



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

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

Case no. 4215/2022

In the matter between:

REDER CONSTRUCTION (PTY) LTD
[Registration number: 2018/252595/07]

Plaintiff

and

**THE MINISTER OF PUBLIC WORKS AND
INFRASTRUCTURE OF THE REPUBLIC OF
SOUTH AFRICA**

First Defendant

**THE TRUSTEES OF THE TIME BEING OF THE
INDEPENDENT DEVELOPMENT TRUST**

Second Defendant

CORAM: **MANYE, AJ**

HEARD ON: **7 MAY 2024**

DELIVERED ON: **17 SEPTEMBER 2024**

Manye AJ

Introduction:

[1] At the start of this trial the court was told by both Plaintiff and Defendants that they have reached agreement to submit heads of argument ultimately addressing only 1 remaining issue as the rest of the disputes had already been agreed to in the Draft Order handed in by agreement. No oral evidence was led and no witnesses were called to testify.

[2] The parties had resolved and agreed that the determination of the remaining issue in relation to claim 1 will depend upon the court's finding whether, the declaration of the National State of Disaster in terms of Section 27(1) of the Disaster Management Act, No. 57 of 2002 (*"the DMA"*) and the implementation of the nationwide lockdown from 26 March 2020 until 30 May 2020, created a supervening impossibility for the First Defendant to make payment of the additional costs and time-related general items claimed by the Plaintiff.

Background:

[3] On or about the 3rd August 2017, pursuant to a tender process initiated by the First Defendant's Department for procurement of necessary construction services in respect of the project titled "*DEPARTMENT OF DEFENCE: BLOEMFONTEIN TEMPE: 44 PARACHUTE REGIMENT – MAJOR REFURBISHMENT OF FACILITIES AND CIVIL SERVICES*" (*"the project"*); 'the First Defendant accepted Plaintiff's bid and made a written offer of appointment to the Plaintiff for and in respect of the services as a contractor, to render the necessary works and services of the project.'

[4] On the 8th August 2017 the Plaintiff, in writing, accepted the First Respondent's offer and a written contract (*"the contract"*) was concluded between the parties.

[5] The contract so concluded was comprised of the following documents which formed part of the terms and conditions:

- 5.1 The offer of the appointment and the Plaintiff's acceptance of such offer;
- 5.2 The General Conditions of Contract for construction works, second edition, 2010 (*"the GCC"*);
- 5.3 The contract data (*"contract data"*);
- 5.4 The pricing data, scope of work and site information.

[6] The relevant express terms of the contract are the following:

6.1 The Plaintiff is appointed as the contractor for the rendering of construction works and services (*"the works"*) at a total construction amount of **R110 233 198.50 (VAT inclusive)**;

6.2 The Plaintiff shall execute the works to such an extent that practical completion of the whole of the works shall be achieved within thirty six (36) months calculated from the commencement date, which period includes special non-working days and year-end breaks.¹

6.3 The Plaintiff may, in writing to the engineer, demand compliance within a stated time by the Department with the terms of the contract, which terms shall be specified in such demand.²

6.4 If the Plaintiff suffers delay to practical completion and/or incurs additional costs from any failure or delay on the part of the Department, its agents, employees or other contractors not employed by the Plaintiff in fulfilling any necessary obligations in order to enable the works to proceed in accordance with the contract, the Plaintiff shall be entitled to make a claim in accordance with Clause 10.1 of the GCC, for purposes of which the time limit of twenty eight (28) days provided in Clause 10.1.1.1 of the GCC shall commence to run only from the time when compliance with the said terms has actually taken place.³

6.5 If the Plaintiff considers itself entitled to an extension of time for circumstances of any kind whatsoever which may occur that will, in fact, delay practical completion of the works, the Plaintiff shall claim in accordance with Clause 10.1 of the GCC such extension of time as is appropriate. Such extension of time shall take into account any special non-working days and/or relevant circumstances,

¹ GCC, Clause 5.14.1; Contract data, Clause 1.1.1.14 and 5.14.7.

² GCC, Clause 5.10.1.

