Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 1496/2019

In the matter between:

BASE MAJOR CONSTRUCTION (PTY) LTD Applicant

and

THE DEPARTMENT OF ROADS AND PUBLIC WORKS, NORTHERN CAPE PROVINCE First Respondent

THE MEC: DEPARTMENT OF ROADS AND PUBLIC WORKS, NORTHERN CAPE PROVINCE Second Respondent

Heard on: 25/10/2024

Delivered on: 25/04/2025

Summary: Failure to perform in terms of contract. Contract terminated but subsequently re-instated in terms of an Addendum. Respondents terminating contract relying on the Addendum. Application seeking declarator. Interpretation of the contract incorporating the Addendum in issue.

ORDER

In the result the following order is made:

The application is dismissed with costs which costs shall include counsel fees on Scale C of Rule 69(7).

JUDGMENT

MAMOSEBO ADJP

[1] The relief that the applicant, Base Major Construction (Pty) Ltd, is seeking is a declarator in the following terms:

1. On the 21st of May 2019, the respondent was precluded from lawfully terminating the Compendium JBCC Principal Building Agreement, (Compendium Agreement) concluded between the applicant and the respondent in light of its failure to pay the amount certified as payable to the applicant in terms of the Interim Payment Certificate No 22;
2. On the 21st of May 2019, the respondent, in terminating the Compendium Agreement, as concluded between the applicant and the respondent, repudiated the written agreement;
3. The applicant in accepting the said repudiation, has lawfully terminated the Compendium Agreement, as concluded between the applicant and the respondent;
4. The respondent is precluded from levying penalties against the applicant, in respect of those periods that the respondent was in material breach of its obligations, as they arose in terms of the Compendium Agreement, in so far as it had not effected payment to the applicant of amounts that were due and payable;
5. The respondent is to instruct its Principal Agent to issue a further Interim Payment Certificate, in terms of sub-clause 38.5.7 of the Compendium Agreement, which Interim Payment Certificate is to provide for the reversal of all penalty amounts levied against the applicant, in respect of those periods where the respondent had breached its obligations, as they arose in terms of the Compendium Agreement; and
6. Costs of the application.

[2] An issue arose pertaining to the filing of the supplementary heads of argument by the applicant which was opposed, which requires prior attention. This application was heard in the opposed motion court. The applicant filed its written heads on 30 May 2024 and the respondents on 23 October 2024. The matter was argued on 25 October 2025 and judgment in the matter was reserved.

[3] Erasmus Superior Court Practice 2nd ed Vol 3, M1 – 2 [Service 20, 2023] NC Practice Directive Clause 3(4) provides:

In respect of each opposed application heads of argument shall be filed with the registrar and served on the opposing party –

(a) before 12:00 on the Monday preceding the trial date on behalf of the applicant;

(b) before 12:00 on the Wednesday preceding the trial date on behalf of the respondent.

Provided that in respect of long or complicated applications the heads of argument shall be filed and served at least eight and six court days respectively before the trial date.

In amplification, The Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities stipulates that:

"61.11 After a hearing when judgment is awaited, a legal practitioner shall not place before or try to send to a judicial officer any further material of whatever nature, except by agreement among representatives of all parties; provided that, if consent is unreasonably withheld, the placing of further material may, in an appropriate case, be the subject matter of an application to re-open the hearing to receive it or, if the further material consists only of references to authorities which might offer assistance to deciding a question, a legal practitioner may address a request in writing to the judge's

> registrar or equivalent court official to approach the judicial officer with an invitation to receive the references."

[4] The respondents submit that the applicant did not attempt to reach an agreement to file additional heads but merely placed the heads before court. Not only does the supplementary heads contain case law, but it also makes various submissions in an attempt to further the applicant's case which was not previously dealt with.

[5] The applicant's original heads, filed on 30 May 2024, comprise 75 pages and 220 paragraphs. The respondents' original heads consist of 12 pages and 48 paragraphs. Substantive argument does not lie in the size of the heads but on how well articulated the issues are captured. The applicant's heads are quite copious and ought to have been confined to the crux of the issues. It is plain that the respondents' heads accord with the practice directive of this Division and were filed on the Wednesday preceding the hearing date on Friday 25 October 2025.

[6] The remarks by Buys J in *Kriel v Terblanche NO en Andere*[1] are apposite:

> 'The purpose of heads of argument is to identify the dispute and to set out the argument to be delivered so as to assist the Court and the opponent in the preparation of the case and during argument in Court. The Court will always try to assist legal representatives by granting time for further argument where necessary. Where the dispute is identified, however, the practice which allows the applicant's legal representative first to listen to the argument of the respondent's legal representative before he replies thereto is objectionable.'

