

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 81906/19

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 14 August 2025 E van der Schyff

In the matter between

MOKOENA GENERAL MAINTENANCE AND PROJECTS (PTY) LTD PLAINTIFF

and

JOVAN PROJECTS (PTY) LTD DEFENDANT

JUDGMENT

Van der Schyff J

Introduction

[1] The plaintiff, Mokoena General Maintenance and Projects (Pty) Ltd ('MGMP') represented by Mr. Solomon Mokoena, and the defendant, Jovan Projects (Pty) Ltd ('Jovan') represented by Mr. John van der Linde, concluded an agreement on 27 March 2019. In terms of this agreement MGMP was appointed as a sub-contractor for the Ebony Mall project. Jovan terminated the contract on or about 23 May 2019.

This litigation flows from the alleged breach of the contract and MGMP claims damages of R4 350 611.00 for 'loss of income'. During closing argument, it became apparent that MGMP's claim, properly defined, was for loss of profit.

Pleadings

Particulars of claim

- [2] MGMP averred in its particulars of claim that the parties entered into a 'written contract, partly oral agreement'. Annexure A is attached as being a copy of the written contract.
- [3] The terms of the agreement, according to MGMP, were the following:
- a. MGMP would carry out brickwork labour for the erection of Ebony Mall in Tembisa;
 - b. MGMP 'would be allocated 14 million bricks, sub-divided equally with the other 2 sub-contractors' (*sic.*);
 - c. Each subcontractor would be allocated 4,666,666 (four million six hundred and sixty-six thousand six hundred and sixty-six) bricks;
 - d. Each brick would be at the cost of R0.95 cents;
 - e. MGMP would be expected to issue invoices to Jovan for services rendered on a fortnightly basis;
 - f. Payment would be made into MGMP's bank account.
- [4] The contract was to run until the completion of the stipulated construction work. Pursuant to the agreement, MGMP did part of the brickwork and sent invoices attached to the particulars of claim to Jovan. During May 2019, barely two months after the contract period commenced, the agreement was orally terminated by Jovan, who advised MGMP that their services were no longer needed.
- [5] As a result of the breach of contract, MGMP suffered 'expected damage of loss of income' in the amount of R4 350 611.00.

Plea

- [6] Jovan pleaded that a written agreement had been concluded between the parties. This agreement is constituted by two documents, Annexure 'A' and 'B'. The defendant raised a special plea and requested a stay of the proceedings pursuant to the dispute being referred to arbitration. I paused to state that the special plea was argued at the onset of the proceedings. I indicated to counsel that I am of the view that I can only rule on the special plea after evidence has been led.
- [7] As to the merits of the claim itself, Jovan denied being indebted towards MGMP for payment of the amount claimed or any other amount whatsoever.
- [8] Jovan pleaded that it bears no knowledge of MGMP being a private company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa, and denied the averments made in this regard.
- [9] Jovan pleaded that the material terms of the agreement between the parties were that:
- a. MGMP would perform brickwork as and when areas became available for a subcontractor to proceed at the sole discretion of the project manager when previous work was approved;
 - b. No particular quantities were agreed, but the bill of quantities only allowed for 1,240,000.00 stock bricks and 150,000 face bricks;
 - c. MGMP's invoices furnished to Jovan had to correspond with the project manager's measured quantities and agreed rates;
 - d. MGMP's services would be rendered on an ad hoc basis as and when required, but not for any particular fixed term.
- [10] Jovan further pleaded that MGMP breached the agreement by failing to:
- a. Pay the labourers employed by it after receipt of payment from Jovan;
 - b. Discharging its obligations timeously under circumstances where time was of the essence;

- c. Deliver on the performance criteria and milestones as determined by the project manager;
- d. Submit source documents to Jovan in support of claims for payment as agreed between the parties;
- e. Failed to rectify its breach of the agreement despite a demand to do so.