³ GCC, Clause 5.10.1.

including concurrent delays or savings of time which might apply in respect of such claim.⁴

[7] Without limiting the generality of Clause 5.12.1 the circumstances referred to in Clause 5.12.1 of the GCC includes:

7.1.1 The amount and nature of additional works;

7.1.2 Abnormal climatic conditions;

7.1.3 Any provisions of the conditions which allow for an extension of time; and

7.1.4 Any disruption which is entirely beyond the Plaintiff's control.⁵

[8] If an extension of time is granted, the Plaintiff shall be paid such additional time related to general items, 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.⁶

[9] If the Plaintiff fails to complete the works, to the extent which entitles it to receive a certificate of practical completion in terms of Clause 5.14.2(c), by the due completion date, the Plaintiff shall be liable to the Department for the sums stated in the contract data as a penalty for every day that elapses between the due completion date and the actual date of practical completion, including special non-working days.⁷

[10] In terms of the Contract Data, Clause 3.13, the engineer's authority to act and execute the functions and duties in respect of amongst others, the granting of an extension of time claim and/or a ruling on claims associated with claims for the extension of time were expressly excluded. However, in respect of a ruling given by the engineer, and although the parties may have delivered a dispute notice, the ruling shall be in full force and carry into effect unless and until otherwise agreed by

⁴ GCC, Clause 5.12.1.

⁵ GCC, Clause 5.12.2.

⁶ GCC, Clause 5.12.3.

⁷ GCC, Clause 5.13.1; Data, Clause 5.13.1.

both parties, or in terms of an adjudication decision, an arbitration award or Court Judgment.⁸

[11] I consider the above to mean that the GCC therefore allows the Plaintiff to submit a claim for extension of the date for practical completion when circumstances beyond the control of the Plaintiff was a delay in completion of the works in accordance with the initial agreed contract period.

[12] Clause 9 of the GCC provides for termination of contract if a state of emergency is declared by the Government, or if riot, commotion, politically motivated sabotage, acts of terrorism or disorder occur, and if any such event beyond the control of the contractor shall materially affect the execution of works, or the supply of labour or materials, or physically interfere with the access to the site or constitute a material risk to persons or property associated with the contract, the contractor shall, unless and until the contract is terminated in terms of this clause, endeavour to complete the execution of the works to the best of his ability; provided that:

12.1 Either the employer or the contractor shall, if such state of affairs continue for a period of at least twenty (20) consecutive days or for two (2) or more periods aggregated not less than forty (40) working days in any period of six (6) months, be entitled to terminate the contract by written notice to the other party and, upon such notice being given, the contractor shall (save as to the rights of the parties under this clause) terminate forthwith but without prejudice to the rights of either party in respect of any antecedent breach thereof; or

12.2 If the employer shall undertake, in writing, to bear any resultant additional costs involved in continuing the works, the contractor shall not exercise his right to terminate the contract.⁹

[13] It is important at this stage to state that neither of the parties invoked the provisions of Clause 9 of the GCC relating to termination of the contract between the parties.

⁸ General Conditions of Contract for Construction Works, 2nd Edition, 2010.

⁹ GCC, Clause 9.1.2 to 9.1.2.2.

[14] It is my considered view that where neither party terminated the contract and the execution of the works was delayed, the Plaintiff remains entitled to payment of increased costs associated by such circumstances that caused the delay in execution and completion of the works.

[15] Plaintiff and the First Defendant approached the Court on the 7th May 2024 with a draft order settling the dispute between the parties wherein it was agreed that the draft order be made an order of Court.

[16] In terms of the agreement, the First Defendant consented to the Judgment being granted in favour of the Plaintiff in respect of claims 2 to 9 and that the crisp issue recorded in paragraph 1.3 of the draft order, in respect of claim 1 be determined by the Court, namely that the declaration of the National State of Disaster in terms of Section 27(1) of the Disaster Management Act no. 57 of 2002 (*"the DMA"*) and the implementation of the nationwide lockdown from 26 March 2020 until 30 May 2020, created a supervening impossibility for the First Defendant to make payment of the additional costs and time-related general items claimed by the Plaintiff.

[17] For the purpose of the determination of claim 1, the Plaintiff and the First Defendant also agreed that the aforesaid issue shall be determined based upon:

[18] The provisions of the contract, namely the General Conditions of Contract for Construction Works, Second Edition, 2010 (*"the GCC"*) and the Contract Data; and

[19] The facts pleaded in paragraph 9 to 33.6 of the Plaintiff's particulars of claim and the facts contained and recorded in annexures "POC 5" to "POC 9" to the particulars of claim, which facts are to be regarded as common cause and undisputed.

