

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NUMBER: 3415/2021

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED:</u>
Signature: 	
Date : 4/12/2024	

In the matter between:

LEBAKA CONSTRUCTION (PTY) LTD

PLAINTIFF

AND

POLOKWANE LOCAL MUNICIPALITY

DEFENDANT

JUDGMENT

STRÖH JA

[1] The *Plaintiff* (Lebaka Construction (Pty) Ltd) instituted an action against the Polokwane Local Municipality (hereinafter the *Defendant*) claiming confirmation of the *Agreement* between the *Plaintiff* and *Defendant* and payment in respect of retention funds in the amount of R 1 123 520,87 (One Million One Hundred and Twenty-Three Thousand Five Hundred and Twenty Rand and Eighty Seven Cents) plus VAT. While

the *Plaintiff* was leading its first witness in the trial, the matter stood down. The parties then agreed upon a written statement of facts in the form of a special case for the court, for the adjudication of the court in terms of Rule 33(4) of the Uniform Rules of Court.

[2] The Stated Case in terms of Rule 33(4) of the Uniform Rules of Court was compiled by the parties' legal representatives and reads as follows:

[1] It is common cause between the parties that:

[1.1] The parties entered into a written agreement (hereinafter the 'Agreement') in terms of which the *Plaintiff* was to construct a water pipeline.

[1.2] The *Agreement* consists of the following:

[1.2.1] Service Level Agreement;

[1.2.2] The General Conditions of Contract (hereinafter the 'GCC');

[1.2.3] The tender document.

[1.3] In terms of Clause 9.2.2 of the *GCC*, the *Defendant* is entitled to terminate the *Agreement* by written notice to the *Plaintiff*, subject to compliance with Clause 9.2.2.7, if the *Plaintiff*:

[1.3.1] Has failed to proceed with the Works with due diligence; or

[1.3.2] Is not executing the Works in accordance with the *Agreement* or neglected to carry out its obligations under the *Agreement*.

[1.4] In terms of Clause 9.2.2.7, the *Defendant* may give the *Plaintiff* 14 days' notice to rectify the default and if the *Plaintiff* fails to rectify the default within these 14 days, the *Defendant* may then without further notice, notify the *Plaintiff* in writing of the termination of the *Agreement* and expel the *Plaintiff* and order it to vacate the site within 24 hours.

[1.5] On 12 February 2018, the *Engineer* (acting as the agent of the Defendant) delivered a letter to the *Plaintiff* (as per 'PLM1') attached to the Defendant's Plea (referred to as 'the Breach Letter'). The *Breach Letter* informed the *Plaintiff* of a number of breaches of the *Agreement*, granting the *Plaintiff* 14 days to rectify these breaches.

[1.6] On 3 May 2018, the *Defendant* addressed a letter to the *Plaintiff*, (as per "PLM2") attached to Defendant's Plea (the "Termination Letter") in terms of which the *Defendant* terminated the *Agreement* and required the

Plaintiff to remove plant from the site, vacate the site and restore it and all of the property to the *Defendant* within two working days after receipt of the letter.

[1.7] On 1 June 2018, the *Plaintiff's* attorney of record addressed a letter to the *Defendant* (as per Index 4, Item 2 (Trial Bundle) annexed as "M7") to the Particulars of Claim. The *Plaintiff's* attorney's letter to the *Defendant* (M7) denied that the *Defendant* was in breach of the *Agreement* & further alleged that the *Breach Letter* was ill-founded and that the Termination Letter was baseless. As a result, the *Plaintiff* cancelled the *Agreement* in accordance with Clause 9.3.1.1 of the GCC (as amended) based upon a repudiation of the *Agreement* by the *Defendant*.

[2] It is the *Plaintiff's* case that:

[2.1] The *Breach Letter* was invalid due to fact that the letter was done by the Engineer instead of the *Defendant* as provided for in clause 9.2.2.7 of the GCC (as amended).

[2.2] The *Termination Letter* was consequently invalid and, especially the third last paragraph thereof, requesting the *Plaintiff* to vacate the site, constituted a repudiation of the *Agreement*.

[3] The *Defendant* holds the opposite view in respect of the above-mentioned contentions by the *Plaintiff*.