[11] Jovan pleaded that MGMP repudiated the agreement through its actions, a repudiation that Jovan accepted. A notice of termination was given to MGMP on or about 23 May 2019, and the agreement was lawfully terminated. Jovan pleaded in the alternative that MGMP made performance impossible, and further in the alternative that performance became impossible because it had to make use of alternative contractors to discharge the obligations owed to it by MGMP. MGMP was paid for all the work completed by it.

Plaintiff's replication

[12] In replication, MGMP denied that the agreement concluded between the parties included Annexure 'B' attached to Jovan's plea. MGMP reiterated that 'the only valid contract signed' is marked Annexure 'A'. Since Jovan alleged that the community insisted on the termination of the agreement with MGMP, MGMP requested that Jovan furnish minutes of the meeting where it was decided that MGMP's service be terminated, this was not done. MGMP's agreement was with Jovan and not with the community.

Issues in dispute

[13] When the trial commenced, MGMP's counsel listed a number of issues in dispute. Counsel for Jovan, however, stated that the totality of issues in dispute is set out in the Joint Practice Note ('JNP'). The following issues are listed in the JPN:

- a. The *locus standi* and citation of the plaintiff;
- b. The court's jurisdiction as raised in the defendant's special plea;

- c. The extent of the agreement as to whether the agreement is embodied in Annexure A to the MGMP's particulars of claim, or Annexures "A" and "B" of Jovan's plea;
- d. Whether the terms of the agreement are those pleaded in paragraphs 5.1-5.7 of the plaintiff's particulars of claim, or those pleaded in paragraph 13.1-13.4 of the defendant's plea?
- e. Which party breached the agreement?
- f. Whether the plaintiff suffered damages as a result of any breach of contract by the defendant?
- g. If so, the quantum of the damages.

Evidence

[14] Mr. Solly Mokoena testified on behalf of MGMP. Mr. Mokoena testified that he is the sole director of the plaintiff. His attention was directed to the termination letter,¹ wherein it was stated by Jovan that MGMP's 'lack of performance to speed up the pace as well as the mismanagement of [its] staff with the wrong ratio of tradesmen vs labour has caused [it] to underperform', and asked to comment on it. He denied that there was any issue with MGMP's performance. Mr. Mokoena's evidence is that they (MGMP) were working well and that Mr. Van der Linde said they were doing a good job.

[15] Mr. Mokoena's comment on the averment in the letter that it was brought to Jovan's attention by the Steering Committee that MGMP has not paid the workers from the Labour Desk² their full wages was that Jovan was responsible for paying the workers from the Labour Desk and would have refunded MGMP. It became apparent through the evidence presented that the community where Ebony Mall was built required that local labourers be used in the project. This resulted in the Labour Desk's existence where local labourers were sourced for some aspects of the work. MGMP employed

¹ Annexure 'B1' attached to the plaintiff's particulars of claim filed on Caselines 28-180.

² The community demanded that local labour be used in the project. The Labour Desk was set up where local labour could be sourced from.

30 labourers. I pause to state that MGMP did not fully traverse this issue. Mr. Mokoena testified that MGMP paid the labourers.

- [16] Mr. Mokoena's attention was then directed to the particulars of claim wherein MGMP claimed that it created invoices and sent the invoices to Jovan for payment. The evidence rendered in chief on this aspect is significant since Jovan denied that MGMP submitted source documentation in support of claims for payment. MGMP's evidence was that it was obliged, and indeed, did send invoices to Jovan on a fortnightly basis. He said he took invoices to 'Frans' or emailed them.

- [17] Only three invoices were attached to the particulars of claim. Of these, only one was dated. The first invoice is dated 31 May 2019. It contains invoice number 3836. The invoice was for an amount of R73,268.67. No allowance is made for any Value Added Tax ('VAT'). The accompanying undated payment certificate is signed by Mr. Mokoena only, and not signed on behalf of Jovan. The second invoice is undated. It reflects invoice number 3835, and indicates an amount of R82,649.05 as the amount due and payable. This invoice does not reflect any amount attributed to VAT. The undated payment certificate linked to this invoice is again only signed by Mr. Mokoena. The third invoice attached is again undated. It curiously also reflects invoice number 3836. This invoice was for the amount of R145 620.73. Again, no amount is attributed to VAT. No corresponding payment certificate was provided.

