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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION
[FUNCTIONING AS THE GAUTENG DIVISION MBOMBELA]

Case number : 1605/2017

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|-----|--|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED : YES |

H.C. Jansen van Rensburg

SIGNATURE

Date : 4 April 2019

DATE

SIGNATURE

In

PAVEBUILD CC

PLAINTIFF

CK2003/099769/23

And

F.J. JOUBERT & SONS CC

DEFENDANT

JUDGMENT

JANSEN VAN RENSBURG AJ

INTRODUCTION

[1]. The plaintiff is PAVEBUILD CC a close corporation with registration number CK2003/099769/23 properly registered in terms of the statutes of the Republic of South Africa with address plot 1[...] W[...] R[...] E[...] Mpumalanga.

[2]. The defendant is F.J. Joubert & Sons CC 2009/016009/23 a company properly registered in terms of the statutes of the Republic of South Africa with address Stabilis Inc Pro Forum Building, Van Rensburg Street 5 Nelspruit, Mpumalanga. The defendant in the meantime converted to a company.

LEGAL ACTION BETWEEN THE PLAINTIFF AND THE DEFENDANT

The plaintiff

[3]. On 19 September 2013 the plaintiff issued a summons against the defendant for the non-payment of the following amounts for work done –

- (a). Claim one : Riverside X 13 Nelspruit. Outstanding amount due to the plaintiff settled at R 160 528-00 + VAT.
- (b). Claim three : Ingwe Mall Malelane. Outstanding amount due to the plaintiff settled at R 35 470-27 + VAT.
- (c). Claim four : Construction of Wall at SAPPI Ngodwana. Outstanding amount due to the plaintiff settled at R 135 547-80 + VAT.
- (d). Claim five : Erecting of a wall at the Grove Nelspruit. Outstanding amount due to the plaintiff settled at R 59 796-63 + VAT.

[4]. Based on the above I am not going to deal with the initial arguments regarding the contracts entered into between the plaintiff and the defendant and the contents of those contracts. The point of departure will focus on the only outstanding aspect namely the wall at Makro which consist of two elements namely the claim by the plaintiff and the counter claim by the defendant.

[5]. The defendant admitted the following amounts due and payable to the plaintiff regarding claim 2 excluding the cost of the construction of the wall at Makro Nelspruit [this will be dealt with later in the judgment] -

- (a). Rings : R 67 200-00 plus VAT.
- (b). Civil work: R 24 460-00 plus VAT.
- (c). Edging: R 22 400 – 00 plus VAT.
- (d). Repair edging: 9 028-00 plus VAT.
- (e). Civil work: R 95 040-00 plus VAT

THE ISSUE IN DISPUTE : THE REMAINDER OF CLAIM TWO : THE CONSTRUCTION OF THE WALL AT MAKRO NELSPRUIT

[5]. In January 2011, the plaintiff handed a quotation to the defendant who included the same standard conditions as that of claim one to perform work for the defendant at Makro Nelspruit. The quote was accepted by mr K. Joubert as an authorised representative on behalf of the defendant.

[6]. The quotation was for the construction of a '*loffel brick wall*' [the wall] on the outskirts of the main construction site over a specific distance to act as a barrier on the side of the construction terrain. The construction wall would consist of specific '*loffel*' cement bricks which would be placed in a specific order and format and ground covered with a woven wrap material (something like a big bag filled bag at the back of the loffel cement bricks) which would be compacted to secure the ground on the inside of the wall. The wall would be built at an angle of 60 degrees according to the specifications of the designer, mr Farraris. The plaintiff completed the construction of the wall and other civil engineering works for the defendant.

[7]. The construction of the wall was overseen and monitored by the defendant in

person, personnel of the defendant and the responsible engineer for the complete site on which the whole Makro complex was constructed.. No complaints were received from the defendant or any other persons during the construction of the wall. Sometime after the plaintiff handed over the construction site of the wall to the defendant, a huge crack appeared on the surface of the parking area behind the wall.

[8]. The plaintiff previously warned the defendant of the incorrect digging of a trench for a storm water system as well as the cracks in the tar surface on top of the wall being the edge of the parking area close to the face of the wall. Over the period December 2011 to January 2012 it so happened that there was excessive rain in the Nelspruit. The crack on the parking area was not covered, repaired covered to prevent rain from entering at the back of the wall. After the plaintiff handed over the wall to defendant and left the site, the defendant refused to pay the plaintiff the outstanding amount due and owed to the plaintiff.

[9]. The amount outstanding was R 969 606 – 17 + VAT.

COUNTER CLAIM BY THE DEFENDANT TO THE PLAINTIFF'S CLAIM – MAKRO NELSPRUIT

[10]. The defendant included a counter claim for money due by the plaintiff to the defendant for damages and repairs to the '*Makro wall*' to the value of R 2 050 557 - 63 + VAT caused purportedly by the poor quality of work done in the construction of the wall by the plaintiff and which the defendant claimed to have to be rebuild as the wall '*collapsed*'.