[4] The Honorable Court is requested to adjudicate upon the following questions of law:

[4.1] Whether the *Breach Letter* issued by the Engineer instead of the *Defendant*, being the Employer, was valid and in compliance with clause 9.2.2.7 of the GCC (as amended)

[4.2] Whether the *Termination Letter* was invalid and amounted to repudiation of the *Agreement*.

Evidence before the Court

[3] The *Plaintiff*, pursuant to a successful tender, entered into an agreement with the *Defendant* for the construction of the Sebayeng Dikgale Bulk Water Project.

The *Agreement* between the parties consisted of the following documents:

3.1 Service Level Agreement;¹

3.2 General Conditions of Contract for Construction Work (Second Edition-2010) (referred to as the 'GCC');²

3.3 Tender document.³

[4] The *Tender document* consists of a clause named 'Additional Special Conditions or Amendments to the General Conditions.'⁴

Clause 9.2 of the GCC was substituted in the *Tender document* with a new Clause 9.2, with the Heading: '3.1.13 Termination by Employer (CL 9.2)'⁵

[5] On 12 February 2018, the *Engineer* (MSW) informed the *Plaintiff* that the *Plaintiff* is in breach of certain conditions of the contract and had to rectify the breach within 14 (fourteen) days of the date of this letter.⁶

[6] On the 3 May 2018, the *Defendant's* attorney wrote a *Termination letter* to the *Plaintiff* informing the *Plaintiff* that the *Agreement* between the *Plaintiff* and *Defendant* is cancelled due to one of the conditions to be non-performance as scheduled.⁷ Certain paragraphs in the *Termination Letter* is of importance and will be discussed later in this judgment.

[7] On 3 May 2018, the *Plaintiff* wrote the *Defendant* a letter whereby it cancelled the *Agreement* between them on the basis of repudiation.⁸ Certain paragraphs in this letter is of importance and will be discussed later in this judgment.

[8] The *Plaintiff* relied on Rule 33(4) of the Uniform Rules. According to Rule 33(4) of the Uniform Rules, when one looks at the interpretation of

¹ Trial Bundle Index 1, Page 18-22

² Pleadings Bundle Index1, Page 23- 93

³ Pleadings Bundle Index 1-3, Page 94 – 274

⁴ Pleadings Bundle Index 2 Page 172-178

⁵ Pleadings Bundle Index 2 Page 176

⁶ Pleading Bundle Index 4 Page 318 – 319

⁷ Pleadings Bundle Index 4 Page 316 - 317

⁸ Pleadings Bundle Index 4 Page 311-315

contractual provisions; the plain, ordinary and grammatical meaning of the words in question is relevant. This court was referred to numerous case law and specifically to the *Endumeni* case⁹ which the *Plaintiff* argued-“the Court must look at the surrounding circumstances to create the document in question. To this end the Court must consider the initial terms of the GCC and the specific amendments thereto.”

[9] In paragraph 14 of the *Plaintiff's* Heads of Argument in the stated case, the *Plaintiff* relied on the principles of breach of contracts and cancellation of contracts that:

“14. A party wishing to rely on the cancellation of a contract because of a breach must allege and prove:

14.1 a breach of the contract;

14.2 an accrued right to cancel because of a material breach,¹⁰ or that the contract contains a cancellation clause (*lex commissoria*) and its provisions (such as prior notice) have been complied with;¹¹

14.3 a clear and unequivocal notice of rescission conveyed to the other party (unless the contract dispenses with notice)”¹²

The *Plaintiff* clearly argued by relying on case law (cited in the *Plaintiff's* Heads of Argument) that the notice for a breach of contract must comply ‘literally’ with the agreement (contract). The *Plaintiff* emphasized “It is clear, I think, that they do not hold the notices invalid because of any possibility of prejudice to the person notified, but solely because a literal compliance with the agreement is required in cases of forfeiture.” Having regard to the procedure for breach of agreement, the *Plaintiff* argued “strict compliance with the procedure for breach must be complied with, failing which the notice will be found to be invalid.”