[20] It must be emphasized that it is therefore not in dispute that, in the absence of alleged supervening impossibility, the First Defendant is liable for payment of the

amounts claimed in terms of claim 1 pursuant to the extension of the date of practical completion granted to the First Defendant.

[21] Notwithstanding the above in paragraph 20, consequently the only issue between the parties is whether the declaration of the National State of Disaster and the implementation of the lockdown for the period of 26 March 2020 until 30 May 2020 created a supervening impossibility for the First Defendant to make payment of the additional costs and time-related general items in terms of the contract.

[22] On 15 March 2020 during the execution of the works the National Disaster was declared in terms of Section 27(1) of the Disaster Management Act¹⁰ and in terms of the regulations published on 25 March 2020 and on 16 April 2020, a national lockdown, restricting movement of persons and goods from 26 March 2020 until 30 April 2020 (*"the lockdown"*) was implemented.

[23] It is natural that the lockdown caused a delay in the execution of the works by the Plaintiff as contemplated in the contract and the GCC.

[24] It is not in dispute that the Plaintiff submitted a claim for the extension of the date of practical completion of the works, claiming an extension of forty-nine (49) calendar days and the payment of additional costs and additional time related to general items consequent upon the extension of the date for practical completion in the amount of **R975 714.42 (including VAT)**.

[25] It is further not in dispute that the First Defendant approved the Plaintiff's claim for extension of the date of practical completion but did not award or pay the additional costs and additional time-related general items claimed.

[26] It is further not in dispute that on 8 April 2020, the Plaintiff notified the engineer in writing of its intention to claim in terms of Clause 5.12.3 of the GCC for the extension of date for practical completion of the works and the payment of

¹⁰ Act 57 of 2002 (*"the DMA"*).

additional costs for the delay to the implementation of the works caused as a result of the national lockdown.¹¹

[27] It is further not in dispute that on 3 June 2020 the Plaintiff further submitted its written claim for the extension of the date for practical completion of the works which culminated in forty-nine (49) calendar days until 17th November 2020 for the payment of additional costs in the said amount.

[28] The First Defendant pleaded to the provisions of Clause 9.1.2 of the GCC which provides that if a state of emergency is declared by the Government to which it is pleaded but a state of disaster is tantamount to and if any such event beyond the control of the contractor shall materially affect the extension of works, the contractor shall, unless and until the contract is terminated in terms of this clause, endeavour to complete the execution of the works to the best of their ability.¹²

[29] The First Defendants further pleaded that if the state of affairs continues for a period of at least twenty (20) consecutive days or for two (2) or more periods aggregating to less than forty (40) working days in any period of six (6) months, the contractor shall be entitled to cancel the contract upon notice to the other party, which shall terminate forthwith upon notice being received and without prejudice to the rights of either party in respect of any antecedent breach thereof.

[30] Subsequent to the publication of Regulations on 26 March 2020 in accordance with Section 27(2) of the Disaster Management Act. Regulation 11(b) of the Regulations provide that:

"During the lockdown, all businesses and other entities shall cease operations, except for any business or entity involved in the manufacturing, supply or provision of essential goods or services, save where the operations are provided from outside of the Republic or can be provided remotely by a person from their normal place of residence."

[31] It would appear that the First Defendants relies on above regulation in that it provided or imposed restriction of movement and confined its personnel to their

¹¹ Particulars of claim para 22.

¹² Index and paginated papers, p. 285, para 14.2.

places of residence unless they were performing an essential service or obtaining an essential services or goods or services or collecting a social grant or seeking medical attention.

[32] The Plaintiff submitted in his Heads of Argument that supervening impossibility arises when, following the valid conclusion of a contract, fulfilling an obligation derived from it becomes objectively and permanently impossible through no fault of either party. Plaintiff further submits that, common example of such impossibility includes impossibilities triggered by *major* or *casus fortuitous* or unforeseeable events due to some change in law or an act of state. In such event, the obligation under the said contract are generally extinguished and contracts comes to an end.¹³

[33] The Supreme Court of Appeal in **MV Snow Crystal Transnet Ltd v Owner of MV Snow Crystal**¹⁴ the doctrine of impossibility was contextualized in the following:

"This brings me to the appellant's defence of supervening impossibility of performance. As a general rule impossibility of performance brought about by this major or casus fortuitous will excuse performance of a contract but it will not always do so. In each case it is necessary to look at the nature of the contract, the relationship of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, be applied.

