REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO. 4924/2020

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.

....

....

DATE 23/9/25 SIGNATURE [redacted]

In the matter between:

PGN CIVILS (PTY) LTD **Plaintiff**

And

GREATER GIYANI MUNICIPALITY **Defendant**

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 23 September 2025.

JUDGMENT

Masilo AJ

Introduction

[1] The Plaintiff on 5th August 2020 issued Provisional Sentence Summons against the Defendant in which it claimed the following: -

"Claim 1

(a) The Defendant is ordered is ordered to pay the Plaintiff retention monies VAT inclusive in the sum of R65,207.77;

(b) Interest on the sum of R65, 207,771 at the rate of 8.75 per cent a tempore morae from 26 December 2018 until date of payment;

(c) Cost of suit;

(d) Further and alternative relief

Claim 2

(a) The Defendant is ordered is ordered to pay the Plaintiff retention monies VAT inclusive in the sum of R1,121, 119.81

(b) Interest on the sum of R1,121, 119.81 at the rate of 8.75 per cent a tempore morae from 30 September 2019 until date of payment;

(c) Cost of suit;

(d) Further and alternative relief."

[2] On 5 November 2020, the Defendant filed its Answering Affidavit to the Provisional Sentence Summons. The Plaintiff filed its Replying Affidavit on 19 November 2020.

[3] The Provisional Sentence was heard by Phatudi J, on 21 January 2022, where after the court refused Provisional Sentence and ordered the Defendant to deliver its plea within 10days after the granting of the order.

[4] The Defendant filed its plea to Plaintiff's Provisional Sentence Summons, which was subsequently amended on 10 April 2025. The Plaintiff on 11 April 2025 filed its consequential Amended Replication.

Background

[5] The Greater Giyani Municipality issued Tender No. G/G/M 015/018/2017 for the Bode Paving of Internal Streets, the date for collection of tender documents was 28 April 2017 and the date for compulsory briefing session was 2 May 2017, whilst the closing date was 26 May 2017 at 12h00.

[6] The Plaintiff is a construction company which on 24 May 2017 completed the Bid Documents and submitted its tender for the consideration and adjudication by the Greater Giyani Municipality.

[7] In a letter sign dated by the Acting Municipal Manager, on 6 July 2017 the Greater Giyani Municipality issued a letter of appointment in favour of PGN Civils (Pty) Ltd for the construction of Bode Paving of Internal Streets: Tender No. G/G/M 015/018/2017, in the amount as follows:

Tender Amount:	R15,706,142.91
Contingency :	R1,570,614.29
Sub-Total :	R17, 669,410.77

VAT	:	R2,473,717.51
TOTAL		**R20,143,128.28**

[7] On 14 July 2017 PGN Civils (Pty) Ltd accepted the offer for the construction of Bode Paving of Internal Streets: Tender No. G/G/M 015/018/2017, in the same letter provided its Project Team list. Also enclosed a Surety Bond, All Risk Insurance, Letter of Good Standing, OHS Safety Plan and the CV of the Project Team.

[8] The Tender Document on page T60, MBD7.1 in paragraph 2 thereof states that – "The following documents shall be deemed to form and be read and construed as part of this agreement: (I) Bidding Documents, (ii) General Conditions of Contract; The same is found in T62, MBD7.2, T64, MBD7.3.

[9] Further the Tender Document on page C20, in paragraph C1.7.1 deals with Contract Specific Data, it reads that – *"The Conditions of Contract are the General Conditions of Contract for Construction Works (2010) published by the South African Institution of Civil Engineering (GCC).*

[10] Furthermore, on page C23, in item C1.7.2 it is stated that *"Variations to the General Conditions of Contract 2010 apply to this contract. The headings in these Special Conditions of Contract shall not be deemed to be part thereof nor be taken into consideration in the interpretation or construction thereof or of the Contract."*

[11] In C26, Clause 50 deals with Variations Exceeding 15 per cent. It provides that –

> *"In the last paragraph, fifth line, replace "(if any)" with "(based on the amount by which such additions or deductions shall be in excess of 30% of the Tender Sum)"*

Add the following sub-clause

"50.1.7 Variations exceeding 30% per cent

Where the decrease or increase in the quantity of work has not resulted from a written variation order (or an additional agreement) in terms of clause 39 but from the fact that the quantities are less or more than those given in the bill of quantities, the tendered rates or sums shall still apply, except in the case of a sub-item (or an item not subdivided into the sub-items) in the bill of quantities, which covers work the value of which during the tender stage exceeds 7.5% of the value of the tender sum, and where the quantity of such sub-item or item, upon completion of the contract, deviates by more than 30% from the quantity given in the bill of quantities so that the scale of activities or the method of construction consequently changes to such an extent that the tendered rate or sum no longer applies. In such case the Engineer, should he deem it to be in the interest of the Employer or should the Contractor enter a claim, shall, considering the extent by which the deviation in respect of the quantity of the sub-item or item concerned exceeds 30% determined a sum which will be equitable in the circumstances, and shall certify that such sum shall be deducted from or added to the sums owing to the Contractor."