[10] The *Plaintiff* finally relied on the legal principle of repudiation in its argument, referred to *Datacolor International (Pty) Ltd v Intamarket*

⁹ *Natal Joint Municipal Pension Fund v Endumeni Muni* 2012(4) SA 593 (SCA)

Para [18]

¹⁰ *Singh v McCarthy Retail t/a McIntosh Motors* [2002] 4 All SA 487(A), 2000 (4) 795 (SCA)

¹¹ *Kragga Kamma Estates CC v Flanagan* [1995] 1 All SA 486 (A), 1995 (2) SA 367 (A)

¹² *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] 1 All SA 581 (A) , 2001 (2) SA 284 (SCA) par 29

(Pty)Ltd¹³ and Starways Trading 21 CC v Pearl Island Trading 714 (Pty) Ltd.¹⁴

[11] The *Defendant* relied on Rule 33(4) of the Uniform Rules of Court: “the agreement between the parties consists inter-alia on the GCC which was amended by contract data contained in part C of the tender document, which also forms part of the Agreement.”

[12] It is common cause between both parties that Clause 9.2 of the GCC was deleted and substituted with a new Clause 9.2 (as set out in Clause 3.1.13 of the contract data in part C of the *Tender document*).¹⁵

[13] The *Defendant* further argued (by relying on Rule 33(4) of the Uniform Rules) that the essence of the dispute between the parties is the status of the letter addressed by the *Engineer* to the *Plaintiff* on the 12 February 2018, of which a copy was attached to the Defendants Plea as ‘PLM 1’ (‘the Breach Letter’).

[14] The *Defendant’s* argument is that the *Breach Letter* was written in terms of Clause 3.1.13 of the *Tender document* which replaced Clause 9.2 of the GCC. The *Breach Letter* was based on Clauses 9.2.2.3 and 9.2.2.5 of Clause 3.1.13. (‘Termination by Employer (CL 9.2)’):

According to Clause 9.2.2, ‘If the contractor’ ‘Has failed to proceed with the Works with due diligence’ (Clause 9.2.2.3) or ‘Is not executing the Works in accordance with the Contract, or is neglecting to carry out his obligations under the Contract’ (Clause 9.2.2.5).

[15] It is further common cause that the *Plaintiff* contends that the *Engineer* was not authorized to issue the *Breach Letter* as per Clause 9.2.2 as amended, however if the *Plaintiff* failed to proceed with the Works with due diligence or is not executing the Works in accordance with the *Agreement*, the Employer may give the Contractor 14 days’ notice to rectify the default.

¹³ *Datcolor International (Pty) Ltd v Intamarket (Pty)Ltd* [2001] 1 All SA 581 (A), 2001 (2) SA 284 (SCA)

¹⁴ *Starways Trading 21 CC v Pearl Island Trading 714 (Pty) Ltd* [2017] 4 All SA 568 (WCC)

¹⁵ Pleadings Bundle Index 1 Page 91-92

[16] Clause 6 of the *Defendant's* Heads of Argument states that: "The *Engineer* was the agent of the Employer having a wide mandate to administer the *Agreement*:"

6.1 Clause 1.2.3 of the GCC provides that the common or statute law shall determine whether any person acting or purporting to act on behalf of the Employer, Engineer or Contractor is duly authorized so to act.

6.2 In terms of clause 3.1.1 of the GCC the function of the *Engineer* is to administer the Contract as agent of the Employer, in accordance with the provisions of the Contract".

[17] According to the *Defendant* "although clause 9.2.2 explicitly authorizes the Employer to give 14 days' notice to the Contractor to rectify defaults there is no indication that the *Engineer* is prohibited from issuing such notice. Being the agent of the Employer acts performed by the *Engineer* in the administration of the *Agreement* which may have been strictly unauthorized may be ratified by the Employer."

[18] The aspect of ratification was discussed in length in the *Defendant's* Heads of Argument. Paragraph 11-13 of the *Defendant's* Heads of Argument is of importance which states:

"11. The *Termination Letter* of 3 May 2018 is a clear ratification by the Employer's accounting officer of the *Breach Letter*.

