

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2023-067555

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 16 May 2025

SIGNATURE OF JUDGE:

A handwritten signature in black ink, which appears to be "H. S. M. M.", is written over a black rectangular redaction box.

In the matter between:

LONEROCK SPARTAN GROUP JV

Applicant

and

**THE MINISTER OF THE NATIONAL DEPARTMENT OF
PUBLIC WORKS AND INFRASTRUCTURE
ZIMBINI HILL NO
TIMOTHY SUKAZI NO
MICHAEL SUTCLIFFE NO
RAYMOND NKANDO NO
KARABO SIYILA NO
LERATO KUMALO NO
NTHABISENG MKHWANAZI NO
MPILO MBAMBISA NO
KRISHEN SUKDEV NO
LUFUNO NEVONDWE NO**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent
Tenth Respondent
Eleventh Respondent

REHANA PARKER NO

Twelfth Respondent

(in their capacity as the trustees for the time being of the INDEPENDENT DEVELOPMENT TRUST (REGISTRATION NUMBER: IT 669/91))

JUDGMENT

HF OOSTHUIZEN AJ

THE CONTRACT

- [1.] The applicant, a joint venture between two companies, claims payment from the first respondent of two extension of time claims pursuant to a construction contract relating to the upgrading of certain civil engineering services at the Pretoria Waterkloof Air Force Base ("the contract" and "the project" respectively).
- [2.] The contract consists of the applicant's tender and an offer of appointment, in which the General Conditions of Contract for Construction Works (2015) Third Edition, published by the South African Institute of Civil Engineering ("the GCC 2015") and contract specific data, being amendments, additions and omissions of the GCC 2015 ("the contract data") were incorporated.
- [3.] The offer of appointment was signed on behalf of the first respondent by the Independent Development Trust ("the IDT"), whose trustees are cited in the application as the second to twelfth respondents. No relief is sought against the IDT and the IDT abides the decision of the Court.
- [4.] The first respondent, as the custodian and manager of all the National Government's fixed assets, concluded a memorandum of agreement with the IDT as an agent to assist the first respondent with the implementation of the so-called Infrastructure Programme Plan. The IDT accordingly manages the project on behalf of the IDT in return for the payment of a market-related management fee and disbursements.

- [5.] The IDT is accordingly the implementing agent on behalf of the National Department of Public Works, who is described in the offer of appointment as the "*Employer*".
- [6.] The IDT is, somewhat confusingly, also described in the contract data (and accordingly also in the GCC 2015) as the "*Employer*".
- [7.] It is common cause that the IDT fulfilled the role of "*Employer*" in terms of the GCC 2015, as amended by the contract data, save that the IDT is not liable for the payment of any amounts to which the applicant is entitled in terms of the contract - the first respondent remains liable to make payment to the applicant of any amounts to which it is entitled.
- [8.] The GCC 2015 moreover provides for an "*Employer's Agent*", who is identified in the offer of appointment as Endecon Ubuntu (Pty) Ltd ("*Endecon*").
- [9.] I will, to prevent possible confusion, refer in this judgement to the "*Employer*" / implementing agent as the IDT and to the "*Employer's Agent*" as Endecon.
- [10.] The relevant express terms of the GCC 2015, as amended by the contract data, are as follows: (All references in this judgement to clauses are to clauses of the GCC 2015.)
- [10.1.] The functions of Endecon is to administer the contract as agent of the IDT, in accordance with the provisions of the contract (clause 3.2.1).
- [10.2.] The IDT shall have the right to reverse and amend any certificate, instruction, decision or evaluation of Endecon and to issue a new one, and such certificate, instruction, decision or evaluation shall for the purposes of the contract be deemed to be issued by Endecon (clause 3.2.3, as amended).
- [10.3.] The applicant shall deliver to Endecon a monthly statement for all amounts it considers to be due and Endecon shall, by signed payment certificates certify the amount it considers to be due to the applicant (clauses 6.10.1).