THE REMAINING ISSUE IN THIS MATTER : CLAIM FOR CONSTRUCTION OF THE WALL AT MAKRO IN NELSPRUIT

[11]. The only issue between the plaintiff and the defendant that remained is the claim

and counterclaim by the parties referring to the construction of a wall at Makro in Nelspruit. The issues for this court to determine are the following -

- (a). What amount is due by the defendant to the plaintiff; if any?
- (b). Was there a valid counterclaim by the defendant against the plaintiff based on unprofessional work done by the plaintiff?

EVIDENCE IN CHIEF BY THE PLAINTIFF

FIRST WITNESS : MR RUTHMAN

[12]. Mr Ruthven is the owner of the plaintiff which was contracted by the defendant to do some civil engineering and building/construction work for the defendant. The witness has a civil engineering diploma, had worked for ConCor for a number of years and has been installing storm water and drainage pipes for close to 18 years. He has extensive knowledge of building walls such as the ones contracted for at SAPPI Ngowana and Makro in Nelspruit. He has the skills and knowledge to undertake civil engineering works and to level, fill and pave large areas.

[13]. The plaintiff supplied the defendant in each of its claims against the defendant with a written quotation which included the work to be done, an amount due for the work done and some standard conditions applicable in executing the work for the defendant. The standard conditions of the quotations were as follows –

- (a). Payment by the defendant to the plaintiff was to be affected within 30 days of the completion of the work done by the plaintiff based on monthly certificates.
- (b). The plaintiff testified that it included a rate of 2% interest per month on outstanding payments but it has never enforced this clause on the quotation as the plaintiff was relying on the defendant for work. This interest was abandoned by the plaintiff during evidence-in-chief.

- (c). Quantities of work completed would be provisional and subjected to re-measurement.
- (d). Standard JBCC conditions would be applicable on this quotation for the work to be done by the plaintiff.
- (e). Standard quotations of the plaintiff would be valid for 30 days.
- (f). Specific reference in the contracts were made that no retention was included in the quotation.

[14]. The defendant was mostly represented by mr K.Joubert, who verbally accepted the quotation by the plaintiff by means of a telephone conversation and an order to continue with the work so quoted. In some instances, the defendant would verbally request the plaintiff to do more work than quoted from which was included in certificates for payment.

- (a). The defendant did not object to any of the conditions set by the plaintiff in its quotation, either in writing or verbally.
- (b). The work done by the plaintiff was regularly inspected by personnel of the defendant and by engineers. At no stage was any problems encountered or the plaintiff instructed to rectify or correct the work in progress.
- (c). The witness indicated that the defendant, with reference to mr Joubert, was informed that work has been completed and that the plaintiff was evacuating the site. Nobody came to 'sign off' the site and the plaintiff left the site.
- (d). Allegations of the misuse of the woven material and the incorrect placing of the material were denied. The photographs shown to the court is a clear indication of the material used, the method of placing of the material, the compacting of the material and the positioning of the bricks in the correct order and depth. Various photographs were used to deny this allegation by the defendant.
- (e). The wall at Makro was constructed according to the drawing by mr Farraris who was responsible for the inspections and '*signing off*' of the wall

being completed.

[15]. With regard to the Makro construction site it the plaintiff testified that he was instructed to build a wall with specific instructions by the designer, mr Farraris. The plaintiff received the terrain plan and instructions and proceeded to build the wall at Makro Nelspruit. The specifications of the wall was that it should be built at an angle of 60 degrees, contained some specific '*loffel bricks*' which had to be placed in a specific order and format, covered with some form of woven mat of a specific specification which would be filled and compacted. The plaintiff constructed the wall according to the specifications of the designer. [See page C1 of the Plaintiff's bundle].

[16]. The court was presented with a diagram of the design of the wall and number of photos which showed the process followed in the construction of the wall. The photographs showed the way in which the '*loffel bricks*' was laid, filled, compacted and staggered together. The binding material was included in the wall as specified by the designer Mr Farraris. The plaintiff has surplus stock which he used and which was then supplemented with '*new stock*'. Off-cuts were included into the wall instead of throwing it away. The '*off-cuts*' had no influence on the wall as the '*off-cuts*' does not qualify as '*rubble*'.

[17]. The evidence by the plaintiff was that the construction site was frequently visited by personnel of the main contractor, the defendant and the designer during the construction of the wall. Persons overseeing the construction of the wall were Allen Pone, Silvo Farraris, Kobus Joubert and Arend vd Berg. At no stage did anyone complained to the plaintiff about the construction of the wall. The wall was subsequently completed by end of 2011.

[18]. The defendant instructed the plaintiff to do some additional construction work such as the filling of gaps and the compacting of the area behind the wall.
[Photo 10,13 and 14].

[19]. After the wall was handed over to the defendant, the company of John Walters came and dug a 4 meter deep trench behind the wall to install a storm water drainage system. John Walters was not present as he was overseas but oom Dawid was present. The plaintiff informed the defendant (Arend vd Berg) of the effect of this construction in that the ground beneath and above this drainage pipes were incorrectly done. The defendant did not respond to the warnings by the plaintiff.