The rule will not avail a Defendant if the impossibility is self-created; nor will it avail the Defendant if the impossibility is due to his/her fault. Save possibly in circumstances where a Plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the Defendant."

[34] In **Post Office Retirement Fund v South African Post Office SOC Ltd**,¹⁵ the SCA stated with authority that the Defendant relying on the defence of supervening impossibility, must meet the following requirements:

*"In order to establish impossibility of performance, whether initial or supervening, four (4) requirements must be met by the party relying on this defence. They have been set out by Bradfield as follows: **first**, the impossibility must be absolute as opposed to probable. The mere likelihood that performance will prove impossible is not sufficient to destroy the*

¹³ **Free Stone Property v Remake Consultants** 2021 (6) SA 470 at para 11.

¹⁴ 2008 (4) SA 111 (SCA) at para 28.

¹⁵ JDR 001 (8) SCA at para 80.

contract. **Second**, the impossibility must be absolute as opposed to relative. If a promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract. **Third**, the impossibility must not be the fault of either party. A party who has caused the impossibility cannot take advantage of it and so will be liable on the contract. **Fourth**, the principle must give way to the contrary common intention of the parties. This intention may be expressed as when, for example, a seller expressly represents or guarantees that the goods sold exist."

[35] The First Defendant in paragraph 5.1 of its Heads of argument submit that regulations so promulgated under the Disaster Management Act in response to curbing the spread of COVID-19 extinguished the Defendant's obligation to make payment of the additional time-related general items claimed by the Plaintiff.

[36] I do not agree with the Defendants' contention above that the declaration of regulations relating to State of Disaster to curb the spread of Covid-19 extinguished its obligation to pay but opted not to terminate the contract and performance of the works as provided for in clause 9 of the GCC.

[37] In view of the above I find that the Declaration of Regulations under the Disaster Management **Act 57 of 2002 ("the DMA")** did not create supervening *impossibility* for Defendant to effect payment as claimed by the Plaintiff. Clearly the lock-down *prima facie* proved hindrance to perform certain tasks but did not create permanent impossibility.

[38] In light of the above I make the following order:

1. **In respect of claim 1:**

The defendant is liable to pay the defendant in an amount of **R975 714.42** including VAT.

2. Payment of interest on the amount of **R975 714.42** calculated as follows:

2.1 at 7% per year from 11 November 2020 until 17 November 2021;

2.2 at 7.25% per year from 18 November 2021 until 27 January 2022;

- 2.3 at 7.5% per year from 28 January 2022 until 23 March 2022;
- 2.4 at 7.75% per year from 24 March 2022 until 18 May 2022;
- 2.5 at 8.25% per year from 19 May 2022 until 20 July 2022;
- 2.6 at 9% per year from 21 July 2022 until date of payment.
- 2.7 Cost of suit on scale B

In respect of claims 2 to 9: (By Agreement between the parties the **Draft Order** is made an order of Court as follows:

Judgment is granted against the First Defendant in favour of the Plaintiff as follows:

Claim 2:

- 3. Payment of the amount of **R757 660.39**.
- 4. Payment of interest on the amount of **R757 660.39** calculated as follows:
 - 4.1 at 7% per year from 11 November 2020 until 17 November 2021;
 - 4.2 at 7.25% per year from 18 November 2021 until 27 January 2022;
 - 4.3 at 7.5% per year from 28 January 2022 until 23 March 2022;
 - 4.4 at 7.75% per year from 24 March 2022 until 18 May 2022;
 - 4.5 at 8.25% per year from 19 May 2022 until 20 July 2022;
 - 4.6 at 9% per year from 21 July 2022 until date of payment.
 - 4.7 Cost of suit (Scale B).

Claim 3:

- 5. Payment of the amount of **R17 636.42**.
- 6. Payment of interest on the amount **R17 636.42** calculated as follows:
 - 6.1 at 7% per year from 7 January 2021 until 17 November 2021;
 - 6.2 at 7.25% per year from 18 November 2021 until 27 January 2022;

- 6.3 at 7.5% per year from 28 January 2022 until 23 March 2022;
- 6.4 at 7.75% per year from 24 March 2022 until 18 May 2022;
- 6.5 at 8.25% per year from 19 May 2022 until 20 July 2022;
- 6.6 at 9% per year from 21 July 2022 until date of payment.
- 6.7 Cost of suit (Scale B).