[12] The Tender document in C29, para C2.1 clause 6 to 8 thereof reads that –

"6. The works executed are measured for payment in accordance with the methods described in the contract documents under various payment items, notwithstanding any custom to the contrary. …

7. The amount of work or the quantities of material stated in the bill of quantities shall not be considered as restricting or extending the amount of work to be done or quantity of material to be supplied by the contractor.

8. ***The statement of quantities of material or the amount of work in the bill of quantities shall not be regarded as authorization for the contractor to order material to execute work. The contractor shall obtain the engineer's detailed instructions for all work before ordering any material or executing work or making arrangements in this regard."***

[13] The Letter of Appointment in paragraph 5 set out the following:

Date of Commencement	: 18 August 2017
Time for completion	: 12 months
Contract completion	: 17 February 2018

One must indicate that the time computation from 18 August 2017 to 17 February 2018 is 6months instead of the recorded 12months.

[14] The Bode Paving, intersected with SANRAL R578 and R81, which warranted that the Greater Giyani Municipality must procure the prior written approval of SANRAL. The Greater Giyani Municipality and SANRAL concluded a written agreement on 13 March 2018.

[15] Pursuant to the Greater Giyani Municipality and SANRAL agreement on 7 June 2018 the Engineer issued written instructions, with G2 Gravel Material on the SANRAL TIE in intersections.

[16] On 14 September 2018, Consulting Project Management (Pty) Ltd, the Engineer signed the Final Completion Certificate and this marked the commencement of the defects liability period, in terms of which only 50% of the retention monies was payable to the Plaintiff.

[17] On 26 November 2018 the Engineer signed and issued a Final Payment Certificate No. 7. Pursuant to the Final Payment Certificate, on 14 December 2018 the Plaintiff prepared its Tax Invoice.

[18] On 11 January 2019 the period permitted for the dissatisfaction/objection in terms of GCC 10.2, elapsed. On 24 January 2019 the Plaintiff issued a letter for the payment of Polokwane Surfacing in terms of the Deed of Cession, which read

> *"RE: TENDER NO. G/G/M015/018/2017 CONSTRUCTION OF BODE PAVING OF INTERNAL STREETS*
>
> *The above matter refers;*
> *This serves as a confirmation that payment for work done by Polokwane Surfacing can be made by utilizing our retention money that was held.*
> *We trust that you will find the above in order."*

[19] On 6 March 2019 the Greater Giyani Municipality' PMU Manager wrote a letter addressed to their Agent SIDA Consulting and Project Management, which stated the following –

> *"SUBJECT: G/G/M015/018/2017 CONSTRUCTION OF BODE PAVING OF INTERNAL STREETS*
> *Good day Mr. B Ncube*
> *Greater Giyani Municipality's Project Management Unit (PMU) office acknowledge receipt of contract payment certificate No. 7 amounting to two Million Eight Hundred and Fifty-Five Thousand and Eighty Three Rands (R2,855, 283.00) Inclusive of VAT.*
>
> *Unfortunately, the above submitted claim has been based on the following:*

- *The additional scope of work which the contractor executed was not approved by the municipality prior execution. The municipality learnt about such works subsequent to execution by the contractor.*
- *...*

Further to the above, Greater Giyani Municipality acknowledge receipt works executed by Polokwane Surfacing specifically G2 Aggregate Material and Medium Grade Asphalt 30mm.
Greater Giyani Municipality cannot process payment on the above mentioned claim until all outstanding issues related to the above project are properly addressed to the satisfaction of the municipality.
Kind regards"

[20] On 21 June 2019 Greater Giyani Municipality wrote a letter to Polokwane Surfacing, requesting the latter to revise its invoice to be in line with the amount of R2,504,990.55. further that the outstanding variance of R111, 605.07 shall be paid in the next 2019/2020 Financial Year.