- [18] Mr. Mokoena testified that the full amounts reflected in the invoices were never paid. He only received partial payment, but he could not recall how much he received at each instance. During Mr. Mokoena's testimony, it became apparent that the invoice reflecting the amount of R82,649.05 was drafted 'after the fact' to represent the full amount MGMP received from Jovan for the duration of its involvement in the project.

- [19] Mr. Mokoena's attention was drawn to a letter dated 21 May 2019 attached to the particulars of claim. It is a letter on the letterhead of the Department of Justice and Constitutional Development, Magistrate's Office, Johannesburg. Mr. Mokoena testified that he approached the Department because Jovan did not pay him according to the agreement between the parties. He was, however, informed that

the Department did not have the jurisdiction to deal with such matters and advised to obtain the services of a lawyer.

- [20] Mr. Mokoena testified that Annexure A to the particulars of claim constituted the written agreement between the parties. He denied that Annexure B to the defendant's plea formed part of the agreement between the parties. He never received any written notice from Jovan prior to the termination of the agreement, nor was any notice in terms of the dispute resolution mechanism contained in clause 30 of Annexure B ever sent to him.
- [21] Mr. Mokoena then testified about his involvement in the building project. He was contracted to do brickwork and was one of three subcontractors contracted for this work. The total brickwork comprised 14 million bricks, which would have been equally divided between the three subcontractors. Each subcontractor would be allocated 4,666,666 (four million six hundred and sixty thousand six hundred and sixty bricks. He expected MGMP to be paid an amount of R 4,433,332 (four million four hundred and thirty-three thousand three hundred and thirty-two rand) as he ought to have been paid 95c (ninety-five cents) per brick. The duration of their subcontract with Jovan was said to be 'until we finish the job'. He understood this to reflect that the subcontract will exist until the whole project is completed. I pause to state that it was only during cross-examination that Mr. Mokoena identified Mr. Van der Linde as the person who told him that 14 million bricks would be equally divided between the three subcontractors.
- [22] When cross-examined, Mr. Mokoena denied any knowledge of the involvement of the Steering Committee in the project. He testified that he had nothing to do with the community as he concluded a contract with Jovan. He was aware that the community required the involvement of local labour in the project, but testified that Jovan was responsible for paying these labourers. MGMP got involved in the project after they submitted their profile to Jovan. He was, however, aware of the volatile and hostile atmosphere, which required the intervention of the South African Police Services and the Defence Force.

- [23] Mr. Mokoena confirmed that the foundation of his claim was the amount of bricks allocated to each subcontractor. His attention was drawn to the fact that Annexure A does not contain any reference to any amount of bricks. He confirmed that the other two subcontractors were already building when MGMP was employed as the third subcontractor. His attention was drawn to the clause in Annexure A that '[t]he subcontractor acknowledges that "time is of the essence" in this contract.'
- [24] It was put to him that Mr. Van der Linde would deny that he ever said that the project would comprise 14 million bricks, which would be subdivided equally between the three subcontractors. It was put to Mr. Mokoena that such an arrangement would not make any business sense, as some builders were more efficient than others and would build faster. To stop them progressing because the limit of an amount of bricks was reached, while another builder was slower, did not add up. Mr. Mokoena agreed that since builders were paid per brick, the faster they built, the more they would be paid.
- [25] Mr. Mokoena denied not paying his workers. His attention was then referred to a letter dated 13 May 2019, which he signed on behalf of MGMP and Mr. van der Linde on behalf of Jovan. In this letter, the parties confirmed that MGMP would borrow R19,000 from Jovan to reimburse MGMP's staff who worked at Ebony Mall. The letter also reflects that Jovan has overpaid MGMP R14 353.00. Jovan was willing to re-measure all the work done by MGMP. The total amount of R33,353.00 owed by MGMP to Jovan would be deducted in smaller increments from MGMP's payments as soon as they commence with new brickwork. Jovan informed MGMP that it would assist MGMP in managing its workforce. However, MGMP was advised to lay off its workers and employ a smaller team as soon as 'a new area' was available.
- [26] Mr. Mokoena initially denied that MGMP borrowed any money from Jovan. He did acknowledge that he signed the letter. He said that Mr. van der Linde informed him that the community is threatening him, and he had to take local labourers from the labour desk. Mr. Mokoena was of the view that he was not responsible for remunerating the workers added to his workforce. The fact that he signed this letter, however, was not disputed. He then testified that he decided he would come back and pay Jovan back when he started working again. It was put to Mr. Mokoena and