[Photo 22,23, 24, 29, 36, 37 and 57 of bundle A].

[20]. A fence was erected on the perimeter juts off the tared parking area on the compacted area.

[Photo 20, 22, 23,38 and 39 of bundle A].

[21]. An irrigation system consisting of a 50 mm water pipe was installed behind the wall to irrigate plants on the area.

[Photo 25 of bundle A].

[22]. During November 2011 the plaintiff informed the defendant that the paved area behind the wall '*cracked open*' and the plaintiff was accused of not having compacted the area as it should have been. The defendant accused the plaintiff of unprofessional workmanship and the defendant again retained 10% of the quoted amount payable to the plaintiff. From the photographs disclosed by the plaintiff, the cracks in the parking area, the fence and the irrigation pipe was not within the area of which the plaintiff was responsible for but on the top of the wall.

[Photo 30, 32, 43 ,44, 58,59,61,62,70 and 68 of annexure A].

[23]. The defendant supplied the ground for the filling and compaction of the wall and the area behind the wall and the adjacent areas. This ground was stockpiled on the terrain. The plaintiff conducted three tests on the construction site which test results were handed to the engineer in charge of the construction of the wall. These teste were

referred to as DKP tests. The plaintiff received no complaints regarding these test results.

[24]. The representatives of the plaintiff being Arend vd Berg and Kobus Joubert were present on the construction site on a daily basis. The engineer would come and go but the personnel of the defendant were the primary entity and persons who would exercise inspections and quality control over the plaintiff in constructing the wall.

[25]. The plaintiff referred to the photographs disclosed by the plaintiff to the defendant which show the stages of the construction of the wall and clearly showed the '*benching*', the material used as well as the positioning and overlap of the '*loffel bricks*'.

[Photos photos 3 to 10, 11, 15 to 19 of bundle A]

[26]. Tests on the density of the ground were performed which met the requirements of the design and the compaction of the wall.

[Page 97 of the bundle by the plaintiff].

[27]. A final certificate was issued by the designer mr Farraris that the wall was completed. [Page 85 of the plaintiff's bundle].

[28]. The witness confirmed that the plaintiff made use of the '*nuclear density metering device*' to measure the density of the ground and the compaction. The results of the tests as well as those of the DKP tests were sent to mr Farraris.

[29]. Mr Ruthman testified about the construction of the wall including the design, the benching, the cutting away of the face of the wall to get to a 60° angle, the filling of the '*bidum*', the compaction of the layers and the preparation and execution of the final stages of the construction of the wall including the people present on site on a daily basis whilst the construction of the wall was in progress.

[30]. Finally the witness confirmed the requests to the defendant to inspect the wall and the warnings of the storm water drainage system behind the wall. The witness confirmed that the material used in the construction of the wall was according to the standards set and that the invoices reflected the quoted amount for the construction of the wall. The '*bidum*' was placed in such a position that anybody could see the material. [Photo 28 of bundle A]. The witness denied any fraudulent actions in the construction of the wall.

CROSS-EXAMINATION OF MR RUTHMAN

[31]. The plaintiff confirmed that he did build the wall according to specifications supplied by mr Farraris. The plaintiff confirmed that mr Joubert, Arend vd Berg, Allen Payne and the engineer was on a daily basis present on the construction site and that none of them ever complained about the construction of the wall. Mr Farraris would visit the site once every two weeks to inspect the wall and to give instructions, if needed.

[32]. The plaintiff testified that the wall at Makro was constructed according to the design by mr Farraris. The defendant was informed that the wall was completed and no one came to inspect the wall.

[33]. The DLP tests were performed by Letaba lab for analysis to verify the compaction of the ground and surface areas.

[34]. The plaintiff does not have knowledge of who filled the cracks in the parking area adjacent to the wall. The plaintiff denied the allegation that the poor construction led to the purported damage to the wall. The plaintiff confirmed that he reported the digging of the trench behind the wall, the installation of the water pipe and the consequent filling of the trench to Arend vd Berg, John Walters, Allemn Payne and oom Dawid. There was no response to his reports or the warnings in this regard.

[35]. The plaintiff denied unprofessional work regarding the preparation, the benching, the filling and the placing of the *'loffel bricks'*. The wall was certified by mr Farraris and the plaintiff withdraw from the construction site as the work was completed.

[36]. After completion of the wall, the plaintiff never went back to the wall at Makro.

[37]. The defendant refused to make payment for the outstanding work done by the plaintiff.

SECONMD WITNESS : EXPERT ON BEHALF OF THE PLAINTIFF: PAUL NICKHOLSON

[38]. The witness is a civil and structural engineer and has 30 years of engineering experience. The witness has experience of the *'type of walls'* designed by mr Farraris.

[39]. The witness testified that should a trench of up to 4 meters deep be dug behind the wall, such as the present one, and the trench is not properly compacted, cracks such as depicted on the photographs would occur. The example was used where the ground of a grave has not been compacted; the ground would *'fall in'* so to speak which would create further problems. The digging of a trench such as this one, would also contribute to the weakening of the compacted area behind the wall.