[21] On 14 August 2019 Greater Giyani Municipality wrote a letter to Polokwane Surfacing, requesting the latter to revise its invoice to be in line with the amount of R2,504,990.55.

[22] On 6 November 2019 Greater Giyani Municipality wrote a letter to Polokwane Surfacing, confirming Greater Giyani Municipality has committed to pay Polokwane Surfacing the available amount of R2,059,674.28 VAT inclusive on the project which happened to be the retention of the main contractor PGN Civils.

[23] On 20 November 2019 Greater Giyani Municipality wrote a letter to Polokwane Surfacing, confirming that it has paid all the monies to PGN Civils for the work done at Bode paving of internal streets excluding retention.

Summary of the Evidence

Plaintiff

[24] The Plaintiff called only one witness Mr. Mnisi, who is the general manager of the Plaintiff. He testified that he was involved in the overseeing of the project. He testified that the Plaintiff had an agreement with Polokwane surfacing which resulted in the Defendant also co-signing the Cession Agreement.

[25] His evidence-in-chief can be summarized as follows: -

25.1 During the construction, the plaintiff had an arrangement with Surfacing which resulted in a conclusion of cession agreements in terms of which the proceeds of the contract were ceded to Surfacing.

25.2 The defendant had to make payments to Surfacing out of payment certificate 7.

25.3 Payment certificate 7 was issued on 26 November 2018. It included 50% of the retention which was due at the time. It was transmitted to the defendant under letter dated 26 November 2018.

25.4 A list of cessions concluded with Surfacing and their values was provided in the payment certificate.

25.5 The engineer certified that an amount of R65 207.77 was to be paid to the plaintiff. Mr. Mnisi explained this amount as the balance that was to be paid to the plaintiff after paying Surfacing using 50% of the retention that was due. The money to be paid to Surfacing was for the G2 material which had been ordered from Surfacing.

25.6 In a letter dated 24 January 2019, the plaintiff confirmed that the defendant could use its retention money that was held at the time to pay Surfacing. Payment certificate 7 was for the final progress payment and 50% of the retention. An additional work was done in respect of an agreement that was entered into between the defendant and South African National Roads Agency SOC Limited (SANRAL).

25.7 The work that was done in terms of the agreement between the defendant and SANRAL (the SANRAL Agreement) was not a variation that required the approval of the defendant as the value of that work was below the threshold of 30%.

25.8 The plaintiff was appointed to execute specific work which was paving of Bode internal streets and joining two roads, SANRAL roads R81 and R578. During the tender stage, the plaintiff priced for joining the streets using 80 mm interlocking bricks and asphalt.

25.9 The engineer was supposed to get approval to connect from SANRAL. It was at that stage when SANRAL rejected the road connection designs and specified G2. SANRAL wanted G2 material to be used.

25.10 The additional quantities did not exceed the 30% threshold to require a variation order.

25.11 The road connection was not a new scope of work. It was included the BOQ except for the G2 material. The dispute was about the quantities. The engineer issued a site instruction that the plaintiff must use the G2 material. Regarding the completion certificate Mr. Mnisi stated that this certificate was issued on 25 September 2019 after the expiry of the defects liability period of 12 months. The remaining 50% retention then became due for release.

25.12 Mr. Mnisi admitted that payment certificate 7 was not transmitted to the defendant on 26 November 2018 which is the date on which it was signed and the cover letter.

25.13 He also admitted that in terms of the letter of appointment, the agreement was for the construction of paving of Bode internal streets for a specific amount of R20 143 128,28 and no variation work were to be executed without the express approval of the Municipal Manager in writing. Secondly, the plaintiff was not entitled, under any circumstances, to execute any variation work outside the awarded amount. Thirdly, should the plaintiff proceed with variation work without the approval, the defendant shall not be liable for the work done and payment therefor.

25.14 Mr Mnisi further testified that the plaintiff did not need an approval for what it did because the work included connections to the existing roads R578 and R81 at Bode Village. The only deviation from the contract was only in respect of the material that was used. He explained that the plaintiff used G2 material instead of G5 material and denied that the change in the material from G5 to G2 was a change in scope of work.

25.15 It was put to Mr. Mnisi that the use of G2 material was the variation as contemplated in clause 6.3.1.3 of the GCC. [14] In terms of that clause: If the engineer requires any variation of the form, quality or quantity of works or any part thereof, he shall have power to order the contractor to, inter alia, change the character or quality of any such work. In terms of this clause, the change in character or quality of the work requires a variation order.