confirmed by Mr. Van der Linde when he testified that Jovan did not pay the amount of R19,000 to MGMP. The amount was paid directly to the labourers on MGMP's payroll by Jovan after MGMP provided a list of names with the individuals' banking details.

- [27] When it was put to him that MGMP's work pace was too slow because of the ratio between tradesmen and labourers, Mr. Mokoena denied it. Mr. Mokoena took issue with the fact that Jovan never provided MGMP with detailed drawings and a bill of quantities. These documents were, however, later discovered after the litigation commenced.

- [28] While being cross-examined, Mr. Mokoena said that although the written agreement contained in Annexure A provides for the use of stock bricks and face bricks at different tariffs, Jovan only provided face bricks. The tariff for stock bricks was R840.00 / 1000 bricks, and for face bricks, R950.00 / 1000 bricks. It was put to Mr. Mokoena that he attempted to enlarge his claim by claiming that only face bricks were utilised in the project.

- [29] It was put to Mr. Mokoena that the community was, among others, angered by the fact that MGMP did not pay its workers. As a result, Jovan had to intervene and pay the workers directly. The community, through the Steering Committee, demanded that MGMP's involvement in the project be terminated. Because he had to finish the project, and in an attempt to calm the volatile atmosphere and address the complaints that MGMP did not pay its workers, Jovan decided to terminate the agreement with MGMP.

- [30] It was put to Mr. Mokoena that Mr. Van der Linde would testify that he did not use MGMP's invoices when he calculated payment owed to MGMP. He used the measurements provided by his own employees. Mr. Mokoena could not explain why the payment certificates did not contain Jovan's employee's signatures. He conceded later that Mr. Franz Bulow would 'check' MGMP's measurements. Mr. Mokoena could not explain why two of the three invoices were not dated.

- [31] Mr. Mokoena's evidence regarding the payment of his workers by Jovan was inconsistent. He first denied that Jovan lent him any money, then conceded that he signed the letter confirming the transaction and planned to pay back the money when work was allocated to him again. Later, he claimed again that he paid the workers himself. Later, he again acknowledged that Jovan paid them, but said he did not know the reason why Jovan paid them.
- [32] After having heard Mr. Mokoena's evidence, this court was none the wiser as to how it came about that a contract was concluded between MGMP and Jovan. Except for a remark in passing that Mr. Mokoena deposited his profile in a box at the Labour Desk, no evidence was tendered as to whom he had negotiations with, or what the negotiations preceding the conclusion of the contract entailed.
- [33] After Mr. Mokoena's evidence, the plaintiff's case was closed. The defendant called Mr. van der Linde to testify. Mr. Van der Linde testified that the agreement captured in Annexure A was sent to MGMP for signing. He could not recall if it was emailed or delivered by hand. He explained that MGMP was awarded a contract after submitting a profile in a box at the Labour Desk. The Labour Desk was a community structure as the project commenced in a hostile community.
- [34] The agreement provided to and signed by MGMP consisted only of Annexure A. Annexure B to the defendant's plea is referred to in Annexure A. The document, Annexure B, was not sent to MGMP together with Annexure A.
- [35] Jovan contracted with three subcontractors for the brickwork. The contracts did not commence at the same time. MGMP was the third subcontractor with whom a contract was concluded. At this point the other contractors have already commenced with brickwork. Work would be allocated to the contractors depending on the workload. Both face bricks and stock bricks were used in the project. Mr. van der Linde emphatically denied telling Mr. Mokoena that 14 million bricks would be divided between the three subcontractors. Some builders worked faster, the work areas were of different sizes, and contractors could not work across each other's allocated working areas. There were times when the subcontractors laid down work