[7] I am of the view that the applicant is attempting to supplement its case in the supplementary heads having had sight of the respondents'

[1] 2002 (6) SA 132 (NC) (Paragraph 52 at 149C/D - F/G.) quoted from the headnote

argument, which approach is objectionable and stray from the principle enunciated in *Kham and Others v Electoral Commission and Another*[2] where Wallis AJ said:

> 'In application proceedings the affidavits represent both the pleadings and the evidence.'

If the applicant's founding affidavit is deficient it cannot be augmented by heads of argument. The applicant has neither dealt with the issues raised by the respondents during argument nor the salient issues in its affidavit. Of importance is its failure to deal with the Addendum even in the impugned supplementary heads. There is therefore no reason to accept these supplementary heads.

[8] The respondents raised several defences some, for example non-compliance with the State Liability Act, 20 of 1957; whether arbitration or litigation is the correct forum; compliance with the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, in their written heads but they were not argued, correctly so. The main issue for determination therefore revolves around the interpretation of the contract, incorporating the Addendum.

[9] The duration of the project was meant to be 14 months. The applicant was awarded a R161,421,288.75 tender to construct student accommodation under Bid No DRPW 02/2016 Kimberley: Construction of New Nursing College – Phase 1 (Student Accommodation) after a successful bid. In a letter dated 10 November 2016 under signature of the Head of the Department, (HOD) Mr Kholekile Nogwili, the bidder was informed that the contract period will commence on the date following the day on which the bidder was notified of its appointment.

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[2] 2016 (2) SA 338 (CC) para 46

The bidder was also made aware of the stipulation in the contract relating to the penalty in the amount of R15,000.00 per day for each day the contract was delayed.

[10] Mr Stephen J Lu, Chairman/Director of the applicant, directed a letter of acceptance to the first respondent on 18 November 2016 in which he wrote:

> 'This letter serves as an acceptance for the abovementioned project with the tender amount of R161,421,286.75. We acknowledge receipt of the appointment letter and agree to complete the work with the tendered amount and time.'

It is common cause between the parties that the Compendium Agreement was concluded on 16 November 2016. The applicant commenced with the construction of the works on 03 February 2017. The applicant submitted claims for interim payments which were considered by the Principal Agent to determine what the applicant would be entitled to.

[11] The Principal Agent furnished the applicant with the General Conditions of Contract (GCC) on 25 May 2017 (the Principal Building Agreement). In para 24 of its founding affidavit, the applicant states that an addendum was concluded on 07 November 2017 without mentioning the circumstances which had led to the conclusion thereof. The respondents' response lies at para 16 of the answering affidavit accusing the applicant of non-performance of its obligations and the termination of the contract.

[12] The respondents' 'without prejudice' termination letter signed by the HOD, annexed as "KN1" addressed to the Managing Director, Mr Stephen Lu, dated 27 September 2017, reads:

'On 21st June 2017 we caused a formal notice to be addressed to you in terms of clause 36.2 advising that you are in breach of your obligations as set out in clause 15.3 and of our intention to cancel the contract should you not remedy such breach within a period of ten (10) working days. Despite such notice and the Department having given you more than enough opportunity to correct the situation, you have failed to remedy your breach and in the circumstances this letter serves as formal notice of the immediate cancellation of the contract in accordance with the provisions of clause 36.3.

Your attention is drawn to the further provisions of clause 36.5 and the application of *inter alia* the following:

1. The execution of the works shall cease and, subject to the provisions of item 2 below, you are required to immediately vacate the works and the site and relinquish possession thereof to us; and
2. Within a reasonable time of being instructed to do so by the Principal Agent you are to remove your temporary buildings, plant, machinery and surplus materials and goods failing which they will be removed and sold.

The cancellation of the contract is without prejudice to our rights, as the employer, to:

1. Employ others to safeguard the works and to appoint another contractor to complete all outstanding work and to rectify defects; and
2. Recover from you whatever damages that we have suffered in consequence of such cancellation and the completion of all outstanding work by another contractor.
3. Report your non-performance with the possibility of having you listed in the National Treasury Register of Defaulting Contractors.

In the meanwhile we shall instruct the Principal Agent to prepare a report on the status of that portion of the works completed by you followed by the issue of the final account, both of which will be delivered to you in accordance with the requirements of clauses 36.5.2 and 36.5.3.'