Claim 4:

- 7. Payment of an amount of **R91 878.67**.
- 8. Payment of interest on the amount of **R91 878.67** calculated as follows:
 - 8.1 at 7% per year from 3 July 2021 until 17 November 2021;
 - 8.2 at 7.25% per year from 18 November 2021 until 27 January 2022;
 - 8.3 7.5% per year from 28 January 2022 until 23 March 2022;
 - 8.4 at 7.75% per year from 24 March 2022 until 18 May 2022;
 - 8.5 at 8.25% per year from 19 May 2022 until 20 July 2022;
 - 8.6 at 9% per year from 21 July 2022 to date of payment.
 - 8.7 Cost of suit. (Scale B)

Claim 5:

- 9. Payment of an amount of **R42 981.17**.
- 10. Payment of interest on the amount of **R42 981.17** calculated as follows:
 - 10.1 at 7% per year from 3 July 2021 until 17 November 2021;
 - 10.2 at 7.25% per year from 18 November 2021 until 27 January 2022;
 - 10.3 at 7.5% per year from 28 January 2022 until 23 March 2022;
 - 10.4 at 7.75% per year from 24 March 2022 until 18 May 2022;
 - 10.5 at 8.25% per year from 19 May 2022 until 20 July 2022;
 - 10.6 at 9% per year from 21 July 2022 to date of payment.

10.7 Cost of suit. (Scale B)

Claim 6:

- 11. Payment of an amount of **R44 978.09**.
- 12. Payment of interest on the amount of **R44 978.09** calculated as follows:
 - 12.1 at 7% per year from 3 July 2021 until 17 November 2021;
 - 12.2 at 7.25% per year from 18 November 2021 until 27 January 2022;
 - 12.3 at 7.5% per year from 28 January 2022 until 23 March 2022;
 - 12.4 at 7.75% per year from 24 March 2022 until 18 May 2022;
 - 12.5 at 8.25% per year from 19 May 2022 until 20 July 2022;
 - 12.6 at 9% per year from 21 July 2022 to date of payment.
 - 12.7 Cost of suit. (Scale B)

Claim 7:

- 13. Payment of an amount of **R30 230.09**.
- 14. Payment of interest on the amount of **R30 320.09** calculated as follows:
 - 14.1 at 7% per year from 3 July 2021 until 17 November 2021;
 - 14.2 at 7.25% per year from 18 November 2021 until 27 January 2022;
 - 14.3 at 7.5% per year from 28 January 2022 until 23 March 2022;
 - 14.4 at 7.75% per year from 24 March 2022 until 18 May 2022;
 - 14.5 at 8.25% per year from 19 May 2022 until 20 July 2022;
 - 14.6 at 9% per year from 21 July 2022 to date of payment.
 - 14.7 Cost of suit. (Scale B)

Claim 8:

- 15. Payment of an amount of **R10 665.74**.

16. Payment of interest on the amount of R10 665.74 calculated as follows:

- 16.1 at 7% per year from 3 July 2021 until 17 November 2021;
- 16.2 at 7.25% per year from 18 November 2021 until 27 January 2022;
- 16.3 at 7.5% per year from 28 January 2022 until 23 March 2022;
- 16.4 at 7.75% per year from 24 March 2022 until 18 May 2022;
- 16.5 at 8.25% per year from 19 May 2022 until 20 July 2022;
- 16.6 at 9% per year from 21 July 2022 to date of payment.

16.7 Cost of suit. (Scale B)

Claim 9:

17. Payment of an amount of **R35 443.84**.

18. Payment of interest on the amount of **R35 443.84** calculated as follows:

- 18.1 at 7% per year from 3 July 2021 until 17 November 2021;
 - 18.2 at 7.25% per year from 18 November 2021 until 27 January 2022;
 - 18.3 at 7.5% per year from 28 January 2022 until 23 March 2022;
 - 18.4 at 7.75% per year from 24 March 2022 until 18 May 2022;
 - 18.5 at 8.25% per year from 19 May 2022 until 20 July 2022;
 - 18.6 at 9% per year from 21 July 2022 to date of payment.
- 18.7 Cost of suit.

19. The costs of Plaintiff's counsel, in respect of claims 2 to 9, shall be taxed and allowed on taxation at the rate of **R2 300.00 plus VAT per hour** and **R23 000.00 plus VAT per day**, thus falling within **Scale B** as envisaged in Rule 69 of the Uniform Rules of Court.

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T.L. MANYE, AJ

APPEARANCES**For the Plaintiff:**

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