11.1 The opening paragraph refers to the *Breach Letter*.

11.2 The last sentence of the first paragraph on page 2 of the *Termination Letter* states that the *Plaintiff* failed to remedy causes of complaint set out in the *Breach Letter*.

11.3 The *Breach Letter* is again referred to in the second paragraph on page 2 of the letter where it is stated **[and despite being put in terms within a reasonable period as evidenced by the contents of the letter of 12 February 2018 and your subsequent failure to remedy the defects]**.

12. The *Plaintiff*, in paragraph 5 of its response of the *Termination Letter*, dealt at length with each default stipulated in the bulleted paragraphs on

page 1 of the *Breach Letter*. This was done in an effort to show that the *Plaintiff* was not in default of any of its obligations in terms of the *Agreement*. Of importance is the fact that it is recorded in paragraph 5 that a number of actions were taken by the *Plaintiff* subsequent to and in response to the *Breach Letter*. In paragraph 6 of the letter it is stated **“The above sets at naught any merit applicable to the MSW notice dated 12 February 2018 and...”** This indicates that the *Plaintiff* regarded the *Breach Letter* as a proper notice in terms of Clause 9.2.2.7.

13. The *Employer* as principal was fully entitled to ratify the *Breach Letter* which he duly did by way of the *Termination Letter*. Consequently, the contention that the *Breach Letter* is invalid is without any merit.”

[19] Finally, the *Defendant* discussed the legal principle of repudiation in its argument. The *Defendant* in response referred to two well-known cases namely, *Nash v Golden Dumps (Pty) Ltd*¹⁶ and *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*.¹⁷

[20] The *Defendants* closing argument stated that:

“The *Defendant* acted within its rights in terms of the *Agreement* to afford the *Plaintiff* 14 days to rectify its defaults as set out in the *Breach Letter*. Although this letter was technically not in accordance with clause 9.2.2 the *Employer* by way of the *Termination Letter* unequivocally ratified the *Engineer’s* actions. The termination of the *Agreement* was therefore done on lawful grounds and could not reasonably have created the perception that the *Defendant* intended no longer to be bound by the *Agreement*.”

The stated facts in this matter disclose that information regarding the *Plaintiff’s* state of mind regarding the *Breach Letter* and *Termination Letter*. It is therefore doubted whether a final determination can be made at this stage as to the *Plaintiff’s* perception regarding the aforesaid letter.”

[21] **Rule 33(4) of the Uniform Rules of Court** reads as follows:

¹⁶ *Nash v Golden Dumps (Pty) Ltd* 1985(3) SA 1 (A)

¹⁷ *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] 1 All SA 581 (A), 2001 (2) SA 284 (SCA)

"If, in any pending action, it appears to the court **mero motu** that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order directing the disposal of such question in, such manner as it deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on application of any party make such order unless it appears that the question cannot be decided separately."

In ***King v King***¹⁸ MT Steyn AJ as he then was, held:

[C] "Can an action which has actually commenced however be described as a 'pending action' within meaning of Rule 33(4) – When it comes to the interpretation of a Rule of Court it is well to bear in mind that the Rules constitute the procedural machinery of the Courts of justice and that they are intended to expedite the business of such courts. See ***Hudson v Hudson*** 1927 A.D 259 at p.267

[E] In ***Webster***, Seventh New Collegiate Dictionary (1963) the word "pending" is said to mean "not yet decided".

[G]The words "pending action" are not used in any special or restricted sense in the sub-rule and in my opinion, they must be accorded their ordinary meaning. I am, therefore, of the opinion that the words "any pending action" as used in the sub-rule mean any action in which the issues between the parties have not yet been finally decided or disposed of.

The present action before this court is therefore a pending action within the meaning of Rule 33(4).

In ***Minister of Agriculture v Tongaat Group***¹⁹ Miller J held: "Court not likely to grant application which is brought by a litigant who has raised a point which, if said, would eliminate a certain claim and this save much evidence at trial, if it appears to the Court that there is no or very little substance in such point.

¹⁸ 1971(2) SA 630 (O) 634 para [C], [E], [G]

¹⁹ 1976 (2) SA 357 (D) at 364D

Obviously, if there is no substance in the point, it would be a sheer waste of time and cost to have a separate hearing”.