as they waited for areas to be built to become available. The subcontractors were not on site permanently.

- [36] He testified that around 1.3 million bricks were used on the project, and stated that no building in Pretoria would have required 14 million bricks. He confirmed that both stock bricks and face bricks were used when Ebony Mall was erected. MGMP was only one and a half months on site. Mr. Van der Linde testified that MGMP's pace was slow in comparison with the other subcontractors. He ascribed it to the ratio between tradesmen (bricklayers) and labourers. This is also the reason why MGMP could not pay its workers.
- [37] Mr. Van der Linde testified that his site agent was Mr. Franz Bulow. Mr. Bulow would provide him with the measurement of the work done, and he would calculate the payment to be made to the respective subcontractors based on Mr. Bulow's measurement. Invoices could not be prepared in advance. Where disputes arose, Mr. Bulow would re-measure the work together with the relevant subcontractor. He denied any knowledge of disputes between MGMP and Jovan regarding payments made to MGMP. According to his calculations captured in a spreadsheet that was discovered, Jovan paid over R92,174.19 to MGMP.³
- [38] Mr. Van der Linde testified that the Steering Committee demanded that MGMP's involvement in the project be terminated as MGMP did not pay its labourers. He eventually acceded to this demand as part of Jovan's efforts to defuse the hostile atmosphere and to prevent further delays, although he attempted to provide MGMP with advice. By terminating MGMP's contract, Jovan suffered a financial loss as it was not able to recover the payments made to the labourers or the amount by which MGMP was overpaid.
- [39] When cross-examined, Mr. Van der Linde denied the existence of any disagreement between MGMP and Jovan. He said the issue that arose was a compliance issue. He reiterated that Jovan only terminated the contract with MGMP after the Steering Committee demanded it. Whilst counsel for MGMP initially took issue with the fact

³ Caselines 28-178.

that MGMP was not provided with a resolution by or the minutes from the meeting with the Steering Committee regarding the termination of MGMP's involvement in the project, he later put it to Mr. Van der Linde that the reason why Jovan terminated the agreement with MGMP was the pressure put on it by the community. Mr. Van der Linde testified that Jovan usually goes out of its way to assist the subcontractors it concludes contracts with, but here the community demanded the termination of the subcontract.

[40] When questioned as to why Jovan did not provide the plans with dimensions and bill of quantities to MGMP when requested to do so, Mr. Van der Linde explained that drawings and plans were available at the site office, and it was accessible. As for the bill of quantities, it contained privileged information that could not be distributed before the project was finalised.

[41] Mr. Van der Linde explained that payments were made to subcontractors even if invoices were not provided. This was done because payment was calculated based on the measurements taken by Jovan's site inspectors. Since MGMP was not a VAT vendor, no invoices were required to make payments. Even when acceptable invoices were not rendered, payment was made based on Jovan's measurements. Counsel put it to Mr. Van der Linde that MGMP was a VAT vendor. However, I pause to point out that evidence was not presented substantiating this statement, and the invoices provided by MGMP do not reflect any VAT liability.

[42] Mr. van der Linde testified that Jovan had no labourers. The labour was acquired through subcontracts. He denied any knowledge of invoices sent by MGMP and said the invoices attached to the particulars of claim were not relevant to the work done.