[13] The applicant made representations and committed to achieve the milestones as set out in the addendum without any further delays. That is how the Addendum came about. The respondents reinstated the contract on the terms as provided for in the Addendum to the JBCC Contract Agreement to this effect:

'**Whereas** the Employer and the Contractor intend to further amend the JBCC Contract Agreement [entered] into in November 2016 (hereinafter referred to as "the Contract Agreement");

And whereas the parties desire to amend the Agreement further by:

NOW THEREFORE IT IS HEREWITH AGREED TO THE AGREEMENT AS FOLLOWS:

1. Stricter supervision of the Contractor; that the interim milestones are introduced by giving the employer the option to terminate the contract if any of the milestones are not achieved,
   - 13 December 2017 – Precast slabs installed on cluster A and C;
   - 30 January 2018 - Precast slabs introduced on cluster B and D;
   - 20 April 2018 – Cluster A ready for beneficial occupation.
2. No further delays and immediate implementation of works programme as submitted on 20/10/2017;
3. A 10% cash guarantee based on the original contract amount is implemented to replace the current 5% guarantee and the 5% retention of contract sum on the payment certificates.
4. That under the current circumstances that no additional P&G [Preliminary and General Amounts] for the period from April to July 2018 and that the remaining P&G would be certified prorate up to the date of practical completion. However, the Department and BMC agree that should circumstances change that normal EOT be submitted, be considered by the Employer and either granted or refused as per the Revised Contract.
5. The contractor confirm that no applications for the revision of the date for practical completion will be submitted in terms of the 14 notifications said

to date and that all other claims that may have arisen from the previous period [are] extinguished.

6. The contractor confirms that CPAP is still not applicable to this contract as per original contract.

7. The contractor to confirm that to his availability the necessary resources, skills and subcontractors to implement the project and that he will replace the whole management team that work on the project to date.

8. The parties agree that the Contractor will complete the contract by 22 June 2018 as per the Contractor's Revised Programme.

This Addendum is herewith attached to and will form part of the Agreement concluded and signed in November 2016, all other terms of the Original Agreement remain as agreed to;

To the extent that any terms or conditions contained in this addendum may contradict or conflict with any terms of the attached Agreement, it is expressly understood and agreed by the parties that the terms of this Addendum shall take precedence and supersede the Agreement.

Should the above terms/conditions be acceptable to the contractor that you submit your answer to this office by end of business on Monday 30 October 2017.'

Mr Stephen Lu accepted the terms and conditions of the Addendum by letter dated 03 November 2017.

[14] The revised completion date was 22 June 2018. The agreed sum was payable monthly after the issuance of an interim payment certificate. There is disagreement between the parties. On the applicant's version, it achieved its obligations in terms of the contract. The respondents maintain that had that been the case there would not have been a need for the initial cancellation of the contract due to non-performance in the latter part of 2017 but subsequently reinstated on the terms specified in the Addendum.

[15] The respondents confirm it made several interim payments for the period March 2017 to March 2018 in terms of the agreement. However, it accuses the applicant of continually missing the set milestone dates of the completion of the works. According to the respondents, progress was poor despite the applicant having been served with numerous formal notices for its breach of obligations in terms of clause 15.3. It was continuously reminded to proceed with the works with due skill, diligence, regularity and expedition to bring the works to completion. These notices and reminders notwithstanding, the applicant defaulted.

[16] The parties are not *ad idem* pertaining to some of the interim payment certificates. These accusations are not material for the resolution of the dispute as they relate primarily to accounting and computation issues. The respondents are adamant that from 22 June 2018 the applicant was in material breach of its contract and cannot blame the late payments for its non-completion of the works. It would have been entitled to claim interest due to the late payments as provided for in the contract, it contends.

[17] The applicant maintains that payment of R835,801.96 was made to it on 28 June 2019. Clause 31.9 of the contract stipulates that the employer shall pay the contractor the amount certified within twenty-one (21) calendar days of the date of issue of the payment certificate. Payment shall be subject to the contractor giving the employer a tax invoice for the amount due. The respondents deny that it is an incorrect amount, and it is on an unsigned certificate. The respondents further denied paying that amount on 28 June 2019 which date follows the date after which the contract was cancelled by the respondents.

[18] The applicant, relying on clause 36.6 of the contract, contends that the employer's right to cancel the contract in terms of this clause should not be exercised should the employer be in material breach of the contract. According to the applicant, the failure by the employer to pay or paying the interim certificates late constitutes a material breach of the contract and ought to non-suit the respondents for cancellation of the contract. The applicant further contends that because of the material breaches of the contract the respondents were not entitled to levy any penalties.