25.16 It was further put to Mr. Mnisi that in terms of clause 6.3.2 of the GCC no such variation shall be made by the contractor without a written order by the engineer in which it is stated to be a "variation order". The handwritten note referred to as a site instruction does not comply with clause 6.32 of the GCC. Regarding the nature of the agreement, Mr. Mnisi stated that the contract in place was not a fixed price contract and that it was a re-measurement contract.

25.17 Mr. Mnisi was referred the Tender Documents, Pricing Instructions, clause 3. [17] This clause provides that the quantities in the BOQ are proximate quantities. This clause does not assist the plaintiff as it does not apply to a fixed price contract. It only applies to re-measurement contract and the contract between the parties in this case was a fixed price contract.

25.18 With regards to the defendant's objection letter, Mr. Mnisi testified that the letter registered the defendant's objection against the additional work. He characterized the additional work as "an increase or decrease in quantities". He further agreed that the objection related to the use of a contingency fee without the approval of the defendant.

25.19 The question put to him that the plaintiff was not entitled to use contingency without the approval of the defendant. He simply said this was a matter between the defendant and the engineer.

25.20 That it was the term of the agreement that contingency fee was under the sole control of the defendant. Mr. Mmusi admitted this as correct. Therefore, the plaintiff should not have used it without the approval of the defendant.

25.21 Mr. Mmusi responded to the statement that the plaintiff exceeded the contract price without approval of the defendant by merely saying the quantities exceeded the contract value. Mr. Mmusi further testified about the letter written by the plaintiff dated 24 January 2018 confirming that its retention should be used to settle moneys owing to Surfacing. He stated that this letter referred to the first 50% of the retention that was due at the time of issuing payment certificate 7.

Defendant

[26] The Defendant called only one witness Mr. Norman Thembani Mahani was called as a witness, and he testified that he is the Deputy Director: Project Management Unit (PMU). He testified that –

26.1 He joined that defendant on 2 January 2019 as the Project Manager. At that time the project in question had reached a practical completion stage. His only involvement in this project as the overseer of all projects, which was post certificate of practical completion..

26.2 During January 2019, a payment certificate which is being impugned (objected to) was brought to his attention. He advised that an objection letter be written to indicate the defendant's dissatisfaction with the claim, which objection letter was written and delivered to the engineer.

26.3 In the letter of objection, the defendant stated that the contract amount was exceeded without its approval. In addition, it was stated that the contingencies were used without the approval of the defendant.

26.4 Mr. Mahani proceeded to testify that he also had to deal with a payment that was due to Surfacing. The plaintiff was approached and it confirmed that the defendant should use its retention to pay Surfacing.

26.5 At that time only 50% of the retention was due and payable and the total amount of the cessions due and payable was R2 616 658.92. The first 50% of the retention was not enough to settle the whole amount owing to Surfacing.

26.6 Even though the defendant had the letter from the plaintiff, it had to wait for the defects liability period to expire before we could make payment. The payment to Surfacing was made in December 2019 after the total value of the retention was due and payable.

26.7 The proof of payment shows that an amount of R2 059 674.28 was paid on 24 December 2019 in accordance with the negotiations between Surfacing and the defendant.

26.8 It needs to be stated that this payment was made in full and final settlement of what was owing to Surfacing.

26.9 Mr. Mahani testified that the amount of R2 616 658.92 which was owed to Surfacing correlated with amounts appearing in the deeds of cession.

26.10 He reiterated that the objection to payment certificate 7 was that the contract amount had been exceeded without approval. Extra work was done without the defendant's approval.

26.11 The SANRAL agreement work was included but the quantities were exceeded without the approval of the defendant.

26.12 Regarding payment to Surfacing, Mr. Mahani reiterated that when the plaintiff's letter confirming that the defendant could use the retention to pay Surfacing was received, no payment was made as there were not enough funds to cover the amount of the cessions. At that time, only 50% of the retention was due and it was not enough to cover the amount of R2 616 658.92 owing to Surfacing. The defendant waited for defects liability period to expire and made payment in December using 100% of the retention.

26.13 Mr. Mahani stated that the letter from the plaintiff did not distinguish between the due and undue retention. In response to this Court's question, Mr. Mahani testified that the reason the defendant had to wait and not make payment immediately after receipt of the plaintiff's letter of 24 January 2019 was because the 50% of the retention that was available to be paid to Surfacing was not enough to settle the debt in full. The defendant waited for the other 50% to be available before making the payment using 100% of the retention. He indicated that the defendant had the certificate in January 2019 and that the objection letter should have been delivered within 28 days.

