



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR401/2023

In the matter between:

FOUNTAIN CIVIL ENGINEERING (PTY) LTD

APPELLANT

and

ACTOPHAMBILI ROADS (PTY) LTD

RESPONDENT

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Lopes J, sitting as court of first instance):

- (a) The appeal is upheld with costs on scale C.
- (b) The order of the court a quo is set aside and replaced with the following:
 - '1) The defendant is absolved from the instance with costs.
 - 2) Judgment is granted in favour of the defendant in the sum of R291 697.43 together with costs.'

JUDGMENT

Seegobin J (E Bezuidenhout J and Marion AJ concurring)**Introduction**

[1] This appeal lies against a portion of the judgment and order of the KwaZulu-Natal Division of the High Court, Durban (per Lopes J), in terms of which judgment was granted in favour of the respondent, Actophambili Roads (Pty) Ltd, in the sum of R2 846 449.16,¹ together with interest and costs.

[2] An application for leave to appeal by the appellant, Fountain Civil Engineering (Pty) Ltd, was subsequently refused by Lopes J. The appeal before this court comes pursuant to a successful application for leave to appeal by the appellant to the Supreme Court of Appeal, granted on 10 August 2023.

The parties

[3] The appellant is Fountain Civil Engineering (Pty) Ltd, a private company duly incorporated in terms of the company laws of the Republic of South Africa.

[4] The respondent is Actophambili Roads (Pty) Ltd, a private company duly incorporated in terms of the company laws of the Republic of South Africa.

Background facts

[5] The South African National Roads Agency Soc Ltd ('SANRAL'), as the main employer, concluded a civil engineering contract with the appellant, in terms of which the appellant was to undertake certain roadworks on the R23 near Standerton in Mpumalanga ('the main contract').

[6] On 4 August 2017 and at Standerton, the appellant concluded a subcontract agreement with the respondent in terms of which the respondent was appointed to

¹ This amount is incorrect. The correct amount should have been R2 890 203.77. This is arrived at by deducting the agreed amount of R291 697.43 which was due to the appellant, from the respondent's claim of R3 181 901.20.

undertake certain of the roadworks comprising the main contract, consisting of the application of Cape seal and asphalt ('the subcontract agreement').

[7] The subcontract agreement comprised the following documents:

- (a) the General Conditions of Contract ('GCC'), being the FIDIC Conditions of Contract for Construction, first edition, 1999;
- (b) the Subcontract Works Information (annexure 1 to the subcontract agreement);
- (c) the Subcontract Bill of Quantities (annexure 2 to the subcontract agreement); and
- (d) the Relevant Specifications, being COLTO 1998, and the Project Specific Conditions, as per the main contract between the appellant and SANRAL.

[8] The total value of the subcontract was R33 105 394.80, with the commencement date being 4 July 2017. The period for any defects liability and maintenance was specified to be 12 months on completion of the scope of the work.

[9] Clause 3.6 of the subcontract agreement regulated the manner, conditions and method of payment. It reads as follows:

'3.6 Progress payments will be made monthly and the date of measurement will be the 20th day of each month, invoices for progress payments are to be submitted within five (5) days of the date of measurement. Payment will be made by the last day of the following month i.e. thirty-five (35) days from invoice date.

No invoices for payment will be acceptable and/or processed unless an approved subcontract payment certificate is issued and signed by both the subcontractors duly authorised representatives. Subject to compliance with the above and any other necessary applicable compliance in terms of the Contract or the relevant legislation or laws governing the Contract payment will be made within thirty-five (35) days of the date of the invoice.

No payment other than the final payment shall be deemed to constitute approval of any work or other matters or of the accuracy of any claim or of any additional work, unscheduled work, extras or varied work.'

[10] The following facts were common cause:

- (a) The respondent commenced with and performed work in terms of the subcontract agreement.
- (b) The respondent submitted 11 invoices to the appellant in respect of work done.
- (c) Payment certificates were issued in respect of these invoices and the amounts were paid by the appellant.
- (d) By mutual agreement between the appellant and the respondent, the subcontract agreement was cancelled on 27 June 2018.
- (e) Pursuant to the cancellation of the subcontract agreement, the respondent rendered three further invoices, namely invoices 12, 13 and 14, totalling R3 181 901.20 (inclusive of VAT) to the appellant for payment.
- (f) These invoices were disputed by the appellant and remained unpaid.
- (g) In the action proceedings instituted by the respondent for the recovery of the outstanding balance, the appellant, whilst denying that the amount was owing, specifically pleaded that the work performed by the respondent was defective in the manner set out in the plea and furthermore, that the three invoices relied upon by the respondent for payment, did not comply with the requirements of clause 3.6 of the subcontract agreement.
- (h) In its counterclaim, the appellant claimed payment in the sum of R411 697.47 for remedying the respondent's defective work, and a further amount of R1 770 000 in respect of liquidated delay damages levied by SANRAL (as the employer) for the delayed completion of the works.