Discussion

[43] Much was made by MGMP's counsel about Mr. Van der Linde's credibility as a witness. I disagree with the submission that Mr. Van der Linde was not a credible witness. He was consistent in providing Jovan's version before the court.

[44] Mr. Mokoena's evidence was somewhat erratic and disjointed. Several *lacunae* exist in his evidence. Most importantly, he failed to lead any evidence as to how and where the parties agreed that MGMP would be allocated a third of the alleged 14 million bricks that would apparently be utilized in the project. Mr. Mokoena did not explain whether this agreement was reached before the written contract was concluded, and if so, why it was not incorporated as a term in the written agreement. He did not explain how MGMP came to tender for the project by submitting his profile. The three invoices attached to the particulars of claim served no purpose at all and did not substantiate MGMP's version that contract-compliant invoices were regularly submitted on a fortnightly basis. Mr. Mokoena contradicted himself as far as his testimony regarding the R19,000 paid by Jovan to MGMP's workforce went. He also failed to provide clear and coherent evidence regarding the labourers from the Labour Desk that MGMP apparently was required to accommodate after the agreement was concluded between Jovan and MGMP. This aspect was also not raised in the pleadings.

[45] The plaintiff faces several obstacles in this litigation. The first can be regarded as highly technical, but in itself is dispositive of the claim. It is averred in the particulars of claim that the plaintiff is a private company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa. The defendant pleaded that it bears no knowledge of this allegation and accordingly denied it. In the joint practice note, respectively signed on 11 and 15 July 2025, the plaintiff's *locus standi* is listed as an issue in dispute. The plaintiff led no evidence to substantiate the averment that it is indeed at this point a private company with limited liability registered and incorporated in accordance with the laws of the Republic of South Africa.

Locus standi

[46] For the plaintiff to have *locus standi*, it was required to prove that it is indeed a juristic entity. Since this aspect was not proven, it cannot be said that the plaintiff has the

required standing to institute legal proceedings in its own name. It suffices to quote from *Van Heerden v du Plessis*:⁴

'Daar kan geen eis wees sonder 'n eiser nie; 'n dokument wat voorgee om 'n dagvaarding te wees maar wat van 'n verweerder verlang dat hy aan die eis van 'n nie-bestaande persoon moet voldoen is 'n nulliteit sover dit die daarstelling van 'n eis betref. Die eiser is hy wat die uitdaging tot litigasie uitstuur (Voet 5.1.9) en moet 'n *persona* wees.'

(*'There can be no claim without a claimant; a document purporting to be a summons but requiring a defendant to comply with the demand of a non-existent person is a nullity so far as the establishment of a claim is concerned. The claimant is he who issues the challenge to litigation (Voet 5.1.9) and must be a persona.'*) (My translation)

Onus of proof

- [47] The second obstacle faced by the plaintiff is the onus of proof borne by the plaintiff. The plaintiff bears the onus of proving the agreement and the terms that it alleges.⁵ The onus of proving the terms of the agreement may involve the proof of a negative, for example, that the parties did not agree on an additional term alleged by the defendant.
- [48] As far as the evidence regarding the terms of the contract is concerned, the court is faced with two mutually destructive versions. The plaintiff, MGMP, could only discharge this onus if it succeeded in satisfying the court on a preponderance of probabilities that its version is true and accurate and therefore acceptable and that Jovan's version is false, or mistaken and falls to be rejected.⁶
- [49] If this court weighs up MGMP's testimony against the general probabilities, MGMP's version falls short. I agree with the defendant that it defies logic and business sense

⁴ 1969 (3) SA 298 (O) at 304A.

⁵ *Kriegler v Minitzer and Another* 1949 (4) SA 821 (A) at 826.