[40]. The witness read the report by mr Farraris and confirmed that mr Farraris would not have *'signed off'* the wall if he was not satisfied with the construction of the wall. From the photos taken of the trench, some white material is clearly visible which would be the material used to construct the wall.

[Photo 24 of bundle A].

[41]. According to the witness the trench should not have a negative effect on the *'benching and the construction of the wall'*. One aspect that the witness testified about

was that if the compaction of the trench was not done properly and the leaking irrigation pipe, this could have a negative effect on the compacted soil behind the wall.

[42]. The witness testified about the material used to construct the wall and the precautions including quality control, the design and the dimensional line and intervals of the wall. The '*short pieces*' included in the wall have no effect on the quality of the wall.

[43]. The witness referred to the DKP tests conducted on the wall which was indicative of the '*carrying capacity of the ground*'. The witness confirmed that the plaintiff made use of the '*nuclear density metering device*' to measure the density of the ground and the compaction. These tests were regularly done and sent to mr Farraris (the designer of the wall).

[44]. The witness confirmed that water would be able to enter the area behind the wall through the huge cracks on the parking area. This would have a negative effect on the filling, the storm water trench and pipe as well as the effect on the wall.

CROSS-EXAMINATION OF THE EXPERT

[45]. The witness testified about the instalment of the irrigation pipe on top of the wall. The witness could not give an estimation of the penetration of the water as it differs from clay to sand. A dense capacity of 90% is only an indication of the capacity of the compacted soil and not of the water content. The witness testified that the white material depicted on the photographs could have been that of the material used for the benching and the erection of the wall.

This concludes the evidence by the plaintiff

EVIDENCE BY THE DEFENDANT

FIRST WITNESS : MR FARRARIS (THE DESIGNER OF THE WALL)

[46]. This witness designed the wall at Makro Nelspruit. The witness referred to the design of the wall which is found on page 133 of bundle B of the defendant. The wall is designed at a 60 ° angle with a height varying from 7,5 to 10 meters. The first compacting is 2,1 meters x 750 mm x 1.8 meter at the base of the first '*bag of sand*'. The final layer of '*bags of sand*' at the top of the wall is 1,4 meter x 1meter x 1 meter. As the wall is constructed the length of the '*sand bags*' shorten the higher the wall is build.

[47]. Referring to bundle B photo 142 the witness confirmed that the '*bidum*' [the white material used for the '*sand bags*'] was correctly placed in position by the plaintiff. The witness referred to the project engineers L&S engineers who would report back to the witness via emails, photographs and other reports by the engineers.

[48]. The witness confirmed that he inspected the wall at the '*two third stage of construction*'. At no stage was it necessary to doubt the quality of the construction of the wall by the plaintiff. The witness confirmed that the results of the compaction tests were sent to him on a regular basis. The tests of the plaintiff and the Laboratory were sent to the witness at the same time and the reading and results were the same. The witness inspected the wall after completion and the witness was satisfied with the end result. The witness issued a certificate to L&S engineers who were the consulting engineers of the whole project.

[49]. The witness testified that the plaintiff had the necessary skills and knowledge to construct the wall at Makro.

[50]. The witness would inspect the construction of the wall at the beginning, thereafter when the wall reached the '*one third of completion*' and again at '*two thirds of completion*' and a final inspection after the wall was completed.

[51]. The witness confirmed that in December 2010 L& S did DCP tests in the trench behind the wall [dug by Walters] and that the results showed inadequate compaction of the soil below the storm water pipe. The witness personally saw the results of the tests which was poor and below the standards set for such trenches and storm water pipes. The trench was dug about 3 to 4 meters behind the wall that the plaintiff constructed. The wall did not '*buckle or had any cracks*'.

[52]. The witness confirmed that the information contained in the letter dated 7 March 2012 referring to the poor compaction above the storm water pipe resulted in cracks in which the water flow saturated the soil and effected the filling below the pipe [Page 93 of bundle A]. This in itself was alarming as the wall could be compromised. The filling below the pipe was than the required '*G7 quality* ' of filling'

[53]. The witness confirmed that he wrote a letter dated 7 March 2012 to mr Allen Payne referring to the inadequate compaction of the soil in the storm water trench. [Page 99 of bundle A]. When the wall was later on inspected, the witness saw the irrigation pipe leaking and what he reported it, the water was shut down.

[54]. The witness testified that when the wall was '*repaired*' at some debt no '*bidum*' was present. The witness does not know who took the photos or what happened prior to the photos being taken [Bundle B – photos by defendant].

[55]. The witness confirmed that he saw the '*bidum*' sticking out on the face of the wall. The witness testified that there was no '*bidum*' in some part of the wall.

CROSS-EXAMINATION

[56]. The witness confirmed that he relied on other people in constructing and control over the construction of the wall. Mr Joubert informed the witness that mr Ruthman was reliable to do the job.

[57]. The witness confirmed that L&S was the engineers in charge of the construction site, that the site engineer was represented by Allen Page, that the defendant was represented on site by mr Joubert and mr Arend vd Berg and other personnel was present during the construction of the wall..