The trial

[11] In the trial heard by Lopes J in 2022, two witnesses testified via video-link: Mr Petrus Christoffel du Plooy (Mr du Plooy) testified on behalf of the respondent and Mr Kevin Anthony Volpe (Mr Volpe) on behalf of the appellant. At all relevant times, Mr du Plooy had been employed by the respondent as its contract manager for seven and a half years whilst Mr Volpe, who was the commercial manager for SMEC, an engineering company, dealt with the respondent's final account and the nature of the disputes that arose with regard thereto.

[12] In the judgment that followed and based on a concession made by the respondent concerning three items that featured on invoice 12, and counterclaimed by the appellant for remedial work, the court *a quo* ('the court') simply reduced the respondent's claim by the sum of R291 697.43. Nothing further was said about the appellant's counterclaim, nor was judgment entered for the appellant in this amount.

Issues on appeal

Appellant

[13] The following issues were identified by the appellant for determination:

- (a) Whether the respondent had discharged the onus of proving that it had complied with the terms of the subcontract agreement and could enforce payment based on the invoices produced by it, without any proof of measurement of the work, without certification by the appellant and despite a dispute as to the basis for the respondent's calculation.
- (b) Whether reliance on clause 3.6 of the subcontract agreement, pleaded in paragraph 4(b) of the appellant's plea, was 'opportunistic and a makeweight' and whether the reliance on the clause was 'without substance'.
- (c) Whether the court ought to look at the past conduct of the parties in implementing the agreement, where there is no dispute regarding the meaning of clause 3.6 of the subcontract agreement.

Respondent

[14] The respondent raised the following issues:

- (a) Whether the appellant is entitled to rely on compliance with a formality (the issuing of a signed payment certificate) in an agreement between the parties to avoid liability for payment by it.
- (b) The extent to which the appellant may rely on defences not pleaded by it in circumstances where such reliance was objected to when raised during the hearing in court.
- (c) Whether the appellant discharged the onus of proving the special defence raised by it concerning the measurement clause in the agreement.

Submissions in this court

Appellant's main argument

[15] The appellant contended that in granting judgment in favour of the respondent, the court held that the appellant's reliance on clause 3.6 of the subcontract agreement, pleaded in paragraph 4(b) of the appellant's plea, was 'opportunistic and a makeweight'. The appellant submitted that it had denied that the respondent had complied with the terms of the agreement. Its reliance on the clause was, however, dismissed by the court as being 'without substance'.

[16] According to the appellant, the court relied on the Supreme Court of Appeal's judgment of *Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd*² in considering the conduct of the parties in their implementation of the agreement as far as the first 11 payment certificates were concerned and then applied this conduct to the invoices on which the respondent now relied. The appellant submitted that clause 3.6 of the subcontract agreement was never in dispute. It provided, *inter alia*, that no payment, other than the final payment, shall be deemed to constitute approval of any work or other matters or of the accuracy of any claim or of any additional work, unscheduled work, extras or varied work. The appellant contended that the invoices on which the respondent relied were compiled by the respondent. These were not payment certificates as envisaged by clause 3.6. The appellant further submitted that the approach adopted by the court was impermissible in that it either created a contract for the parties or it deleted a provision which was not in dispute.

[17] The appellant further contended that a final account was prepared by it for discussion purposes. The appellant had recorded various objections to the respondent's calculations and invited the respondent to a meeting and to bring all the supporting documentation. According to the appellant, no supporting documents were presented to the court.

² *Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd* [2012] ZASCA 126 para 15.

[18] The appellant pointed out that clause 12 of the GCC, referred to above, provides for the measurement of works and its valuation for payment. Applying clause 3.2 of the subcontract agreement, the reference in clause 12 to the 'engineer' is a reference to the appellant and the reference to the 'contractor' is a reference to the respondent. The appellant submitted that the respondent was obligated to assist it in making the measurement and in supplying any particulars requested by it. According to the appellant, a failure to do so would result in the measurement by or on behalf of the appellant being accepted as accurate.

[19] Lastly, it was the appellant's submission that a distinction must be drawn between the issuing of interim payment certificates and a final payment certificate. Whilst the respondent had disputed the appellant's final measurement, it failed to apply the dispute resolution process provided for in clause 20 of the GCC. The respondent provided no source documents for the final calculation. The measurement which was used by the appellant in determining the final calculation was based on a signed and approved measurement by the engineers which must stand. The appellant submitted finally that the respondent failed to discharge the onus of proving compliance with the terms of the subcontract agreement and thus its claim against the appellant.

Respondent's main argument

[20] With reference to clause 12 of the GCC, the respondent submitted that during the hearing before Lopes J, the appellant sought to impermissibly expand the issues to rely on an alleged failure by the respondent to substantiate the measurements of its work in terms of the clause. Whilst this attempt was objected to by the respondent, the appellant did not amend its pleadings.