- [10.4.] Endecon shall deliver to the applicant the payment certificate within 7 days after receipt of the applicant's statement and the first respondent shall pay the amount due to the applicant within 28 days of receipt of the payment certificate subject to the applicant submitting a tax invoice for the amount due (clause 6.10.4).
- [10.5.] In the event of failure by the first respondent to make payment by the due date, the first respondent shall pay to the applicant interest at the rate determined by the Minister of Finance from time to time in terms of section 80(1)(b) of the *Public Finance Management Act, 1999*,¹ compounded monthly, on all overdue payments from the date on which the same should have been paid to the date when payment is effected (clause 6.10.6.2, as amended).
- [10.6.] Endecon may in a payment certificate make any correction or modification of any previous payment certificate, which has been issued by it (clause 6.10.7).
- [10.7.] The applicant may, after giving 14 days written notice to the IDT, with a copy to Endecon, suspend the progress of the works where the first respondent has failed to make full payment of the amount certified in a payment certificate (clause 5.11.1).
- [10.8.] If the applicant considers itself entitled to an extension of time that will extend practical completion of the works beyond the due completion date, the applicant shall claim in accordance with clause 10.1 such extension of time as is appropriate (clause 5.12.1).
- [10.9.] Circumstances which could justify an extension of time include any disruption which is entirely beyond the applicant's control (clause 5.12.2.4).

¹ Act 1 of 1999

- [10.10.] If an extension of time is granted, the applicant shall be paid such additional time related general items as are appropriate (clause 5.12.3).
- [10.11.] The applicant shall, within 28 days after the circumstance, event, act or omission giving rise to a claim for an extension of time has arisen or occurred, deliver to Endecon a written claim, setting out the particulars of the circumstance, event, act or omission giving rise to the claim concerned; the provisions of the contract on which it bases the claim; the length of the extension of time claimed on the basis of calculation thereof; and the amount of money claimed on the basis of calculation thereof (clause 10.1.1.1).
- [10.12.] If, by reason of the nature and circumstances of the claim, the applicant cannot reasonably comply with all or any of the provisions of clause 10.1.1.1 within the said period of 28 days, it shall within the said period of 28 days notify Endecon, in writing, of its intention to make the claim and comply with such of the requirements of clause 10.1.1.1 as it reasonably can; and as soon as is practicable, comply with such of the requirements of clause 10.1.1.1 as have not yet been complied with (clause 10.1.1.2)
- [10.13.] If the applicant fails to comply with the 28 day notice period in clause 10.1.1, as read with clause 10.1.2, or does not deliver its final claim within 28 days after the end of the events or circumstances, the due completion date shall not be extended, the applicant shall not be entitled to additional payment, and the first respondent shall be discharged of all liability in connection with the claim (clause 10.1.4).
- [10.14.] The IDT shall, within 28 days after the applicant has delivered its claim, deliver to the applicant its written ruling on the claim. The amount thereof, if any, allowed by the IDT shall be included to the credit of the applicant in the next payment certificate (clause 10.1.5, as amended).
- [10.15.] If the IDT fails to give its ruling within the prescribed period, the IDT shall be deemed to have given a ruling dismissing the claim (clause 10.1.6).

[10.16.] Disputes are to be referred for final settlement to litigation (clause 10.7, as amended).

THE FIRST CLAIM

[11.] The applicant's first claim arose in consequence of the suspension of works by the applicant from 5 July 2021 to 29 September 2021 following on the first respondent's non-payment of payment certificates.

[12.] On 17 June 2021, the applicant sent a notice to Endecon (and not to the IDT) of its intention to suspend the progress of works due to non-payment of payment certificates.

[13.] On 5 July 2021 (the date on which the suspension of the progress of works commenced), the applicant sent a notice to Endecon of its intention to claim extension of time with associated costs as a result of the suspension of works, setting out the particulars prescribed by clause 10.1.1.1 insofar as it was possible. It specifically indicated that it would only be entitled to finally calculate the costs once it had received full payment.

[14.] Between 29 July 2021 and 22 February 2022 the applicant sent further notices to Endecon on a monthly basis, which notices were similar to the notice of 5 July 2021 and which notices included updated calculations of the claimed costs. The applicant indicated in notices that its claim could only be finally calculated once all outstanding payments are paid in full.

[15.] On 2 March 2022, the applicant submitted a final claim for extension of time for 86 calendar days with associated costs in the amount of R2 505 969.05 (excluding VAT) being preliminary and general cost; plant standing time and interest on late payment.

[16.] Endecon considered the claim and recommended approval of the extension of time claim for 86 calendar days with associated costs in the reduced amount of R2 046 272.88 (excluding VAT). Endecon specifically found that the applicant

had given the necessary notification of intention to claim in the specified time frames.

[17.] On 30 June 2022, the IDT recommended approval of the extension of time claim for 86 calendar days with associated costs in the total amount of R2 057 790.10 (excluding VAT) to the first respondent. The applicant accepted the ruling of the reduced amount.