[58]. The witness was satisfied with the results of the compaction tests done by Letaba Lab.

[59]. The witness was not present when the trench was dug and does not know anything about it.

[60]. The witness testified about the report he submitted when the wall was completed [Bundle B page 142]. The witness confirmed that the John Walters dug the trench for the storm water pipe and that the trench was incorrectly compacted. The witness again referred to the 50 mm irrigation pipe leaking water when he arrived at the site.

[61]. The witness testified that there was only 2 – 3 layer of which the '*bidum*' did not stick out in front of the face of the wall beneath the '*loffel bricks*'. Nobody could X-ray a wall to see all the levels of the constructed wall. The witness confirmed that '*bidum*' was sticking out from under the layers of '*loffel bricks*' in the wall and which was visible from the outside on inspection.

RE-EXAMINATION

[62]. The witness confirmed the drawing of the wall. The '*backfilling*' was done by the defendant. The witness has no knowledge of the trench and the fence that was erected at the back of the wall.

SECOND WITNESS : ME PREDDY

EVIDENCE IN CHIEF AND CROSS-EXAMINATION

[63]. The witness testified about the administration in the office of the defendant. Her evidence did not contribute to the case between the plaintiff and the defendant. The witness was not cross-examined by the plaintiff.

THIRD WITNESS : MR JOHN WALTERS

EVIDENCE IN CHIEF

[64]. The witness testified that he was the person who dug the trench behind the wall at Makro. After the rain damage he then ordered that the trench be reopened to establish whether the damage was caused by the storm water system. The trench was then filled and this was the end of the evidence by the witness. In December 2011 the witness was responsible for the sealing of the cracks in the parking area when instructed by Allen Payne of L&S engineers.

[65]. The DCP tests were performed some 2 meters under the under the storm water pipe; the results of the tests were insufficient and the witness had to pay the cost for the tests. The witness confirmed that he never saw mr Farraris on site. Mr Arend vd Berg was in charge. The witness saw Allen Payne a few times on site and also saw one Peter Bauer on site

[66]. The witness confirmed that the '*bidum*' was folded over at the top of the wall.
[Bundle A photo 24]

CROSS-EXAMINATION

[67]. The witness could not confirmed that mr Ruthman did indeed requested that oom

Dawie Smit be called when the trench was refilled. The witness could not confirm that the trench was compacted with a '*back actor*' as the witness was not present under these circumstances.

[68]. The witness confirmed that Arend vd Berg was permanently on site. Mr Farraris, mr Joubert and other personnel of the defendant was frequently present on the construction site.

RE-EXAMINATION

[69]. The witness confirmed that he reported to Arend vd Berg.

THIRD WITNESS : MR JOUBERT

EVIDENCE IN CHIEF

[70] Mr Joubert testified on behalf of the defendant. Mr Joubert is the owner of the defendant and mr Joubert is with respect not an expert on any of the evidence given regarding the construction of the wall at Makro.

[71]. Mr Joubert referred to some '*invoice*' for the repair of the wall but the invoice was merely a reflection to purported work done, the hire of equipment and an amount for damages suffered by the defendant as a result of the work done by the plaintiff. According to the witness 50% of the wall had to be rebuilt.

[72]. The only reference to any *quantum* of damages suffered by the defendant was a letter dated 31 August 2012 from Mr Joubert to the plaintiff indicating '*cost incurred to rebuild the collapsed wall at Makro Nelspruit*'

[73]. Mr Joubert could not produce any photographs to substantiate any of the claims of a '*collapsed wall*'.

CROSS-EXAMINATION

[74]. It was put to the witness that there was no evidence that the wall '*collapsed*' in the form of photographs indication and damages or wrong doing by the plaintiff in the construction of the wall.

[75]. It was put to the witness that the purported damages referred to was inadequate in its descriptions, quantities and nothing more could be made from the purported damages suffered by the defendant. It was put to the witness that the witness, mr Arend vd Berg, mr Farraris and mr Allen Pane frequently visited the site where the wall was constructed and that there were no complaints about the method or manner in which the plaintiff constructed the wall. It was put to the witness that he is not an expert on ground compaction and density and cannot testify thereabout.

RE-EXAMINATION

[76]. The witness confirmed the procedure to be followed by the plaintiff as to the requests and documentation required for any payments to be made to the plaintiff.

FOURTH WITNESS : MR AREND VD BERG

EVIDENCE IN CHIEF

[77]. The witness was in charge of the construction site where the defendant constructed and executed civil engineering works as a sub-contractor. The witness took photograph 49 in bundle B and one Marius Mostert was contracted to repair the wall. According to the witness a part of the wall measuring 3 meters from the top was removed. The witness testified that there was no '*benching*' as required from the design at this point.

[72]. Reference was made to photo 45 of bundle B and the witness testified that he took the photograph and that there was no '*bidum*' for 1,8 meter.

[73]. The witness testified that it was possible that when the trench was dug, that the '*bidum*' could have been pulled out.