26.14 He was directed to calculate 28 days from 24 January 2019 to 6 March 2019 .He stated that weekends and holidays were not counted. Mr. Mahani did the calculation and testified that on 6 March

2019, the letter of objection was within 28 working days. Mr. Mahani further explained the nature of the agreement in question and stated that it is not a re-measurement contract. The variation work had to be approved by the defendant in accordance with the contract. He confirmed that the SANRAL agreement work was done but it was not approved.

Issues to be determined

[27] The crisp issue to be determined is whether the Defendant is liable to pay the Plaintiff the amount claimed in respect of payment certificate No. 7 and the balance of the retention monies?

[28] In order to answer this question, a number of ancillary questions arise, namely –

28.1 Whether, the Defendant's objection of 5 March 2019 to payment certificate No.7 is ousted by the 28days clause in the contract?

28.2 Whether there was variation of the contract? If yes, Whether the work and the contract price were varied by the Plaintiff in accordance with the contract. Whether, the Plaintiff used the contingency fee without the approval of the Defendant?

28.3 Whether the Plaintiff in its letter dated 24 January authorized the Defendant to pay the cessionary with the remaining 50% of the retention monies?

28.4 Whether the Defendant paid all the amounts that were due to the Plaintiff in terms of the contract?

Application of the law

[29] It is trite that pleadings in action proceedings in the High Court serve an important purpose, of defining the issues between the parties and directing the court what it is called upon to adjudicate.

[30] The SCA as per Mhlanhla JA in ***Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para 11** writing for the majority posited that -

> *"[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.*

[31] This principle was restated with approval in *Molusi & others v Voges N O & others* **2016 (3) SA 370** (CC) para 28 where Nkabinde J observed that:

> *'The purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there are instances where the court may, of its own accord (mero motu), raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed.*

[32] Mhlanhla JA in ***Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para 11**

> *"[12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This*

occurs where the issue in question has been canvassed fully by both sides at the trial. In South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd, 1976 (1) SA 708 (A) at 714G this court said:

> *'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue'.*

[33] The learned Harms DP buttressed the principle in the concurring judgement that -

> *"[22] A court is not bound by pleadings if a particular issue was fully canvassed during the trial. But there is not the slightest suggestion that the matter was so canvassed. As a matter of fact, neither the plaintiff's friend nor his wife testified on his behalf in respect of his state of intoxication at the police office. One can only assume, in the absence of any other explanation, that they would not have supported him. In other words, the police had at the end of the plaintiff's case not the slightest inkling that they had to defend the continued detention after the arrival of the plaintiff's wife at the police station. The defendant was entitled at that stage, at the very least, to know that it had to establish that the legality of the continued detention was an issue. Cases by ambush are not countenanced."*

[34] In 'stepping outside of the pleadings', courts deny respective parties 'the right to know the case they had to meet and the right to a fair opportunity to meet that case' (*Rodaro* at para 61).

[35] In the matter of Spearhead Property Holdings v ED Motors (Pty) Ltd, 2010 (2) SA (SCA) the Supreme Court of Appeal at para 15A-16A stated that:

> *'It is equally trite that since pleadings are made for the court and not the court for the pleadings, it is the duty of the court to determine the real issues between the parties, and provided no possible prejudice can be caused to either, to decide the case on those real issues.*

[36] What is trite and apparent is that the pleading should state every fact which it would be necessary for the pleader to prove in order to support his right to obtain judgment of the court. However, failure to plead every fact is not a bar, to canvassing at trial such evidence, to the extent that it would not be prejudicial to the other party.

[37] The Plaintiff complained bitterly that the Defendant has pleaded a different case on the issue of the use of the contingency fee which was included in the contract price.

[38] The Plaintiff was afforded an opportunity during cross to respond to this issue about the unauthorized use of contingency fee. The Plaintiff is therefore not prejudiced by the evidence regarding the contingency fee, as it is in the contract, it is in the objection letter and he was afforded an opportunity to directly address this aspect.

[39] In order to determine whether the Defendant is liable or not, the following questions arise- Was there a variation or not of the scope of work? If No, what was the cause for the increase in the contract amount?

[40] The increase in the contract amount was as a result of the change in the type of material, from G5 to G2. This change in material was as a result of the contract concluded between the Defendant and SANRAL, wherein SANRAL specifically issued a change the engineering design of the join on R81 and R578. The SIDA Engineer appointed by the Defendant issued a written instruction to the Plaintiff to procure and use G2 material. The Plaintiff explained that the pricing of the two materials is different, with the G2 material being more expensive.

