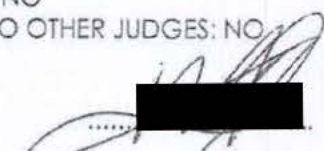


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 19928/2016

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
DATE 22/09/2025	LENYAI J

In the matter of:

BOTSANG-LEDILE CONSTRUCTION & PROJECTS CC

Plaintiff

And

THE MINISTER OF PUBLIC WORKS

Defendant

Delivered: This judgment is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading to Caselines. The date and time of hand-down is deemed to be 14:00 on 22 September 2025.

JUDGEMENT

LENYAI J

[1] The plaintiff instituted three claims against the defendant in respect of a building contract, where the plaintiff cancelled the contract as a result of alleged repudiation by the defendant.

1.1 Claim A is for work executed to date of the cancellation of the contract;

1.2 Claim B is for damages and loss of profit due to the breach of contract; and

1.3 Claim C is for the return or release of retention money held as security by the defendant.

[2] The following facts are common cause:

2.1 On 9th May 2011, the plaintiff submitted a tender for the construction of the new Dube Police Station and residential quarters situated at Mabopane (the works);

2.1 On 13th October 2011, the defendant accepted the plaintiff's tender for the constructions of the works for the amount of R20 712 143.58 (VAT included);

2.3 The building contract between the parties was governed by the JBCC Principal Building Agreement (Edition 4.1 of March 2005) (PBA), read with the Contract Data and the Tender Bill of Quantities which included various amendments to the PBA (the agreement);

2.4 GM Architects and Project Managers was appointed as the Principal Agent on behalf of the defendant;

2.5 Gosame Development Consultants was appointed as the Quantity Surveyor;

2.6 Mr Thapelo Mafabatho was appointed as the Project Manager in the Department of Public Works;

2.7 On 29th October 2013 GM Architects and Project Managers was placed under liquidation and ceased to be the Principal Agent on 1st November 2013.

2.8 On 28th March 2014 the agreement was terminated by the plaintiff.

- [3] The issues to be determined by the court are the following :
- 3.1 Whether the defendant breached the contract;
 - 3.2 Whether the plaintiff was entitled to cancel the contract; and
 - 3.3 Whether there are monies owed to the plaintiff by the defendant.
- [4] The defendant raised two special pleas against the plaintiff's case.
- (1) The first special plea was for non-compliance with section 3 of Act 40 of 2002 however the defendant abandoned this special plea.
 - (2) The second special plea was for non-joinder of the principal agent as an interested party to the proceedings. The legal representative of the defendant submitted in open court that the defendant is not persisting with this special plea.
- [5] It is noteworthy to mention that the plaintiff abandoned claim A and proceeded only with Claim B and C.
- [6] At the onset of the proceedings, the defendant brought an application to amend its plea by withdrawing an admission made in paragraph 11.1.3, to the effect that certificate 27 relied on by the plaintiff was not issued by Gosame Development Consultants. The plaintiff accepted that the defendant could amend and reserved the right to cross examine this issue later during the trial. The Court granted the amendment, and the defendant was ordered to pay the costs of the amendment.
- [7] There are three witnesses that testified in this matter, two on behalf of the plaintiff and one for the defendant. I will now proceed to summarise the evidence of the witnesses.
- [8] The first witness for the plaintiff was Ms Inge Pieterse who testified as an expert witness. She testified that she is a registered Quantity Surveyor, and her main duty is to calculate the costs of the contract. She testified that she had produced an expert report on the instruction of the plaintiff and confirmed the correctness of her report.

- [9] Ms Inge Pieterse testified that due to the fact that she did not have the full set of the payment Certificates 1 to 26, she relied heavily on certificate 27 that was made available to her by the plaintiff.
- [10] She testified that the commencement date of the contract was the 13th October 2011 and the completion date according to her calculations was the 21st October 2013. She further testified that there were extensions to the contract which changed the completion date to the 4th February 2014.
- [11] Ms Inge Pieterse further testified that if a contract is cancelled, the final payment certificate must be prepared or generated by the Principal Agent. She stated that the payment certificate 27 was not signed by Gosame Development Consultants.
- [12] During her evidence in chief it was put to her that the defendant will say that the certificate she relied on was not a payment certificate and that it was not issued by Gosame Development Consultants. She was referred to another certificate with reference "DM2" which was issued and signed by Gosame Development Consultants with a zero amount payable. She confirmed that she relied on certificate 27 provided to her by the plaintiff.
- [13] She further testified that the plaintiff suffered damages due to the cancellation of the contract and therefore the plaintiff is entitled to be compensated for the damages in the form of profit and loss on the outstanding value of the contract. She adopted a profit of 10% on the outstanding value of the contract and calculated the claim for profit and loss in the amount of R608 154.42.
- [14] Under cross examination it was put to her that the certificate 27 she relied on in preparing her report as well as her evidence, was not a payment certificate issued by Gosame Development Consultants. Her response was that if the document she relied on is incorrect, then the report is incorrect except for the security.