[74]. The witness testified that there was a crack in the parking area which could be a contribution of the construction.

CROSS-EXAMINATION

[75]. The witness confirmed the DKG tests that was conducted on the terrain to determine the carrying capacity of the ground formation.

[76]. The witness confirmed that the defendant prepared the '*face of the wall*'.

[77]. The witness confirmed that he was present on a daily basis and that if someone would not execute any work according to plans or specifications, he would reprimand that person and report it to his superior's. He never had to reprimand the plaintiff in any way whilst the wall was constructed.

[78]. The witness confirmed that mr Farraris, Allen Payne and mr Joubert as well as other personnel was on the construction site and that quality control was attended to. The witness does not know the quantity of '*bidum*' that was used in the wall.

RE-EXAMINATION

[79]. The witness confirmed that the plaintiff did some compacting of the ground behind the wall for the defendant. A hug roller was used to compact the ground.

EVALUATION OF THE EVIDENCE BEFORE THE COURT

THE PLAINTIFF

[80]. The plaintiff alleges that it -

- (a). Constructed the wall according to the design and specifications received from mr Farraris.
- (b). The plaintiff erected the wall accordingly and when it was completed handed the wall over to the defendant without any inspection by the defendant.
- (c). That there were personnel of the defendant and L&S engineers on site on a daily basis and that no complaints were mentioned to the plaintiff.
- (d). The plaintiff referred to oom Dawie, Allen Payne and Arend vd Berg who were informed of the potential problems of the trench for the storm water system but yet no one did anything regarding the warnings or the compaction of the trench.
- (e). The cracks in the surface of the parking area also went unnoticed for some time.
- (f). That during the period December 2011 and January 2012 Nelspruit had excessive rainfall read with the crack on the parking area behind the wall and the possible damage to the wall. Nobody paid attention to the warnings or did anything to rectify the crack at that stage as it was already closing time for December 2011.
- (g). That mr Farraris would visit the construction site at some stage during the construction of the wall. At no stage did mr Farraris complained about anything in this regard.
- (h). That the engineer of the main contractor was constantly present on the construction site.
- (i). That mr Arend vd Berg was the site manager of the defendant and that he was present on the site to oversee the construction of the wall.

- (j). That there was 50 mm irrigation pipe and a fence erected at the top of the wall after completion thereof.
- (k). That mr Ruthman was not present when the wall was partially '*demolished*'.
- (l). When the wall was handed over to the defendant no damage was visible on the wall.
- (m). That the tests conducted on the compaction was higher than the required standard and requirements.
- (n). That the trench and the construction at the top of the wall had an influence on any purported damage caused to the wall after the wall was handed over to the defendant.
- (o). The plaintiff had no further responsibility towards the defendant after the wall was handed over. Any purported damage would be at the risk of the defendant.
- (p). That the wall was signed off by mr Farraris and this concluded the responsibility of the plaintiff towards the defendant.

THE DEFENDANT

[81]. The defendant alleges that the plaintiff did not construct the wall according to specifications and that some fraudulent actions caused the damage to the defendant in rebuilding a portion of the wall. As a result of the wall '*collapsed*' and the defendant filed a counter plea for the repair work done on the wall.

EVALUATION OF THE ISSUES BEFORE THE COURT

[81]. The defendant alleges that the plaintiff did not construct the wall according to the design by the designer and that as a result thereof the defendant suffered damages.

[82]. What is interesting is that mr Farraris (the designer of the wall) relied on other

people to exercise '*quality control*' over the construction of the wall and only visited the construction site on intervals. The persons who oversee the construction of the wall were the engineer of the main contractor mr Allen Payne, mr Arend vd Berg and mr Kobus Joubert. From this evidence it is clear that '*all eyes were on the wall*' so to speak. The photos referred to clearly indicate the method and procedures used by the plaintiff to construct the wall.

[83]. When the design of the wall is analysed it is clear that the higher the wall is build, the '*shorter*' the '*bidum*' bags get referring from the face of the wall to the back of the wall. It is clear from the photos referred to where the trench is shown that there are ample '*white material*' which is '*bidum*' visible being excavated during the digging of the trench for the storm water system. It is my view that the explanation by mr Farraris as to '*tearing of material instead of pulling out may be incorrect*'. Mr Farraris could not explain the white material on these photos, nor was he requested by the defendant to give an opinion. The plaintiff testified that he inserted the '*bidum*' as per the design which leads to the top of the wall and which is within the area where the trench was dug.

[84]. What is more interesting is that the allegations of no '*bidum*' was placed in certain layers of the wall stand to be evaluated with caution -

- (a). Firstly, the plaintiff was not present when the wall was partially demolished and
- (b). Secondly the purported little piece of material placed under a '*loffel brick*' seems to be out of the ordinary.

[85]. Why would this be the only one piece of material and the only '*loffel brick*' to be photographed?

[Photo 178 and 179 of the defendants bundle]

[86]. None of the photographs disclosed by the defendant showed a '*collapsed wall*'

as referred to in the letter indicating the repair cost of the defendant. Photograph 174 and 175 shows a constructed wall without any damages.