[21] The respondent further submitted that to the extent that the appellant intended raising defences or issues based on particular clauses in the subcontract agreement, it was incumbent on the appellant to have brought such clauses to the respondent's attention timeously. The respondent contended that, in any event, the issue of

compliance with the measurement procedure in clause 12 is a special defence raised by the appellant. As such, the appellant bore the onus in respect of its special defence. The respondent pointed out that a consideration of the constituent parts of clause 12 demonstrates that the appellant's reliance on the provision is misplaced. In this regard, the respondent submitted, *inter alia*, that the appellant proceeded from an incorrect premise, namely that the reference to 'engineer' in clause 12 is a reference to the appellant. The respondent argued that, having started from a faulty premise, the appellant could not bring itself within the ambit of clause 12.

[22] The respondent furthermore submitted that clause 12 required a measurement to be called for by the engineer. It contended that no clause 12 measurement procedure was called for in the previous 11 undisputed payment certificates. Similarly, when the appellant issued its so-called draft final account, there was no indication that either the engineer or the appellant required the works to be measured or re-measured. The appellant furthermore did not have any evidence that either it or the engineer conducted a measurement.

[23] According to the respondent, the clause also finds application if the 'contractor's representative' is given reasonable notice of the engineer's requirement for measurement. The respondent pointed out that in the context of the subcontract agreement, this person is the 'subcontractor's representative'. No such notice, according to the respondent, was provided to the 'subcontractor's representative' by the appellant. As such, the respondent submitted that the appellant's reliance on clause 12 was unsustainable and the court correctly rejected the appellant's reliance on clause 12 and regarded the conduct of the parties as relevant to its determination. The respondent submitted that, in any event, the uncontroverted evidence of the respondent's witness established that the works were measured, and this was included in the claimed invoices.

[24] With regard to clause 3.6 of the subcontract agreement, the respondent contended that the only non-compliance pleaded by the appellant was that the invoices

upon which the respondent sued were not supported by a payment certificate signed by both parties' duly authorised representatives. According to the respondent, for the invoices to be supported by the signed payment certificates, the appellant would have had to accept the respondent's claims and accordingly, there would have been no dispute.

[25] Finally, the respondent submitted that the submission by the appellant that the respondent bore the onus of proving compliance with clause 3.6 was misguided. The respondent submitted that the requirement for a signed payment certificate is not an 'obligation' in terms of which the respondent was required to perform. To the contrary, in the respondent's submission, it was a term of the subcontract agreement that required cooperation and performance from both parties. The respondent averred that the appellant seeks to take advantage of its refusal to sign a payment certificate in respect of invoices prepared in terms of the established procedure adopted by the parties.

[26] In the analysis and findings that follow, I intend dealing with the issues raised by the parties holistically rather than attempting to address each one separately.

Analysis

[27] As I mentioned earlier on, the subcontract agreement comprised of a number of documents. These documents not only regulated the rights and obligations of the appellant and the respondent *inter se* but also those between SANRAL, as the main employer, and the appellant, as the main contractor. A similar type of contract was described in *Imprefed (Pty) Ltd v National Transport Commission*³ as being '... in common with ones involving complicated and detailed construction or building work, was intended to be an all embracing one in the sense that the rights and obligations of the parties, and in particular payments to the contractor, were to be governed and regulated by its terms.'

[28] Similarly in the present matter, the subcontract agreement and the main contract as a whole not only specified the nature of the work to be performed by the respondent

³ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) (*Imprefed*) at 101A-B.

but it also dealt with the remuneration to be paid; when such remuneration would be paid; what condition would apply to the calculation of such payment; it identified the people who would be responsible for managing the contract as well as payments; the circumstances that would give rise to a claim; and the way in which any such disputes were to be presented, adjudicated upon and possibly resolved before any party embarked on court proceedings.

[29] The disputes in this matter had to be determined in accordance with the claims as pleaded, the nature of the onus resting on both parties and the evidence required to prove the respective claims. The respondent's claim was a monetary one arising out of the subcontract agreement. In order to succeed, its cause of action had to be based on one or more of the terms of the subcontract agreement. Additionally, the respondent was required to plead its cause of action with sufficient precision to enable the court and the appellant to ascertain precisely what was at issue.

[30] In *Imprefed*, the Appellate Division put the position as follows:⁴

'The degree of precision obviously depends on the circumstances of each case. More is required when claims are based upon the provisions of a detailed and complex contract, in which numerous clauses confer the right to additional payment in differing circumstances – a contract, moreover, in which such payments are to be determined, calculated and claimed in different ways depending on which clause is relied upon. In addition, as already pointed out, the contractor may choose to base the cause of action on some common law ground (breach of contract, enrichment or delict) quite unrelated to any additional payments for which the contract provides. Particularly in this context, it goes without saying that a pleading ought not to be positively misleading by referring explicitly to certain clauses of the contract as identifying the cause of action when another is intended or will at some later stage - in this case at the last possible moment - be relied upon. As it was put by Milne J in *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A:

“... a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.”