[19] The respondents deny having been in material breach of its obligations at any stage during the currency of the contract maintaining that payments were made within 21 calendar days and where there were late payments, default interest was reflected in the subsequent interim payment certificate by the principal agent.

[20] What the applicant downplays or deliberately omitted to mention to this Court was that the project was more than 200% over the original contract period. That represents an overrun of more than 11 months on the revised date for practical completion and only 50% complete as of 30 April 2019. Undeniably, this was a material breach of the contract as the applicant was required contractually to execute the project with diligence and the necessary skills. The work was unworkmanlike, sloppy and unprofessional. Of significance is that the applicant has not denied that it was in material breach of its obligations as at the date of termination. The respondents applied a set-off method relying on clauses 31 and 33 of the contract to address the debts due and owing to either party. The respondents maintain that it was not precluded from levying the penalty amounts in respect of the applicant's failure to complete the works by 22 June 2018. The respondents did not cancel the contract

invoking clause 38 of the contract, therefore, it does assist the applicant to invoke it.

[21] Mr Snellenburg SC, for the respondents, submitted that the reinstatement of the contract through the Addendum was essentially based on the fact that the applicant had failed to perform in terms of the agreement by failing to achieve the set milestones and remained in breach of its performance. Having been 200% out of time with the project, the parties had agreed that the Addendum shall take precedence.

[22] The pivotal issue is whether the conclusion of the Addendum supersedes or enjoyed preference over the main contract. The applicant accepted the Addendum and agreed to be bound by it.

[23] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] Wallis JA enunciated this interpretation as the correct approach to interpreting documents in general and contracts in particular:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

[3] 2012 (4) SA 593 (SCA) para 18

[24] Over and above taking into consideration the objective words used by the parties in the Addendum, I have had regard to the contract as a whole and the circumstances in which both the contract and the Addendum came into being. It was agued on behalf of the respondents that the purpose of the Addendum being concluded was because the applicant had failed to reach its milestones and to adhere to the principal agent's instructions. The conduct of the parties is relevant and admissible when interpreting a document. The applicant agreed to stricter supervision and that its management team was to be replaced. The provision, which the applicant agreed to, was that the respondents could terminate the contract should the milestones not be reached. It is further expressly stated in the Addendum that its terms shall take precedence and supersede the original agreement. The respondents cannot be faulted for terminating the contract after the applicant's failure to rectify its breach of contract under the terms of the Addendum. This was a second bite at the cherry that the applicant could have enjoyed wisely. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[4]; *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd*[5]

[25] The main gripe of the applicant relates to some late payments, specifically interim payment certificates 11 and 22. Even if I were to accept that the interim payment certificate number 22 was not paid timeously the applicant would be precluded from relying on clause 36.6 because it has agreed to give the Addendum precedence over the contract in the event of a conflict in their texts. This, therefore, allows the respondents to terminate the contract based on the applicant's non-compliance with the terms of the Addendum.

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[4] 2014 (2) SA 494 (SCA) paras 10 - 12
[5] [2012] ZASCA 125 para 15

[26] What further makes the applicant's hurdle insurmountable is its option to have this matter adjudicated in motion proceedings instead of going to trial. The applicant has also not requested to cross-examine certain witnesses either. Harms DP made these instructive remarks in *National Director of Public Prosecutions v Zuma*[6] pertaining to motion proceedings:

> 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans*[7] rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's ...affidavits, which have been admitted by the respondent ..., together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[27] I am not persuaded that the applicant's submissions in the above regard have substance. The applicant is silent in its founding papers why the contract was terminated the first-time round. It further does not deal with the allegations regarding its failure to adhere to the terms of the Addendum at all other than to apportion blame to the respondents based entirely on the purported late payments. The applicant is a Grade 9 CIDB level, which understandably is not an entry level contractor. Had it adhered to the initial terms of the main contract as agreed to, the project would have reached completion within 14 months as initially contemplated and there would not have been a need for the Addendum with different terms. The public purse must be protected under these

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[6] 2009 (2) SA 277 (SCA) para 26

[7] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) 634 -5

circumstances. There is no reason why costs should not follow the result.

[28] In the result the following order is made:

The application is dismissed with costs which costs shall include counsel fees on Scale C of Rule 69(7).

[redacted]

MC MAMOSEBO
ACTING DEPUTY JUDGE PRESIDENT
HIGH COURT, NORTHERN CAPE DIVISION

For the applicant	Adv. AJ Glendinning
Instructed by:	E Taylor Attorneys c/o Haarhoffs Inc
For the respondents:	Adv. N Snellenburg SC
Instructed by:	Peyper Attorneys c/o Duncan & Rothman Attorneys