Fletcher gave a good and succinct account regarding the circumstances under which the construction Works were suspended including the basis of the JV's claim.

[31] His testimony that the delay in the construction Works was not attributable to the court interdict is corroborated by the MEC's witnesses who confirmed that the JV was instructed not to commence with the construction Works on 04 October 2016 approximately a month before the interdict was obtained by Raubex on 03 November 2016. The written instruction to suspend the construction Works followed on 01 November 2016 again, before the court interdict was granted. I accordingly agree with the JV's contention that the suspension of the Works was not on account of the court interdict which would constitute a supervening impossibility akin to a *vis major.*

[32] It is also important to point out that the MEC acquiesced to the granting of the court interdict. I am unable to find that a consent order can constitute a *vis major* where it was not an unforeseen event: a party would be discharged from liability if it was prevented from performing its obligation on account of a *vis major* but

not if the impossibility was due to its own fault, not unforeseeable or unexpected.[6]

[33] I do not agree that with the MEC's contention that the species of the JV's claim is one of damages and that the JV must prove a breach of contract in order to succeed with its claims. It was explained in *Imprefed (Pty) Ltd v National Transport Commission*[7] that where a contract makes provision for the handing over of the site to a contractor. A subsequent suspension of the construction Works by the employer, or someone acting on his behalf the claim to recover expenses incurred in that regard would be governed by the provisions of the contract and "the amount recoverable is that which the Engineer considers and certifies as fair."

[34] Similarly, there is no merit to the MEC's contention that actual proof of payment of the rentals for the construction equipment is required to substantiate the JV's claim of the additional costs relating to the lease of the construction equipment. I disagree, the lease agreement, Exhibit "A" constitutes sufficient proof of the JV's obligations in terms of the lease agreement.

[35] The MEC's witnesses have relayed a mediocre and improbable version regarding why the JV is disentitled to its standing costs for idle equipment and HOS expenses. Mosianedi and Riddle's evidence that the JV placed unnecessary and unwarranted construction equipment on site and thereafter failed to remove it to mitigate its claim is gainsaid by the provisions of contract ('the Colto"). See Exhibit "H" page 334, section 1302 para (a) titled "GENERAL REQUIREMENTS" and it states that:

> *"Prior to starting with construction, the contractor shall also move all constructional plant and personnel to the site..."*

[36] The JV's evidence that it in order to mitigate its losses it offered to rent out the equipment to other contractors and some was rented remains uncontroverted.

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[6] F du Bois *Wille's Principles of South African Law* 9 ed (2007) at 849; *Kooij v Middleground Trading 251 CC* **2020 JDR 0659** (SCA).

[7] **1993 (3) SA 94** (A) at 104 E-G

[37] The key terms of the JV's claim are embodied in clause 5.11 of the GCC which deals with the ***Suspensions of the Works***. The relevant clause provides thus:

> *"5.11.2. unless such suspension or alteration is otherwise provided for in the Contract or by reason of some default or breach of the Contract by the Contractor, the Contractor shall in respect of delay to Practical Completion and/or to proven additional costs of giving effect to the Engineer's order be entitled to make a claim in accordance with clause 10.1."*

[38] The MEC's reliance on clauses 5.3.1 and 5.12.3. of the GCC in substantiation of its contention that the JV is not entitled to rely on clause on 5.11. 2 of the GCC is in my view unsound because, clause 5.3. deals with the ***Commencement of the Works*** by the contractor it directs the contractor that:

> *"Upon the Engineering's instruction the Contractor shall, save as may be otherwise provided in the Contract or be legally or physically impossible, commence executing the Works. Such instruction shall be subject to the submission by the Contractor, and approval by the Engineer, of documentation required before commencement with the Works execution as set out in the Contract Data."* and

[39] Clause 5.12.3 also does not offer refuge to the MEC as it does not gainsay the JV's entitlement to compensation for additional costs occasioned by the suspension of the Works. It simply provides that:

> *"If an extension of time is granted, the Contractor shall be paid such additional time-related General Item, including for special non-working days, if applicable as are appropriate regarding any other compensation which may already have been granted in respect of the circumstances concerned."*

[40] There is nothing ambiguous about the terms of clause 5.11.2. Taking into account the provisions of the contract as a whole including the General Conditions of Contract for Construction Works (the GCC) second edition 2010 and the Standard Specifications Document (the Colto), the intentions of the parties and the purpose of this provision are succinctly set out. The position

enunciated therein is clear, it sums up the issue in contention[8] and confirms that the JV's claim rests pertinently on the provisions of clause 5.11.2 which entitles the JV to claim the costs for Practical Completion and/or proven additional costs and it includes costs caused by idle construction equipment and OHS costs consequent to the delayed construction Works on the instruction of the Engineer.

[41] On the facts germane to this matter, the rates charged in the invoices submitted by the JV for idle equipment are in accordance with the applicable guidelines, this fact was confirmed by Mosianedi.

[42] The JV has succeeded in establishing its claim relating to idle construction equipment on a balance of probabilities. No sufficient evidence has been adduced to prove how the amount of R828 000.00 relating to the claim of HOS costs is arrived at.

[43] The JV has substantially succeeded in its claims it is accordingly entitled to the costs including costs reserved on 05 October 2021.

ORDER

[44] The order that I issue is the following:

1. The defendant shall pay the plaintiffs:

    1.1. An amount of R46 475 379.04 in respect of idle construction equipment;

    1.2. An amount of R575 279.46 in respect of the interest for the late payment of the plaintiffs' payment certificate rendered on 26 October 2016;

[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* **2012 (4) SA 593** (SCA), para 18.

1.3. Interest on the said amounts *a tempore morae* at the prescribed rate calculated at 10.25% per year from 14 November 2017 until date of final payment; and

1.4. The costs of this application including the costs reserved on 05 October 2021.

The Honourable Justice

2023 -10- 0[redacted]

N.S. Daniso

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Plaintiff:	Adv. S. Grobler (SC)
Instructed by:	Graham Attorneys
	BLOEMFONTEIN
Counsel on behalf of Defendants:	Adv. N.A. Cassim
Instructed by:	The State Attorney
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