⁴ Ibid at 107E-H.

[31] Quoting with approval from *Building and Civil Engineering Claims in Perspective*,⁵ the court in *Imprefed* said:⁶

'Claims usually arise from events or circumstances where one party is alleged to have done something to the detriment of the other, or has failed to do something he has undertaken to do. The Conditions of Contract attempt to anticipate such events and circumstances in one or other of their clauses and it is one (or more) of these that needs to be quoted in support of any claim. Where no such provision covers the event or circumstances in question then one must seek some principle of common law which covers the matter.'

[32] This brings me to the respondent's particulars of claim and the pleaded cause of action. The cause of action appears from paragraphs 6-12 as follows:

'6. The material express, *alternatively* tacit, *further alternatively* implied, terms of the Subcontract were as follows:

- 6.1 The total subcontract value (excluding VAT) was R33 105 394.80 (Subcontract Agreement, clause 2.3.3).
- 6.2 In the interpretation of the provisions of the Principal Contract between the Employer (SANRAL) and the defendant in so far as they were to relate to the Subcontract, the plaintiff would have like powers, rights and responsibilities in relation to the defendant as the defendant had in relation to SANRAL and/or Executive Officer and/or Project Manager and/or Technical Officer and/or Engineer/Employer's Agent (Subcontract Agreement, clause 3.2).
- 6.3 Progress payments would be made monthly and the date of measurement would be the 20th day of each month (Subcontract Agreement, clause 3.6).
- 6.4 Invoices for progress payments were to be submitted within five days of the date of measurement (Subcontract Agreement, clause 3.6).
- 6.5 Payment would be made by the last day of the following month, ie: 35 days from invoice date (Subcontract Agreement, clause 3.6).
- 6.6 Delayed payment (GCC, sub-clause 14.8 as amended by Particular Conditions of Contract, p C1-21)
 - 6.6.1 If the defendant did not receive payment from SANRAL in accordance with the sub-clause 14.7 [Payment] of the GCC under the Principal Contract, the defendant would be entitled to receive financing charges compounded monthly

⁵ G A Hughes *Building and Civil Engineering Claims in Perspective* 2 ed (1985) at 21.

⁶ *Imprefed* at 101F-G.

on the amount unpaid during the period of delay. This period would be deemed to commence on the date for payment specified in sub-clause 14.7 [Payment], irrespective of the date on which any Interim Payment Certificate had been issued.

6.6.2 These financing charges would be at the rate prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No 55 of 1975).

6.6.3 The defendant would be entitled to this payment from SANRAL without formal notice or certification, and without prejudice to any other right or remedy.

6.7 Clause 3.2 of the Subcontract Agreement entitled the plaintiff to the same financing charges as those to which the defendant was entitled as set out in paragraph 6.6 above.

7. The plaintiff complied with its obligations in terms of the Subcontract.

8. On 27 June 2018 the parties cancelled the Subcontract by mutual agreement.

9. During the course of the Subcontract the plaintiff submitted various invoices to the defendant in respect of work done. Eleven payment certificates were issued and paid by the defendant.

10. The plaintiff issued the following further invoices to the defendant:

10.1 invoice number TV0182 dated 31 May 2018 in the amount of R247 117.16 (incl VAT);

10.2 invoice number TV0186 dated 31 July 2018 in the amount of R2 026 075.42 (incl VAT);
and

10.3 invoice number TV0209 dated 31 July 2018 in the amount of R908 708.62 (incl. VAT).

Copies of these invoices are attached marked "POC2", "POC3" and "POC4".

11. In breach of the Subcontract the defendant failed to certify and pay the amounts claimed by the plaintiff.

12. Accordingly, the defendant is liable to the plaintiff in the total amount of R3 181 901.20 (incl VAT).'

[33] The appellant in its plea admitted the allegations contained in paragraphs 2, 3, 4, 5, 6, 8 and 13. In paragraph 4 of its plea, the appellant pleaded that the following were further material express terms of the subcontract agreement:

'(a) the Plaintiff indemnified the Defendant from and against all claims, demands, proceedings, damages, costs, changes and expenses whatsoever arising out of or in connection with the Plaintiff's failure to perform in terms of the subcontract agreement (clause 3.4);

(b) no invoices for payment will be acceptable and/or processed unless an approved subcontract payment certificate is issued and signed by both the Plaintiff and the Defendants' duly authorised representatives (clause 3.6).'

[34] The appellant denied the allegations made in paragraph 7 of the particulars of claim, and in amplification of such denial, it pleaded the following in paragraph 6 of its plea, namely that the work of the respondent was defective in the following respects:

- '(a) repairs and replacement of curbs were necessary;
- (b) an overlay of asphalt occurred due to the incorrect base levels;
- (c) the works required repair and patching.'