[41] To the extent that the BODE paving joinery on R81 and R578 were subject to SANRAL agreement with the Defendant, the engineering designs could not have been final. The same would hold and apply to the pricing of the BODE paving project, as the engineering design was yet to be approved after agreement between the Defendant and SANRAL.

[42] This then leads me to the contention that the contract between the Defendant and the Plaintiff was a fixed price contract. I find it, difficult to can fathom how the contract price could be fixed if BODE paving joinery on R81 and R578 were subject to SANRAL agreement with the Defendant, the engineering designs were not final.

[43] The Defendant's Engineer in terms of clause 6.10 of the GCC was to re-measure the material and to issue payment certificates, on which the Plaintiff was to issue an invoice.

[44] In terms of clause 6.10.4 of the GCC contract, SIDA Engineer the appointed Project Engineer was enjoined after signing off every payment certificate to deliver, within seven (7) days of the approval of the payment certificate to the Defendant. Thus, it is incongruent for the Defendant to claim not to have received the payment certificate with seven (days) from the date of payment

certificate no. 7, and not to bring the court into its confidence of its contention that they did not receive the payment certificate within 7days from their own appointed engineer.

[45] This quaugmire is aggravated by the fact that the Defendant has failed to place before court any evidence on which the court can conclude that the certificate was not delivered within 7days. Instead, the Defendant wants to shift the responsibility to the Plaintiff, and claims that Plaintiff did not show when the certificate was delivered. To buttress the fact that it was not with 7days, the Defendant points to the fact that the invoice is dated 14 December 2018, which is outside of the 7days. The Defendant could not bring the court into its confidence and point to exactly when it received the payment certificate from the Engineer or when it received the invoice for the payment certificate no. 7 from whence the 28days can be reckoned.

[46] The date of delivery of the payment certificate to the Defendant by the Engineer is relevant, to the extent that it is the peg point from which the 28days is to be reckoned. Clause 10.2.2 and 10.2.3 sets a 28days period within which to lodge a dissatisfaction notice with the Engineer, who must then also within 28days make a determination.

[47] The Defendant has not been able to state when it actually received the payment certificate. Neither, was the Defendant able to place any document to show when the payment certificate was delivered and received by it. In the absence of any evidence to the contrary as to when the Engineer's payment certificate was delivered, then only available inference to be drawn is that it was delivered with 7 days in terms of Clause 6.10.4.

[48] The invoice which is merely a computation of the payment certificate is dated 14 December 2018. The fact that the invoice is dated 14 December 2018

does not in any way absolve the Engineer from the duty to submit a payment certificate which the Defendant requires in terms of the contract to effect payment to the Plaintiff.

[49] The Plaintiff attached the invoice which is based on the payment certificate is dated 14 December 2018. A more liberal interpretation to the date from which the 28days dissatisfaction period may be reckoned, since none of the parties was able to place before court a definite date on which the payment certificate was delivered to the Defendant. The Defendant also testified that the computation of the 28days must be exclusive of holidays and weekends, only calculating week days.

[50] The Defendant has testified that if the 28 days within which to object is reckoned from 24 January 2019, renders the dissatisfaction notice to be within 28days. The liberal computation starting by excluding the first day being the 24 January 2019, leads one to the 28th dissatisfaction notice day being on 5 March 2019. This is simply means that by whatever liberal mechanism, is invoked to reckon the 28 days' notice period, the Defendant's notice served on the Engineer on 6 March 2019, the notice is outside of the permissible 28days dissatisfaction period.

[51] Therefore, the Defendant's dissatisfaction notice served on 6 March 2019 was out of time and the provision of clause 10.3.1.5 and the Engineer may not consider the objection and Defendant is bound to accept as the Defendant has no further right to dispute the matter.

[52] This clause puts to bed the complaint about the use of contingency fee, in the claim. One must however, substantively deal with the issue in the following manner, the budget for the BODE paving project resides with the

Defendant. The funds are in the Defendant's account. Neither the Plaintiff or the Engineer has access to the contingency fee budget.

[53] When the Payment certificate were issued, every time they would reflect the amount for the certificate, as well as the total amount payment to date inclusive of the payment certificate. Therefore, the Defendant was fully aware and cannot claim not to be aware that the contingency fee was being employed at any stage, by it to effect payment for the work done. For the Defendant to come on 6 March 2019, to complain of the use of the contingency fee, without its prior approval if rather disingenuous.