[18.] The first respondent approved the extension of time claim but refused to make payment of associated costs, relying on clause 10.1.4, due to the applicant's alleged failure to comply with the following provisions of the contract:

[18.1.] the applicant gave written notice to Endecon (and not to the IDT) of its intention to suspend the progress of the works, as required by clause 5.11.1; and

[18.2.] the applicant did not submit its claim within 28 days after the circumstance that gave rise to the claim had occurred, as required by clause 10.1.1.1.

[19.] I am of the view that there is no merit in either defence:

[19.1.] The failure by the applicant to give written notice to the IDT of its intention to suspend the progress of the works (as required by clause 5.11.1), cannot discharge the first respondent from liability in connection with a claim in terms of clause 10.1.4. The first respondent could only be discharged of liability if the applicant failed to comply with the 28 day notice period in clause 10.1.1 (for an extension of time for practical completion) or if the applicant did not deliver its final claim within 28 days after the end of the relevant events or circumstances.

[19.2.] As I indicated in paragraphs [13] to [15] above, the applicant submitted written claims throughout the period of suspension of works, which set out the prescribed information in terms of clauses 10.1.1.1.1 to 10.1.1.1.4 insofar as the applicant was able to. The applicant thus

complied with the requirements of clause 10.1.1.1, read with clause 10.1.1.2, alternatively complied substantially with such provisions.

[20.] I am in the alternative of the view that the first respondent is bound by the ruling of the IDT, the agent of the first respondent, to approve the applicant's claim:

[20.1.] It is trite that a principal is bound by juristic acts which its duly authorised agent has performed on its behalf.²

[20.2.] It is common cause that the IDT was duly authorised by the first respondent to perform all functions as the "*Employer*" in terms of the contract, including the right to reverse and amend any certificate, instruction, decision or evaluation of Endecon. The first respondent on the other hand is merely obliged to make payment of all claims in terms of the contract.

[20.3.] Although the first respondent would be able to terminate the authority of the IDT to act on its behalf, the first respondent could not simply take over the powers and functions of the IDT in terms of the agreement. The powers and functions of the IDT did not accrue to the first respondent, as argued by Ms Nodada on behalf of the first respondent.

[20.4.] The amount of any allowed claim shall, in terms of clause 10.1.5, as amended, be included to the credit of the applicant in the next interim payment certificate.

[20.5.] A final payment certificate can only be challenged on very limited grounds such as fraud and the like.³ The employer will not be bound if there has been fraud or if the agent had acted in collusion with the contractor to the detriment of the employer or if the agent had exceeded its mandate.⁴

² *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) para [45]

³ *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* 1993 (3) SA 331 (A) at 344C

⁴ *Smith v Mouton* 1977 (3) SA 9 (W) at 13A, which was confirmed in *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* *supra* at 340F

[20.6.] The employer is not entitled to dispute the validity of a final payment certificate *vis-à-vis* the contractor merely because he alleges that the certificate was given negligently.⁵ The employer's remedy in such event is to claim damages from the agent.⁶

[20.7.] Although the legal position in respect of interim payment certificates differs in certain respects from that of final payment certificates, Endecon did not have the power to correct or modify the IDT's ruling in respect of the applicant's first claim in terms of clause 6.10.7, which implies that the claimed amount would in due course be included in the final payment certificate.

[21.] The applicant claims interest on the amount of R2 057 790.10 (excluding VAT) calculated at the rate of 10.25% per annum from 2 March 2022, being the date of the applicant's final claim.

[22.] The claim for interest ignores the following provisions of the contract:

[22.1.] The amount of any allowed claim shall be included to the credit of the applicant in the next interim payment certificate.

[22.2.] Endecon shall deliver to the applicant a payment certificate within 7 days after receipt of the applicant's statement and the first respondent shall pay the amount due to the applicant within 28 days of receipt of the payment certificate subject to the applicant submitting a tax invoice for the amount due.

[22.3.] In the event of a failure by the first respondent to make payment by the due date, the first respondent shall pay to the applicant interest at the rate determined by the Minister of Finance from time to time in terms of section 80(1)(b) of the *Public Finance Management Act*, 1999, compounded

⁵ *Smith v Mouton supra* at 13E

⁶ *Smith v Mouton supra* at 14D

monthly, on all overdue payments from the date on which the same should have been paid to the date when payment is effected.