[35] Whilst admitting that the documents marked as annexures 'POC 2', 'POC 3', and 'POC 4' to the particulars of claim purported to be invoices, the appellant denied that these documents complied with the requirements of clause 3.6 of the subcontract agreement. It further denied the allegations contained in paragraphs 11 and 12 of the particulars of claim.

[36] In the counterclaim, the appellant averred that the respondent had performed defective work, as described in paragraph 6 of its plea, and furthermore that it had delayed the completion of the works. In respect of the costs for remedying the defective work, the appellant claimed the sum of R411 697.47. In respect of the delayed work, it claimed the sum of R1 770 000, being the liquidated delay damages imposed by SANRAL. The appellant claimed a total amount of R2 747 130, as per the calculation in annexure 'C' to the counterclaim.

[37] No further particulars were sought by the respondent regarding the appellant's plea, nor were any other pleadings filed in the matter.

[38] *Ex facie* the pleadings, it becomes apparent that the appellant's defence is grounded in clause 3.6 of the subcontract agreement and specifically in a failure on the part of the respondent to comply with its obligations arising therefrom. The plea records that clause 3.6 is a material term of the agreement which was not complied with by the

respondent in the rendering of invoices 'POC 2', 'POC 3', and 'POC 4'. At the commencement of the trial, the respondent seemed to have accepted that it bore the full onus of proving compliance. Counsel for the appellant made it abundantly clear that what the respondent was claiming for had not been measured in terms of the subcontract agreement and the GCC, nor were the amounts certified for payment.

[39] It is perhaps useful at this juncture to deal briefly with the concept of 'onus' and how this should be discharged. I do so for the simple reason that it is becoming more apparent of late that many practitioners have very little or no knowledge about how the onus in a matter is required to be discharged, particularly in instances where the burden of proof shifts from one person to the other on a certain issue. The authors of *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*,⁷ point out, correctly in my view, that '[t]he onus of adducing evidence and the overall onus of establishing a case on a balance of probabilities are two separate and distinct concepts.⁸ The acceptance by a party of the onus of beginning does not imply an acceptance of the *onus* of proof'.⁹

[40] In *Pillay v Krishna*,¹⁰ the three basic rules which govern the incidence of the burden of proof (in other words the *onus probandi*), which is a matter of substantive law and not a question of evidence, were stated as follows:

'(a) If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it.

(b) Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded *quoad* that defence as being the claimant. For his defence to be upheld he must satisfy the court that he is entitled to succeed on it.

⁷ A C Cilliers, C Loots and H C Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) (*Herbstein*) at ch34-p895.

⁸ *Pillay v Krishna* 1946 AD 946 (*Pillay*) at 952-953; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548.

⁹ *Munsamy (also known as Naidu) v Gengemma* 1954 (4) SA 468 (N); *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 710E-G; *HA Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T).

¹⁰ *Pillay* at 951-952.

(c) He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute.’¹¹

[41] Davis AJA in *Pillay* continued as follows:¹²

‘But I must make three further observations. The first is that, in my opinion, the only correct use of the word "*onus*" is that which I believe to be its true and original sense (*cf.* D. 31.22), namely, the duty which is cast on the particular litigant, in order to be successful of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to, combat a *prima facie* case made by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged. The third point is that the *onus*, in the sense in which I use the word, can never shift from the party upon whom it originally rested. It may have been completely discharged once and for all not by any evidence which he has led, but by some admission made by his opponent on the pleadings (or even during the course of the case), so that he can never be asked to do anything more in regard thereto; but the *onus* which then rests upon his opponent is not one which has been transferred to him: it is an entirely different *onus*, namely the *onus* of establishing any special defence which he may have. Any confusion that there may be has arisen, as I think, because the word *onus* has often been used in one and the same judgment in different senses, as meaning (1) the full *onus* which lies initially on one of the parties to prove his case, (2) the quite different full *onus* which lies on the other party to prove his case on a quite different issue, and (3) the duty on both parties in turn to combat by evidence any *prima facie* case so far made by his opponent: this duty alone, unlike a true *onus*, shifts or is transferred.’

[42] The learned judge concluded with a statement from *Wigmore on Evidence*,¹³ that all rules dealing with the subject of the burden of proof rest ‘for their ultimate basis upon broad and undefined reasons of experience and fairness’.¹⁴

¹¹ As summarised in *Herbstein* at ch34-p895.

¹² *Pillay* at 952-953.

¹³ *Wigmore on Evidence* (vol 9) 2 ed para 2486.

¹⁴ *Pillay* at 954.