[54] The Defendant also in the objection complained that there was a variation of the scope of work, without its prior written approval. The most important aspect of the Defendant's testimony is that the Defendant acknowledged that the work was done by Polokwane Surfacing using G2 and Asphalt material. The Defendant indicated that to date of testifying, the issue regarding the work done and the change in scope by introduction of revised design by SANRAL engineer on the joins to R81 and R578 has not been addressed.

[55] The Plaintiff testified that the change in scope did not exceed 30%, which thus did not require the Engineer to seek the Defendant's written prior approval. The Plaintiff testified that the change in scope was more from G5 material to G2 and Asphalt only impact on the contract by about 15% of the contract value. Further, that it was the Engineer's responsibility and not the Plaintiff's responsibility to procure approval for any variation of the contract.

[56] The contract for BODE paving adjoining R81 and R578 was subject to the approval of designs by SANRAL's engineers. The most important fact is that the change in scope of work was due to an agreement between the

Defendant and SANRAL. Further, that the change in scope was the use of G2 material, when the initial material quoted was G5 material.

[57] The engineer, acting on Defendant's instructions, and giving effect to the terms of the agreement between the Defendant and SANRAL, issued the Plaintiff a written site instruction to change the material to G2 and Asphalt on the joins of the R81 and R578.

[58] Therefore, it is clear that the Engineer's instruction was in terms of the contract, and was within the 30%. Further, the Defendant cannot claim not to have been aware of the change in scope giving rise to a variation of the contract value, as this was brought about by its contract with SANRAL, which changed the initial engineering designs, with which the Plaintiff and other bidders used to cost their tendered price. This change cannot be attributed to the Plaintiff or SIDA engineer. Equally, it is disingenuous for the Defendant to impute impropriety to the Plaintiff and SIDA Engineer.

[59] The Defendant's dissatisfaction and objection if any ought to have been submitted to the Engineer within 28days. This the Defendant failed to do, despite the fact that the Engineer in terms of clause 6.10.4, ought to have delivered the signed payment certificate to it. Further, the 28days notice period was still not met despite affording the Defendant a more liberal interpretation and reckoning of the 28days notice period in terms of clause 10.3.1.5.

[60] The Defendant is therefore liable to pay the Plaintiff for the work done on the BODE paving project, as approved by the SIDA Engineer, in terms of payment certificate No. 7.

[61] The Plaintiff in claim 2 of the Particulars of Claim, seeks payment of a sum of R1,121,119.81 which is the remaining 50% balance of the retention monies. This is in respect of the 10% amounts withheld in respect of each payment certificate issued by the Project engineer. McKenzie, the Law of Building and Engineering Contracts and Arbitration 6th Edition, posits that "*In effect, retention money is money set aside as security for the due completion of the work and to enable a fund to be available to rectify defects which have not been rectified by the contractor.*" Further, that "the ownership of the retention money remains vested in the employer."

[62] The time for the paying over retention money to the contractor depend on the terms of the contract. The General Conditions of Contract, 2010 provide that one half of this retention money becomes due when the certificate of completion is issued and the other half when the engineer certifies payment thereof within 14days of the expiration of the defects liability period.

[63] The defects liability period in respect of the BODE paving project was end of September 2019. The court in Rabbich v Sommerset East Municipality 13 EDC 107 at 115-116, found that generally a contractor is not entitled to any of the retention money until he has completed the contract.

[64] In Cambrian Colliers Co v Jenkins & Sons 23 NLR 431 it was found that where the contract has been lawfully determined by the contractor he is entitled to all money retained up to the time of such determination.

[65] The Defendant claims that the Plaintiff on 24 January 2019 issued it with a letter in which it authorized it to use the remaining 50% of the retention monies. McKenzie, the Law of Building and Engineering Contracts and Arbitration 6th Edition, recognized a contractor may however cede the rights

to the money owed to him or which might become owing to him, out of the retention money.

[66] The Plaintiff contends that from the reading of the letter, what is apparent is that it could only ask the Defendant to utilize the 50% which was available at the time and could not instruct or authorize the Defendant to use to other 50% as the defects liability period was only due to end in September 2019.

[67] As a result the Plaintiff contends that it is incongruent for the Defendant to claim that it was authorized to use monies by the Plaintiff which did not belong to the Plaintiff at the time. Therefore, any contention that the Defendant use the remaining 50% to settle the ceded amount to Polokwane Surfacing would be incorrect.