⁶ *National Employer's General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D-G.

that a principal contractor would agree with three subcontractors, all appointed at different periods, contracted to do brickwork on a project where different-sized areas must be built, where time is of the essence, and where the subcontractors were expected to stand down when a building area was not yet prepared, that the subcontractors would each be allotted the exact same number of bricks to build with according to which their remuneration would be calculated. In addition, Mr. Van der Linde's evidence that there is no building in Pretoria where 14 million bricks were used, and that an estimate of 1.3 million bricks were used in the Ebony Mall project, was not challenged.

- [50] Even if I accept, in MGMP's favour, that the probabilities are evenly balanced, I am not satisfied or convinced that the defendant's version is so improbable that it is inherently false.

Damages

- [51] The final nail in the plaintiff's coffin, is that it did not prove its damages. Even if the court accepts the plaintiff's evidence regarding the terms of the agreement, the plaintiff's claim is a claim for loss of profit. The 'income' that would or could have been generated through the agreement would have been the basis for the calculation of damages if all the work was rendered as agreed and the plaintiff was not compensated accordingly. This is not the case in the current scenario. Here, MGMP claims the benefit it expected to receive had the contract been fulfilled as agreed. MGMP's claim is for loss of profit. MGMP, however, did not lead one shred of evidence regarding the expenses it would have incurred in the course of building, which have to be deducted from the projected income to calculate the projected profit. It is just not possible to calculate MGMP's loss, even on the terms of the agreement as proposed by MGMP.

Remaining issue: Costs relating to the special plea

- [52] Jovan raised a special plea at the commencement of the trial. It sought a stay of proceedings pending the arbitration of the dispute. Jovan contended that the document signed by both parties, Annexure A, incorporated by reference the 'The

Joint Building Contracts Committee – NPC Nominated / Selected Subcontract Agreement Edition 6.1 – March 2014’ (JBCC contract) to the agreement concluded between the parties. MGMP denied any knowledge of the JBCC contract. The JBCC contract contains a clause specifically dealing with dispute resolution. It provides for a dispute to be referred to adjudication and eventually arbitration. I indicated that evidence needed to be presented before I finally dealt with the special plea, and the matter proceeded.

- [53] The specific wording in the signed agreement on which the defendant based its special plea reads as follows:

‘Please execute the following DOMESTIC Subcontract as per JBCC Nominated / Selected Subcontract Agreement Edition 6.1- March 2014 at the NEW SHOPPING CENTRE, EBONY MALL, TEMBISA in accordance with the terms and directions set out below.’

It is later stated in the agreement:

‘Furthermore, this sub-contract shall be deemed to incorporate mutatis mutandis all the terms and conditions of the Principal Building agreement entered into between the Client and JOVAN PROJECTS and that the subcontractor hereby waives and renounces and abandons any terms and conditions set out in this tender which are in conflict with the Principal Building Agreement and the Specific Conditions of Subcontract.’

It is important to note that the JBCC Nominated / selected Subcontract Agreement Edition 6.1 – March 2014 (the JBCC contract) is not included in the documents pertinently stated to have been incorporated into the agreement concluded between the parties.

The agreement does, however, contain a section under the heading ‘Annexure “A” Amendments to the JBCC Edition 6.1 – March 2014 Sub-Contract Document (Pages 2 -4)’