Findings

[43] In para 11 of its judgment, the court recorded the appellant's defence as follows:

'In its plea, Fountain recorded the provisions of clause 3.6 of the sub-contract agreement as a material term of the contract. It then denies the plaintiff's allegation that it complied with its obligations in terms of the sub-contract. Fountain concedes, however, that 11 payment certificates were issued and paid by it. Clause 3.6 provides....'¹⁵

[44] By highlighting the appellant's defence with reference to clause 3.6 of the subcontract agreement, as it did in para 11 of its judgment, the court no doubt was acutely aware of the fact that this clause, and its alleged non-compliance by the respondent, lay at the heart of the dispute between the parties. Despite the fact that no dispute arose between the parties with regard to the meaning and relevance of the clause, the court went to apply the following *dicta* contained in *Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd*:¹⁶

'In the past, where there was perceived ambiguity in a contract, the courts held that the subsequent conduct of the parties in implementing their agreement was a factor that could be taken into account in preferring one interpretation to another. Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision. It is therefore relevant to an objective determination of the meaning of the words they have used and the selection of the appropriate meaning from among those postulated by the parties. This does not mean that, if the parties have implemented their agreement in a manner that is inconsistent with any possible meaning of the language used, the court can use their conduct to give that language an otherwise impermissible meaning. In that situation their conduct may be relevant to a claim for rectification of the agreement or may found an estoppel, but it does not affect the proper construction of the provision under consideration.' (Footnotes omitted.)

¹⁵ Clause 3.6. has already been set out in full in para 9 above.

¹⁶ *Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd* [2012] ZASCA 126 (*Comwezi*) para 15.

[45] In my view, the court's reliance on the above *dicta* in *Comwezi* was misplaced. As I pointed out already, there was no dispute between the parties *in hoc casu* concerning clause 3.6 of the subcontract agreement. Firstly, the clause was specifically relied on by the appellant as being a material term of the agreement. The terms of the agreement were common cause. Even in his evidence, the respondent's witness, Mr du Plooy, accepted that there had to be a measurement process which had to be complied with. Mr du Plooy agreed that the procedure adopted for measurement was to achieve two goals: one was to try to reach a consensus on the amount for payment in terms of the certificate and second, that if no consensus was reached, then the dispute resolution process outlined in the subcontract agreement would be triggered.¹⁷ Secondly, clause 3.6 and its meaning were never disputed by the respondent. Thirdly, annexures 'POC 2', 'POC 3' and 'POC 4', relied on by the respondent to substantiate its claim, were invoices emanating from the respondent only and not payment certificates, as envisaged in clause 3.6. In his evidence, Mr Volpe (the appellant's witness) described these invoices as 'bills of quantities Not a measurement back-up that should be used to get paid'.¹⁸ Mr Volpe's evidence in this regard was left unchallenged.

[46] In light of the above, the real issue with regard to clause 3.6 had to do with compliance and not with interpretation. In circumstances where the respondent had issued 11 interim payment certificates in the past and which were paid by the appellant, the learned judge held that the measurements, invoices and payments 'were all produced/paid in accordance with how the parties intended the sub-contract to operate'.¹⁹ This reasoning was applied by the learned judge to invoices 12, 13 and 14 on which the respondent based its claim. The invoices were objected to by the appellant as being non-compliant. In his evidence, Mr du Plooy conceded, firstly, that the appellant had objected when these invoices were produced by the respondent and secondly, that the parties had not agreed on a final payment certificate.

¹⁷ The record, vol 6, at page 31, lines 1-9.

¹⁸ The record, vol 6, at page 74, lines 1-9.

¹⁹ The court's judgment para 14.

[47] On 27 June 2018, and by mutual agreement, the subcontract agreement was terminated. This was due to a number of breaches of the subcontract agreement committed by both parties. The email, exhibit 'GG',²⁰ of the same date, indicates that Mr Volpe was tasked with attending to the necessary paperwork, the finalisation thereof and the processing of the final account. During the period from June 2018–December 2018, the parties' attempts to agree on a final account proved futile. This was mainly due to the failure on the part of the respondent to produce an account that was properly certified by an engineer and supported by all the necessary documents for payment.

[48] In exhibit 'EE',²¹ dated 12 December 2018, which was a response to a written demand for payment by the respondent's attorneys dated 30 November 2018, the appellant (through Mr Volpe) placed the dispute relating to non-payment in perspective. The contents of this letter are important as they go to the heart of the dispute that eventually served before Lopes J. It is worth quoting the contents in their entirety:

'We refer to your letter of 30 November 2018 and confirm it correct that we entered into a sub-contract agreement with your client.

We concede that there was a breach, by both Parties, of the sub-contract agreement. We rectified our breach, however, your client never rectified their breach and were put on terms for such. Thereafter your client sought to amend the sub-contract agreement by requesting a payment guarantee be put in place, to which we obliged. Your client then continued with the works.

Shortly after your client continued with the works, further conditions subsequent to the abovementioned guarantee being put in place, were then demanded which we did not accept. It is confirmed that by mutual agreement the sub-contract was then terminated.