[87]. Photograph 176 of the defendant shows an incline in the wall. Nowhere was the wall further excavated to proof that no '*bidum*' was included into the wall. [See also photograph 182 by the defendant]. This was not dealt with by the defendant in its evidence.

[88]. There was no argument that no valid contract to construction of the wall was concluded by the plaintiff and the defendant which was reduced in writing [the quotations] and the verbal acceptance of the quotation by the defendant [via telephone call].

[89]. The plaintiff's version is that a contract has been entered into, partially in writing [the quotation] and the acceptance by the defendant with other instructions to execute other civil engineering work on the different terrains [telephonically]. Other instructions would follow as the wall was constructed. The court is not going to enter into the fine print of the contracts as the plaintiff and defendant had settled four claims and the only claim outstanding is based on money due and payable to the plaintiff by the defendant and the counterclaim of the defendant against the plaintiff. In referring to the Plaintiff's quotations accepted by the defendant and in the lack of any other indications on the quotations, it is this court's view that there has indeed come into force a contract between the plaintiff and the defendant based on the conditions set forth on these quotations.

[90]. The following is clear from the photos discovered and presented to the court –

(a). That the plaintiff had indeed executed the building of the wall in accordance with the specifications as instructed by the engineer in charge of the wall.

- (b). That the allegations of the plaintiff not acting professionally are unfounded.
- (c). That the photos clearly show the woven mat to be used in the construction at the beginning and at the end of the construction of the wall.
- (d). That the photos clearly show that the allegation that the woven mat (*bidum*) was not used as prescribed, is factually incorrect. The allegations that the '*bidum*' was only used for some 500 mm are incorrect as the photos clearly indicate that the '*bidum*' was used as prescribed and required. There is no evidence that the wall was rebuilt due to being '*collapsed and demolished*'.
- (e). The plaintiff contacted the defendant regarding the effect of the storm water pipes installed close to the back of the wall which was not his responsibility and further that whatever water leaks or damage was caused by the storm water pipes, was caused after the plaintiff handed over the construction site to the defendant.
- (f). That over the December 2011 to January 2012 period there was excessive rain in the area. The cracks in the tar on the parking area was already '*opened*' and the defendant did not repair the cracks or even just filled it to prevent damage, if any to the wall. The cracked area was not the responsibility of the plaintiff.
 - The plaintiff was requested to compact a terrain on the upper side of the wall by using a heavy roller which area was inside the '*zone of the defendant*'. This compaction of the surface behind the wall had nothing to do with the wall, its construction or its purpose.

[91]. Nowhere did the defendant disclosed photos of the '*collapsed wall*' as described in the letter to the plaintiff. From the photos discovered by the plaintiff and the defendant, it is clear that there might have been a few minor cracks in the wall which occurred after the plaintiff completed the wall. At no stage did the defendant, the engineer responsible for the wall or any other person inspect the wall when it was completed. In this regard the reasonable infringe must be that the wall was correctly erected and the plaintiff informed the defendant that the wall was completed. The lack of

any actions in this regard by the defendant must in itself raise an eyebrow as to the *bona fides* of the defendant. Read herewith the wall was erected in 2011 and the letter of demand by the defendant for purported damages suffered was only dated 31 August 2012, some 8 to 9 months after the wall was completed and handed over to the defendant.

[92]. The burden of proof of damages lies with the defendant in such a manner that a court of law will grant the amount of damages based on a proper presentation with evidence thereto.

(a). Firstly, a defendant cannot just stand up and claim damages without proper proof thereof.

(b). Secondly, the court has the version of the plaintiff who executed the construction of the wall under supervision of the designer, personnel of the defendant and the engineer of the main contractor.

(c). Thirdly, on the other hand there is the claim by the defendant that the plaintiff did not construct the wall according to standards and in an unprofessional manner.

(d). Fourthly, there is a storm water trench, an erected fence nearby the perimeter of the wall, the cracks in the parking area, a leaking irrigation system and more than normal rainfall during the period December 2011 to January 2012 all which occurred after the plaintiff handed over the wall to the defendant.

[93]. In reaching its final verdict a court must evaluate and analyse the evidence before it. This would include the credibility of witnesses, their reliability and probabilities of their evidence. The burden of proof is '*on the balance of probability*', in other words which version is more probable? .

[94]. The principle of '*service rendered and payment*' is applicable in this matter. The plaintiff had to construct a wall and the defendant would pay the plaintiff for the

construction of the wall. The plaintiff alleges that it constructed the wall professionally and in accordance with the design of mr Farraris and under constant supervision and whereas the defendant alleges that the construction of the wall was not done professionally and not in accordance with the design of mr Farraris. The crux of the matter before the court lies within the purported breach of a contract between the plaintiff and the defendant as alleged by the defendant. The defendant alleges that the '*bidum*' was not included in the wall and that the compaction of the ground in the wall was inadequate. For this reason the wall '*collapsed*' and the defendant had to re-build a portion of the wall.