[23.] The applicant has failed to present evidence whether the allowed claim was included to the credit of the applicant in a subsequent interim payment certificate and whether the applicant submitted a tax invoice for the amount due. I am accordingly unable to determine the date on which interest would commence to run, being 28 days of receipt of such payment certificate and subject to the applicant submitting a tax invoice for the amount due.

[24.] I am accordingly only prepared to order the first respondent to make payment of interest from the date on which the application was instituted, being 11 July 2023, at which date the interest determined by the Minister of Finance in terms of section 80(1)(b) of the *Public Finance Management Act*, 1999 was 11,75% per annum.⁷

THE SECOND CLAIM

[25.] The applicant's second claim is for costs in relation to the Covid-19 pandemic's mandatory safety regulations, including the actual costs of R107 477,54 (excluding VAT) for the appointment of a Covid-19 officer to perform screening on all employees to measure their temperatures and keep record of traceability of the Covid-19 virus.

[26.] On 30 September 2022, Endecon recommended payment of R3 075 511.00 (excluding VAT) and confirmed that a Covid-19 officer was appointed to screen the applicant's employees on a daily basis.

[27.] The IDT failed to make any ruling on the second claim, which implies that the ruling was deemed to be dismissed in terms of clause 10.1.5.

⁷ National Treasury General Notice 1907 of 2023, published in the *Government Gazette*, 7 July 2023 number 48923 p 27

- [28.] The first respondent accepts that the Covid-19 pandemic amounted to a disruption which was entirely beyond the applicant's control, within the meaning of clause 5.12.2.4, and that the applicant is entitled to claim costs pursuant thereto.
- [29.] The first respondent only disputes the applicant's entitlement to claim for a Covid-19 officer. It argues that the duties of the Covid-19 officer could have been performed by the applicant's appointed Occupational Health and Safety Officer ("the OHS Officer"), which implies that the claimed costs amounted to an unwarranted duplication of costs.
- [30.] In the replying affidavit the applicant indicated that the duties of the OHS Officer were extensive and wide-ranging in view of the size and extent of the construction site and that it was impossible for the existing OHS Officer to double up as the designated Covid-19 officer.
- [31.] The deponent to the first respondent's answering affidavit is a project manager at the construction management branch of the Department of Public Works. He does not have personal knowledge of the circumstances at the construction site and relies on documents and "*various consultations with relevant officers who were involved in matters relevant to the application*", without identifying them.
- [32.] In view of his lack of knowledge of the circumstances at the construction site, the allegation that the duties of the Covid-19 officer could have been performed by the applicant's OHS Officer is mere speculation.
- [33.] The uncontested facts are that the applicant was obliged in terms of the relevant Covid-19 regulations to appoint a Covid-19 officer; the appointed Covid-19 officer performed the prescribed functions; the applicant claimed actual expenses which it incurred in compliance with its statutory obligations; and the IDT's agent, Endecon, recommended that the applicant be paid.
- [34.] I am accordingly of the view that the applicant has proven its entitlement to the costs of the Covid-19 officer.

[35.] The applicant claims interest on the amount of R3 057 790.10 (excluding VAT) calculated at the rate of 10.25% per annum from 22 June 2022, being the date of the applicant's claim.

[36.] The applicant has failed to prove its entitlement to such interest and I am accordingly only prepared to order the first respondent to make payment of interest on the same basis as in the first claim.

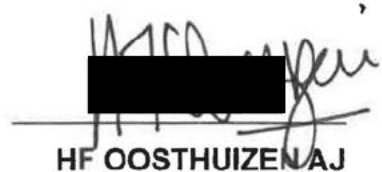
[37.] Ms Nodada has conceded that the applicant's appointment of two counsel was justified.

ORDER

[38.] I accordingly grant the following order:

[38.1.] The first respondent is ordered to pay to the applicant the amount of R5 903 296.27 together with interest calculated on this amount at the rate of 11,75% per annum, compounded monthly, from 11 July 2023 to date of final payment.

[38.2.] The first respondent is ordered to pay the costs of the application, including the costs of two counsel on scale B.



HF OOSTHUIZEN AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 16 May 2025.

Appearances

Adv C Acker and Adf J Hartman, instructed by Pagel Schulenburg Inc appeared on behalf of the applicant.

Adv B Nodada, instructed by the State Attorney, appeared on behalf of the first respondent.

There was no appearance on behalf of the second to twelfth respondents.

Date of Hearing: 7 May 2025

Date of Judgment: 16 May 2025