[22] **Rule 18(4) of the Uniform Rules of Court** reads as follows: “Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

[23] In **Erasmus: Superior Court Practice 2nd**, vol 2, The discussion of the words “**every pleading shall contain a clear and concise statement.**” According to Erasmus “This sub-rule requires that the material fact relied upon must be set out both clearly and concisely in the pleadings concerned. A pleading should not include excerpts from and references to other documents.”²⁰

[24] When having regard to the words, “**of material facts**”²¹ the writer states: “The necessity to plead material facts does not have its origin in the rules of court. It is fundamental to the judicial process that the facts have to be established.

The court, on the established facts, applies the rules of law and draws conclusions as regards the rights and obligations of the parties.

A summons, that propounds the *Plaintiff's* own conclusions and opinions instead of the material facts, is defective.²² “

[25] When having regard to the words, “**Facts and not evidence must be pleaded**²³ and the subrule makes it clear that material facts should be pleaded” the writer states, ‘The distinction between *facta probanda* (the facts that had to be proved) and *facta probantia* (the facts that would prove those facts) should be kept in mind.’²⁴

²⁰ Hough v Gubb 1980 (1) SA 699 © 702 A-E

²¹ ???

²² Buchner v Johannesburg Consolidated Investments Co Ltd 1995(1) SA 215 (T) at 2161

²³ James v Hamilton & Haw (1886) 5 EDC 222, Moaki v Redatt 7 Colmon (Africa) Ltd 1968 (3) SA 98 (A0 at 102 A

²⁴ Nasionale Aartappel Kooperasie Bpk v Price Waterhouse Coopers Ing 2001 (2) SA 790 (T) at 797 G-I

[26] When having regard to the words, “**Upon which pleader relies for his claim**” the writer states, ‘The pleader first duty is to allege the facts upon which he relies, his second duty is to set out conclusions of law which he claims, follow from the pleaded facts. Facts and conclusion of law, must however be separated.’²⁵

[27] When having regard to the words, “**With sufficient particularity to enable the opposite party to reply thereto**” the writer states, ‘There is no exhaustive test to determine whether a pleading contains sufficient particularity for the purposes of this sub-rule but it is essentially an issue of fact: a pleading contain sufficient particularity if it identifies and defines the issues in such a way that it enables the opposite party to know what they are.’²⁶

The degree of particularity will depend upon the circumstances of each case. Thus, for example, greater particularity will be required where claims are based upon the provisions of a detailed and complex contract, in which numerous claims confer the right to additional payment in different circumstances.²⁷

In such cases a pleader may be required to identify explicitly those clauses of the contract on which the cause of action is built.²⁸ If the plaintiff in such a case chooses to base his cause of action on some common-law ground (breach of contract, enrichment or delict), this should be made clear in his particulars. It is important to note that the *Defendant* in his pleadings never pleaded ratification and even if he did would not have made a difference in the outcome.

[28] In my endeavour to resolve the impasse between the parties I should be guided by the principles laid down in **Napier v Barkhuizen**,²⁹ where the sentiments of Cameron JA were echoed by Ngcobo J in the

²⁵ **Prinsloo v Woolbrokes Federation Ltd** 1955 (2) SA 298 (N) at 299 E

²⁶ **Nasionale Aartappel Kooperasie Bpk v Price Waterhouse Coopers Ing** 2001 (2) SA 790 (T) at 798 F-&99J

²⁷ **Improfed (Pty) Ltd v Nasional Transport Commissioner** 1993 (3) SA 94 (A) at 107E

²⁸ **Improfed (Pty) Ltd v Nasional Transport Commissioner** 1993 (3) SA 94 (A) at 107G, **Nasionale Aartappel Kooperasie Bpk v Price Waterhouse Coopers Ing** 2001 (2) SA 790 (T) at 803-5

²⁹ **Napier v Barkhuizen** 2006 (4) SA 1 (SCA) at para 13

Constitutional Court in **Barkhuizen v Napier**,³⁰ who had the following to propound: “the Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of ‘freedom of contract’, while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates. It is also to recognize that intruding on an apparently voluntary concluded arrangements are a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties individual arrangements.”