At the date of termination your client was 3 months late on the required completion of the works, hence our breach notice and further communication issue to your client February & March 2018. This breach placed us in a penalty situation.

The amount which your client alleges as due is incorrect, it has not been certified and is disputed. Your client has claimed for work not done and has failed to provide the necessary supporting documentation as requested in both meetings and in e-mails. A copy of the latest e-mail requesting such supporting documents is annexed.

²⁰ The record, vol 6, at page 40, line 27 to page 41.

²¹ The record, vol 4, at page 343.

In regard to the deductions for defective work and liquidated damages, your figures are incorrect and secondly we stand by our entitlement to deduct same. The defective workmanship has been conceded by your client and the costs of rectification were agreed.

In regard to the Engineer confirmation the total value of your client's claims, we remind you that the Engineer in terms of the sub-contract agreement is SMEC South Africa, represented by Mr Christi Botha who has delegated certain authority to Mr Dennis Cress, now replaced by Mr Paul Olivier. *Furthermore your clients claims are incorrect as the Engineer's representative has rejected extensive portions of your clients workmanship and measurement claims. Further requests for supporting documentation have not been correctly provided by your client.*

Attached please see draft final account of what is due by your client to us.

Accordingly any action instituted will be defended.' (Empasis added.)

[49] It is apparent from the above that Mr Volpe disputed the correctness of the respondent's claim and recorded that it was not certified. He further pointed out that the respondent was claiming for work not done and, in fact, notwithstanding requests, did not provide the necessary supporting documentation. He further recorded that the engineers (SMEC South Africa) had rejected extensive portions of the workmanship and measurement claims. Mr Volpe went on to attach a draft final account of what was due by the respondent to the appellant.

[50] On the issue of the measurement of the works, the respondent in its heads of argument and in oral submissions, contended that at the trial, the appellant sought to introduce a defence based on clause 12 of the GCC, which deals with the measurement of the works, evaluation, and the processing of payment. The respondent submitted that the appellant's reliance on this clause is misplaced and amounts to an afterthought. I find this stance on the part of the respondent to be disingenuous and rather strange. After all, it was the respondent who made reference to the terms of the GCC as being part of the overall agreement between the parties. Additionally, Mr du Plooy did not seem to express any dissatisfaction with this clause.²² Mr du Plooy also seemed to accept that the reference to 'the engineer' in this clause was a reference to the

²² The record, vol 6, at page 34, lines 11-20.

appellant and the reference to 'the contractor' was a reference to the respondent, if clause 3.2 of the subcontract agreement were to be applied.²³

[51] In terms of clause 12.1,²⁴ the respondent was, in circumstances where the appellant required measurement, obligated to assist the appellant in making the measurement and supplying any particulars requested by it. Failure on the part of the respondent to attend and assist, would result in the measurement made by or on behalf of the appellant being accepted as accurate.

[52] It should be mentioned that the process of applying for a final payment certificate and the issuing of a final payment certificate were matters that were regulated by the provisions of clauses 14.11²⁵ and 14.13²⁶ of the GCC and had to be distinguished from

²³ The record, vol 6, page 30, lines 1-4. Clause 3.2 of the General Terms and Conditions of the subcontract agreement provides that:

'In the interpretation of the provisions of the Principal contract in so far as they relate to this Subcontract, the Contractor shall have like powers, rights and responsibilities to this Subcontract as the Employer and/or Executive Officer and/or Project Manager and/or Technical Officer and/or Engineer/Employers Agent has in relation to the Principal Contract, and the Subcontractor shall have like powers, rights and responsibilities in relation to the Contractor as the Contractor has in relation to the Employer and/or Executive Officer and/or Project Manager and/or Technical Officer and/or Engineer/Employers Agent.'

²⁴ Clause 12.1 reads as follows:

'12.1 Works to be measured The Works shall be measured, and valued for payment, in accordance with this Clause. Whenever the Engineer requires any part of the Works to be measured, reasonable notice shall be given to the Contractor's Representative, who shall:

- (a) promptly either attend or send another qualified representative to assist the Engineer in making the measurement, and
- (b) supply any particulars requested by the Engineer.

If the Contractor fails to attend or send a representative, the measurement made by (or on behalf of) the Engineer shall be accepted as accurate. Except as otherwise stated in the Contract, whenever any Permanent Works are to be measured from records, these shall be prepared by the Engineer. The Contractor shall, as and when requested, attend to examine and agree the records with the Engineer, and shall sign the same when agreed. If the Contractor does not attend, the records shall be accepted as accurate. If the Contractor examines and disagrees with the records with the Engineer, and shall sign the same when agreed. If the Contractor does not attend, the records shall be accepted as accurate.