- [54] During closing argument, counsel for Jovan submitted that there is no doubt that MGMP had no subjective knowledge of the JBCC contract, but was nevertheless bound to the terms contained therein since it was incorporated by reference. Counsel also submitted that since this court heard evidence on the totality of the matter, it would have no value to refer the matter to arbitration at this stage, and the issue only remained relevant for purposes of costs.
- [55] That Jovan was aware of its corporate social responsibility is evident from Mr. Van der Linde's evidence. Jovan went out of its way to accommodate subcontractors. Jovan gave advice, lent money to pay workers, sometimes provided wheelbarrows and equipment when a project commenced, provided the scaffolding, and even marked the area that had to be built up with chalk. When subcontractors did not provide contract-compliant invoices Jovan still effected payment based on the measurements of its site officials. When it came to the agreement, however, Jovan expected the subcontractors sourced from the community to be well-versed in intricate legal principles. Jovan did not attach the JBCC contract to the document that had to be, and was, signed by both parties. It did not invite the subcontractor to request a copy of the JBCC contract or inform the subcontractor where the JBCC contract could be accessed. In fact, Jovan did not attach a complete copy of the JBCC agreement to its plea, and counsel informed the court that Jovan's legal team had to purchase a copy before it could upload the last page to the electronic file after I alerted them to the existence of the last page. This raises the question of whether any terms contained in the JBCC contract could actually have been incorporated to the parties' agreement through reference.
- [56] The terms of a standard-form agreement may be incorporated into a contract by reference. The contract must expressly and unambiguously indicate that the external document is to be incorporated. Vague allusions are insufficient. The phrase 'Please execute the following DOMESTIC Subcontract as per JBCC Nominated / Selected Subcontract Agreement Edition 6.1- March 2014' on its own, does not, in my mind, indicate a clear intention to incorporate the terms of the JBCC contract to the agreement. The latter portion of the agreement, which specifically includes

amendments to the JBCC contract, may, on face value, be said to support the proposition that the JBCC contract was meant to be incorporated by the drafter of the signed agreement. This is, however, not the end of the matter.

[57] The totality of evidence does not support a finding that MGMP had actual knowledge of the terms of the JBCC contract or had been given access to the document and had been provided with an opportunity to read and understand the document before or at the time of contracting.⁷ In addition, the signed agreement specifically incorporates certain other documents and agreements to the agreement concluded between the parties. The JBCC contract is not listed among those.

[58] Also relevant is the fact that Jovan, who pleaded that Annexure B formed part of the agreement and the matter should, based on the terms of Annexure B, be referred to arbitration, failed to follow the procedure set out in Annexure B when it terminated the agreement because of the community's pressure. Jovan, however, required MGMP, who it accepts had no subjective knowledge of the content of Annexure B, to be bound by the terms of the JBCC contract. In the prevailing circumstances, the *maxim caveat subscriptor* does not avail the defendant.

[59] In these circumstances, it is fair that the defendant, JOVAN, carries the costs in relation to court time expended in arguing the special plea.

Conclusion

[60] The cumulative effect of MGMP not succeeding in proving that it has the required *locus standi*, that the terms of the agreement are what it alleged them to be, or its loss of profit, renders the issue of whether Jovan indeed breached the contract when it communicated to MGMP that the community has requested Jovan not to let MGMP back on site and that Jovan can therefore not make use of MGMP's services any more, irrelevant.

⁷ See *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) and *Mercurius Motors v Lopez* 2008 (3) 572 (A).

[61] As a result, the plaintiff's claim stands to be dismissed.

[62] There is no reason to deviate from the principle that costs, with the exclusion of costs incurred in relation to the court time expended for arguing the special plea, follow success. The defendant did not seek a punitive costs order against the plaintiff. Having regard to the complexity of the matter, it is just that costs be awarded on scale B.

ORDER

In the result, the following order is granted:

- 1. The plaintiff's claim is dismissed.**
- 2. Subject to 3 below, the plaintiff is to pay the defendant's costs, which costs include the costs of counsel, on Scale B.**
- 3. The defendant is liable for the costs incurred in relation to court time expended on arguing the special plea on scale B.**


 E van der Schyff
 Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. In the event that there is a discrepancy between the date the judgment is signed and the date it is uploaded to CaseLines, the date the judgment is uploaded to CaseLines is deemed to be the date that the judgment is handed down.

For the plaintiff:	Adv. T Mahafha
Instructed by:	Mokhabuki Attorneys
For the defendant:	Adv. JH Wildenboer
Instructed by:	Du Randt Du Toit Pelser Inc.
Date of the hearing:	4 - 7 August 2025
Date of judgment:	14 August 2025