[68] The claim by the Defendant that it utilized the remaining 50% retention monies, as a result of the letter of authorization of 24 January 2019 cannot be correct, this is because if during the defects liability period, it was found that there were defects that warranted to be corrected, the 50% was reserved and ring fenced specifically for that purpose.

[69] The money did not belong to the Plaintiff, for it to can authorize its use. As correctly posted by McKenzie, the Law of Building and Engineering Contracts and Arbitration 6th Edition, and The General Conditions of Contract, 2010 ownership of the remaining 50% was with the Defendant, until the defects liability period was completed.

[70] The Plaintiff only became entitled to the retention money when the defects liability period was completed in September 2019. Therefore, the letter of 24 January 2019 can only be interpreted to have authorized the payment of the

50% retention money that was available at that time as authorized and approved by payment certificate no.7.

[71] Therefore, the Defendant is liable for the payment of the sum of R1,121,119.81 which is the remaining 50% balance of the retention monies.

[72] In the circumstances I deem it appropriate to award the plaintiff an amount of **R 1,186,327.58** in respect of payment certificate No. 7 and remaining 50% of the retention monies, which amount is made up as follows:

1. **Claim 1**

   (a) The Defendant is ordered is ordered to pay the Plaintiff retention monies VAT inclusive in the sum of R65,207.77;

   (b) Interest on the sum of R65, 207,771 at the rate of 8.75 per cent a tempore morae from 26 December 2018 until date of payment;

2. **Claim 2**

   (a) The Defendant is ordered is ordered to pay the Plaintiff retention monies VAT inclusive in the sum of R1,121, 119.81;

   (b) Interest on the sum of R1,121, 119.81 at the rate of 8.75 per cent a tempore morae from 30 September 2019 until date of payment;

TOTAL: **1,186,327.58**

[73] The only remaining question is the issue of costs. The Plaintiff has asked that it should be awarded costs of suit. Without belaboring the point, the law on the question of costs is trite and settled. The Defendant conceded that as at the date of hearing, the issue of the variation of the costs of the material resultantly contract price the agreement between SANRAL and the Defendant, together with the change in design, has not yet been addressed by the Defendant.

[74] This means that the issue of the budget and contract price being exhausted and there being no monies to pay the claim, due to exhaustion in the projected budget for the BODE paving contract, is incorrect.

[75] Instead, had the Defendant put its effort and endeavors as it did in opposing the claim, it would have realized that the change was due to its contract and the change in engineering designs. Further, that the change was less than 30% to warrant the requirement that the Defendant's written approval of the variation must be procured.

[76] The opposition of the claim was clearly abortive, as the Defendant failed to conduct an internal due diligence of the project to can have realized that even its objection letter of 6 March 2019 was out of time. Further, that the claim of the use of the contingency fee by the Plaintiff was misplaced as it was the Defendant and its Engineer who had control of the funds and the Engineer certified the payments with full knowledge of the implication.

[77] The appropriate order in the circumstances of this case is that the costs must follow the suit. The Defendant is therefore liable to pay the costs of the action on scale B.

ORDER

[78] In the circumstances I make the following order:

1. Claim 1

    (a) The Defendant is ordered is ordered to pay the Plaintiff retention monies VAT inclusive in the sum of R65,207.77;

    (b) Interest on the sum of R65, 207,771 at the rate of 8.75 per cent a tempore morae from 26 December 2018 until date of payment;

2. Claim 2

(a) The Defendant is ordered is ordered to pay the Plaintiff retention monies VAT inclusive in the sum of R1,121, 119.81;

(b) Interest on the sum of R1,121, 119.81 at the rate of 8.75 per cent a tempore morae from 30 September 2019 until date of payment;

(c) The Defendant to pay the Plaintiff's costs of suit on scale B.

[redacted]

M.H.M. MASILO

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

APPEARANCES:

Plaintiff's counsel:

Adv. Basson

Instructed by:

Thomas & Swanepoel Inc. Attorneys

c/o Sune DuPlesis Attorneys

Defendant's counsel:

Adv. Ferguson with Adv. Dlamini

Instructed by:

Nobela Attorneys

c/o F.R Chauke Attorneys

Emails : marlene@suneduplessisattorneys.co.za

info@nobelaattorneys.co.za

louis@tslegal.co.za

maryka@tslegal.co.za

Date Heard: 14 April 2025, postponed to 23-26 June 2025

Date of Judgement: 23 September 2025