[29] In **Mohabed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd**³¹ the Supreme Court of Appeal reaffirmed the principle of the privity and sanctity of contracts and stated the following:

‘[23] The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract.’

[30] The Court³² continued and quoted with approval a passage in **Wells v South African Alumenite Company**³³ wherein the Court stated as follows:

‘If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.’

³⁰ **Barkhuizen v Napier** 2007 (5) SA 323 (CC0 at paras 7, 70 -71

³¹ **Mohabed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd** 9183/17) [2017] ZASCA 176 (1 December 2017)

³² **Mohabed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd** 9183/17) [2017] ZASCA 176 (1 December 2017)

³³ **Wells v South African Alumenite Company** 1927 AD 69 at 73

[31] Not long ago the Constitutional Court in ***Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others***³⁴ also had an opportunity to emphasize the principle of ***pacta sunt servanda*** and stated the following:

“[84] Moreover, contractual relations are the bedrock of economic activity, and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivized to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

[85] The fulfilment of many of the rights promises made by our Constitution depend on sound and continued economic development of our country. Certainty in contractual relations foster a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of ***pacta sunt servanda***.”

[32] In ***SA Sentrale Ko-op Graanmaatskappy v Shifren en Andere***³⁵ the Court dealt with policy considerations such as the need to avoid disputes, evidential difficulties often associated with oral agreements, the need for certainty and clarity in a commercial environment, and the infringement of the right to contractual freedom.

[33] The principle of ***Pacta Sunt Servanda*** entails that parties are bound to the agreements they conclude. This principle is fundamental to our law.

[34] In its most common sense, the ***Pacta Sunt Servanda*** principle refers to private contracts and prescribes that the provisions of a contract are binding in law between the parties to the contract. If a party neglect his or her obligations that party acts unlawful.

The first Question of law to be determined is:

³⁴ ***Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others*** CCT 109/19 [2020] ZACC 13

³⁵ 1964 (4) SA 760 (A)

“Whether the *Breach Letter* issued by the *Engineer* instead of the *Defendant* being the Employer, was valid and in compliance with Clause 9.2.2.7 of the GCC (as amended).

[35] The question that needs to be answered is:

Did the *Engineer* (**MSW**) have the authority, to give the notice of breach of contract (the *Breach Letter*) to the *Plaintiff* in terms of Clause 9.2 as amended by “Additional special conditions or amendments to the general conditions of contract.” In the amended GCC the word ‘Engineer’ is replaced with ‘Employer’ to give notice in terms of Paragraph 9.2.2.7. Paragraph 9.2.2.7 of the amended GCC reads as follows; **“Then the Employer** may give the Contractor 14 days notice to rectify the default, and if the Contractor fails to rectify the default in said 14 days, then, without further notice, notify the Contractor in writing of the termination of the Contract...”

[36] To further answer this question as to whether the *Engineer* **MSW** had the authority to give notice of breach of contract (the *Breach Letter*) to the *Plaintiff* in terms of Clause 9.2 as amended, it is necessary to have regard to the empowering instrument, being Clause 3 of the GCC. Proper reading of this clause does not suggest any power or authority given to the *Engineer* in this regard. To the contrary, Clause 3.1.1 of the GCC states, “The function of the *Engineer* is to administer the Contract as agent of the Employer, in accordance with the provisions of the Contract.”

I readily share and endorse the same views expressed by the learned Judges which accord with common sense and commercial practicalities. Indeed, if the above-mentioned case law held a different view, the consequence would defeat the very object of reducing the contract to writing.

[37] Regardless of the reasons for writing the *Breach Letter* to the *Plaintiff*, MSW acted *ultra vires*. MSW equally acted beyond its powers as agent of the *Defendant* (Employer).

[38] The **second Question of law to be determined is the following:**
“Whether the Termination Letter was invalid and amounted to repudiation of the Agreement?”

[39] In **Kragga Kamma Estates CC v Flanagan**,³⁶ Judge Nestadt JA held “There is a *lex commissoria* entitling the seller, in the event of the purchaser breaching any of its obligations, forthwith to cancel the agreement.”