[95]. Bearing in mind the additional facts which came into play after the wall was handed over to the defendant, a court cannot just close its eyes for the potential role these factors played in this matter

- (a). Compaction of the wall. Numerous tests have been done and forwarded to mr Farraris who excepted the tests by Letaba Lab. No complaints were received from the defendant or mr Farraris in this regard.
- (b). Benching and bidum material. The photographs disclosed by the plaintiff clearly showed the use and filling of the material according to the design by mr Farraris. When the defendant dismantled the wall, the plaintiff was not present. The small piece of '*bidum*' under the '*loffel brick*' is interesting in the sense that where is the remainder of the '*bidum*' or the other '*loffel bricks*'?
- (c). The role of the storm water trench. Evidence was lead regarding the warnings by mr Ruthman in this regard which seems to have fallen on deaf ears. The trench was dug and merely covered with a '*back actor*'. No compaction of the trench was done as required.
- (d). The erection of the fence onto of the wall. Although no direct evidence was lead of the potential roll of the disturbance of the fence the court does take notice thereof.
- (e). The cracks in the tar surface on the parking area. Evidence was lead that

the defendant was informed of the cracks and the effect thereof on the area. It seems that the warnings fell on death ears. This coupled with the extraordinary rainfall over December 2011 to January 2012 must not be negated as the cracks in the tar and the possibility of a huge volume of water entering the area behind the wall is a factor to keep in mind.

(e). The '*collapsed wall*'. Nowhere did the defendant disclose any photographs of a 'collapsed wall' The photos disclosed showed some construction work being done after the wall has been handed over to the defendant by the plaintiff.

(f). Plaintiff's presence when the wall was inspected. The plaintiff was not present when the purported '*collapsed wall*' was inspected. The only evidence in this regard was that the plaintiff was busy or would not attend the meeting as the defendant owed the plaintiff money for outstanding work.

(g). Evidence by mr Farraris. It is not clear why mr Farraris would first 'sign off the wall' and then make a 180⁰ degree turnaround. His allegations of fraudulent behaviour by the plaintiff must be evaluated in a serious light. Evidence by the plaintiff was that he inspected the wall at some stages (one third, two thirds and at completion) whilst Allen Payne, oom Dawie, Arend vd Berg and the mr Joubert were constantly on the site. No complaints were lodged against the plaintiff during the construction of the wall. Allegations made by the plaintiff regarding Oom Dawie and Allen Payne were never tested by leading evidence to the contrary.

[96]. The court must apply the burden of proof being which parties version should be accepted based on '*the balance of probabilities*'.

[97]. I have no doubt that there is a combination of human failure and *vis major* which played a role in this matter. I cannot find against the plaintiff as the evidence was that it constructed the wall under the direct and constant supervision of the engineer of the main contractor, mr Allen Payne being supervised by either mr Joubert and/or mr Arend vd Berg who was the site manager of the defendant on the projects at Makro Nelspruit.

From the evidence it is clear that the plaintiff was constantly working '*under four eyes*' so to speak.

[98]. It is with respect that the defendant cannot merely write a letter to the plaintiff indicating some unspecified amounts for damages without any evidence in this regard. The only purported evidence of the damage of the collapsed wall is photographs taken prior to, during and after the wall was repaired. There is no photographs indicating the purported collapse of the wall or part of it prior to the repairs being done indicating the damages suffered, what it consist of, when it occurred, who assessed the purported damages, the proposed quantification or quantum of the repair work to be done or whatever. A mere letter indicating '*damages suffered*' land which is used for a counter claim in this matter against the plaintiff is not enough.

[99]. I have indicated that the contents of the contracts between the plaintiff and the defendant do not come in to play except for the one regarding the wall at Makro. In this matter as the only issue was who has to pay who and for what reason with reference to the wall at Makro Nelspruit?

[100]. I am indebted to counsel who submitted the heads of argument which helped the court to come to its conclusion.

ORDER

I find in favour of the plaintiff on the '*balance of probabilities*' and the following order is made –

1. The defendant has to make payment to the plaintiff for the following claims including VAT –
 - 1.1. Claim 1 : R 160 528-00.
 - 1.2. Claim 2 :

- 1.2.1. Rings around trees : R 67 200-00.
- 1.2.2. Civil works : R 24 460-00.
- 1.2.3. Curving : R 22 400 – 00.
- 1.2.4. Side stones : R 9 028 – 00.
- 1.2.5. Civil works ; R 95 040 – 00.
- 1.2.6. Construction of the Marko wall : R 969 606 – 17.
- 1.3. Claim 3 : R 35 470 – 27.
- 1.4. Claim 4 : R 132 547 – 80.
- 1.5. Claim 5 : R 59 796 – 63.
2. Interest to be paid by the defendant to the plaintiff on the total amount due as from date of the service of the summons on the defendant at 15,5% per annum.
3. The defendant to pay the plaintiff's cost of suit.

H.C. JANSEN VAN RENSBURG
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE OF ARGUMENTS: 3 APRIL 2019
DATE OF JUDGMENT : 4 APRIL 2019
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