If the Contractor examines and disagrees with the records, and/or does not sign them as agreed, then the Contractor shall give notice to the Engineer of the respects in which the records are asserted to be inaccurate. After receiving this notice, the Engineer shall review the records and either confirm or vary them. If the Contractor does not so give notice to the Engineer within 14 days after being requested to examine the records, they shall be accepted as accurate.'

²⁵ Clause 14.11 deals with the application for final payment certificates.

²⁶ Clause 14.13 deals with the issuing of final payment certificates.

the process of applying for and the issuing of interim payment certificates, as provided for in clauses 14.3²⁷ and 14.6²⁸ of the GCC.

[53] It was common cause that Mr Volpe had produced a draft final measurement, which was not agreed to by the respondent. Clause 20 of the GCC deals with 'claim, disputes and arbitration'. In the event of a dispute between the parties on any matters arising from the agreement (in this case dealing specifically with payment), it was open to the respondent to employ the dispute resolution process provided for in the GCC. This would have been a convenient, simple and effective means of resolving the issue relating to final payment. The respondent, however, elected not to follow this process.

[54] In his evidence at the trial, Mr du Plooy accepted that measurement was relatable to source documents²⁹ and that none of these were before the court to test whether the calculations made by the respondent were correct.³⁰ Mr Volpe, on the other, was adamant that no source documents were provided by the respondent and that the measurement which he used was 'signed, approved and agreed with the engineers' to generate the value of the respondent's work.³¹

[55] The respondent was no doubt alive to the fact that the absence of source documents was critical to its claim. This is apparent from the fact that at the commencement of the trial, the respondent attempted, through late discovery, to introduce documents on the basis that 'the full amount of the quantities claimed by the plaintiff is supported by these documents' and that the claim 'is supported by source documents'.³² After an objection by the appellant, this attempt was abandoned.³³

[56] In the final analysis, it is apparent that the respondent was seeking payment on invoices that were never certified and/or supported by source documents, as required

²⁷ Clause 14.3 deals with the application for interim payment certificates.

²⁸ Clause 14.6 deals with the issuing of interim payment certificates.

²⁹ The record, vol 6, at page 33, lines 17-20.

³⁰ The record, vol 6, at page 37, line 26 to at page 38, line 3.

³¹ The record, vol 6, at page 65, lines 5-12.

³² The record, vol 6, at page 14, lines 3-14; and at page 15, line 5.

³³ The record, vol 6, at pages 16 and 17.

by the terms of the subcontract agreement as a whole. The court, of course, did not apply the provisions of clause 3.6 of the subcontract agreement but simply used the parties' 'past conduct' in relation to the other 11 interim payment certificates to reason that the appellant was liable for payment. In doing so, I consider that the court gave clause 3.6 an impermissible meaning and this resulted in making a contract for the parties which was not within their contemplation at the time.

[57] As I pointed out earlier, the court did not interpret the contract at all. I agree with the appellant that clause 3.6, the meaning of which was not in dispute, was simply 'deleted'. Had the learned judge given clause 3.6 a proper construction, he would have found that all *interim* payment certificates are not approval of any work or of the accuracy of any claim unless the work is *finally* measured and the *final* payment is made (emphasis added).

[58] By using the 'past conduct' of the parties as a means to resolve the dispute relating to payment, I consider that the court erred. As cautioned by the SCA in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*:³⁴ 'Comwezi is not to be understood as an invitation to harvest evidence, on an indiscriminate basis, of what the parties did after they concluded their agreement. The case made it plain such evidence must be relevant to an objective determination of the meaning of the words used in the contract.'

Conclusion

[59] In all the circumstances, I conclude that the respondent had failed to prove that it complied fully with the terms of the subcontract agreement as well as with the other terms of the composite agreement relating to final payment. The result is that the respondent simply failed to discharge the overall onus resting on it. On the other hand, the appellant, having raised a special defence on the pleadings, was able to adduce sufficient evidence to prove that the respondent did not comply fully with its obligations in terms of the entire agreement in the rendering of a final invoice. In my view, the

³⁴ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) para 48.

correct finding by the court should have been one for absolution with costs. Insofar as the appellant's counterclaim is concerned, there should have been judgment in its favour in the agreed sum of R291 697.93, together with costs. On the issue of any liquidated delayed damages, the appellant did not discharge the onus resting on it in that regard. In the result, the order I intend making is the one set out herebelow together with costs on scale C. I consider that the matter was sufficiently complex to justify an order under scale C.

Order

[60] In the result, the order I propose is the following:

- (a) The appeal is upheld with costs on scale C.
- (b) The order of the court *a quo* is set aside and replaced with the following:
 - '1) The defendant is absolved from the instance with costs.
 - 2) Judgment is granted in favour of the defendant in the sum of R291 697.43 together with costs.'

SEGOBIN J

E BEZUIDENHOUT J

MARION AJ

Date of hearing:

06 June 2025

Date of judgment: 19 September 2025

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