[40] In **Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd**³⁷ Judge Nienaber JA held “Repudiation has sometimes been said to consist of two parts: The act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, ‘accepting’ and thus completing the breach.”

[Par 16] “Whether the plaintiff by its letters of termination repudiated the agreement: “Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to ‘repudiate’ the contract. Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract come to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated.”³⁸ At the same time this Court has repeatedly stated that the test for repudiation is not subjective but objective (**Ponisammy and Another v Versailles Estates (Pty) Ltd 1973 (1) SA 372 (A)** at 387A_C.

[Para 19] **“Since the test is objective** and the matter is to be approached from the vantage point of the innocent party (in this case the defendant) it follows that the evidence of Hill, the author of the letters RW8 and RW9, as to what the plaintiff had in mind when he drafted them would have been irrelevant. By the same token the evidence of the defendant’s witnesses Wachsberger and Mayer, as to what they understood by, and how they reacted to, the letters were irrelevant. But such evidence, although relevant, would not be conclusive, **since the approach is that a court, faced with the enquiry of whether a part’s conduct amounted to a repudiation, must superimpose its own assessment of what the innocent part’s reaction to the guilty part’s action should reasonable have been.**”

[41] It is settled law that repudiation of a contract occurs where one party to a contract, without lawful grounds, indicates to the other party, whether

³⁶ (2) SA 367 (A) page 370 para F

³⁷ [2001] 1 All SA 581 (A), 2001 (2) SA 284 (SCA) page 287 para 1

³⁸ Corbett JA in **Nash v Golden Dumps (Pty) Ltd 1985(3) SA 1 (A)** at 22D-F).

by words or conduct, a deliberate and unequivocal intention to no longer be bound by the contract.³⁹ Of which the innocent party will then be entitled to either:

- (i) reject the repudiation and claim specific performance; or
- (ii) accept the repudiation, cancel the contract and claim damages. If he or she elects to accept the repudiation, the contract comes to an end upon the communication of the acceptance of the repudiation to the party who has repudiated. Only then does a claim for damages arise.

[42] The *Defendant's (Employer's) Termination letter* dated 3 May 2018, on the second page at paragraph 3 reads as follows:

"In light of the aforementioned, you are notified that Polokwane Municipality hereby terminates the whole agreement and as a result, you are required to remove or cause to be removed plant from site, vacate the site, and restore it and all other property of Polokwane Municipality in your possession for the purpose of the agreement to Polokwane Municipality within two (2) working days after receipt hereof."

[43] I am in agreement with the *Plaintiff* that the attempted termination by the *Defendant* constituted a repudiation of the agreement, which entitled the *Plaintiff* to terminate the *Agreement*.

[44] One of the *Defendant's* contentions is that the *Engineer* acted as an agent for the *Defendant* by writing, the *Breach Letter*.

I disagree with this, as is evident from my reasoning in paragraph 37 of this judgment.

Costs

[45] Both parties contended that the cost should follow the event and, I also do not find any departure from the general rule.

[46] In the circumstances the **following order is made:**

- 1. That the Plaintiff's Claim One (1) and Two (2) against the Defendant succeeds.**

Claim 1

- 1. Confirmation of the cancellation of the agreement.**

³⁹ *Nash v Golden Dumps (Pty) Ltd* [1985] 2 All SA 161 (A); 1985 (3) SA 1 (A) at 22D-F

2. That the Defendant be and is hereby ordered to pay cost of the suit.

Claim 2

3. That the Defendant is ordered to make payment in respect of the retention funds in the amount of R 1 123 520.87 (One Million One Hundred and Twenty-Three Rand and Five Hundred and Twenty Rand and Eighty Seven Cents) plus VAT.
4. Interest on the aforementioned amount a *tempore morae*.
5. That the Defendant be and is hereby ordered to pay cost of the suit.


[REDACTED]
J D STRÖH

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv AA Basson

Instructed by: Thomas & Swanepoel Inc, Tzaneen c/o Kampherbeek & Pogrand Attorneys, Polokwane

For the Defendant: Adv JAL Pretorius

Instructed by: Mohale Incorporated, Polokwane

Dates Heard: 4-5 November 2024

Date Reserved: 5 November 2024

Date Delivered: 4 December 2024