- [15] She further stated that the payment certificate with reference 'DM2" presented to her by the defendant's legal representative during cross-examination, differs from the one she relied on for her report, in that the value of work or amount reflected in both documents differ. She testified that the payment certificate presented by the defendant to her aligns with payment certificate 26, thus automatically meaning the certificate relied upon in making her report is wrong.
- [16] She acknowledged that the total value of work in the certificates, that is certificate 27 she worked on, and the certificate presented by the defendant differ. The one she relied on had the value of total work done of around R11 Million while the one presented by the defendant had a value of total work done of around R10 Million.
- [17] She further conceded that when she made the calculations for profit and loss, she did not factor in the penalties that would have been imposed on the plaintiff for the delay had the cancellation never taken place. She testified that this was considering the fact that after the 4th February 2014, a R4 000.00 penalty fee was to be imposed everyday if the contract had not been cancelled.
- [18] Under re-examination she confirmed that she had no idea about the origin of the documents she relied upon when compiling her report. She further confirmed that the value of the security on the zero certificate presented by the defendant differs from the value of the security on the certificate 27 she relied on, and this means that the value she calculated on her report would be slightly lower than it would be had she used the certificate presented by the defendant.
- [19] She further confirmed that the penalties were not factored in her calculations and that there is no counter claim before the court regarding penalties. She also testified that she was never asked to do any calculations relating to any penalties.

- [20] The second witness for the plaintiff was Mr Jeremiah Matlala and he testified that he is the Managing Director of the plaintiff. He was the project manager for the construction of the building of the police station in Mabopane.
- [21] Mr Matlala testified that the site hand over to the plaintiff was done on the 21st October 2011. He further testified that the payment certificate was issued on a monthly basis. After a certain portion of work was done, Gosame Development Consultants in their capacity as quantity surveyor, would go on site together with some employees of the plaintiff to observe the work done and verify the measurements. Thereafter the plaintiff would prepare a valuation certificate on the template provided by the Department of Public Works and send it to the Principal Agent. The Principal Agent if satisfied would co-sign and send to the Department of Public Works and the plaintiff.
- [22] He further testified that should there be any disputes regarding the information contained in the valuation certificate sent by the plaintiff to the Principal Agent, such would be resolved, and the disputes and the solutions would then be reflected in the payment certificate issued by the Principal Agent. He stated that after the plaintiff sent the certificate 27 to the Principal Agent, they received a zero certificate from Gosame Development Consultants. The plaintiff then received communication from the Principal Agent on the 19th November 2013 indicating that it could not continue with the services it was rendering on the project as it was placed in liquidation on the 29th October 2013. He testified that payment certificates 24 and 25 were issued subsequent to that date and the Department of Public Works paid the plaintiff.
- [23] Mr Matlala continued to testify that the absence of a Principal Agent was problematic for the plaintiff as it could not continue with its work. In January 2014 the plaintiff relied on the JBCC agreement which stipulated that a new Principal Agent needs to be appointed 10 days after the need arises or after the initial Principal Agent leaves. The plaintiff then engaged the Department of Public Works regarding the appointment of a

new Principal Agent. This followed the fact that the liquidated Principal Agent was also the Architect of the project, played a crucial role in this project as they were also responsible for the designs which the plaintiff relied upon to continue with its work. The absence of the Principal Agent led to delays in the project. These delays led to financial burdens as there were unused resources on site which were charging money per period in which they were in the possession of the plaintiff. The delay in the appointment of the Principal Agent is what led to the cancellation of the contract by the plaintiff in accordance with the JBCC agreement, which allowed for cancellation where the client is unable to pay or does not appoint a Principal Agent.

[24] He further testified that the plaintiff sent a letter dated the 12th March 2014 notifying the Department of Public Works of its intention to cancel the contract, with the hope that the Department will act with urgency and accelerate the appointment of a new Principal Agent to avoid this cancellation. On the 28th March 2014 another letter was sent through cancelling the contract in accordance with clause 38 of the JBCC agreement. He further testified that there was no evidence to support the defendant's version that there was a new appointment of a Principal Agent prior to the issuing of the notice of intention to cancel the contract. The Department of Public Works responded on the 15th April 2014 by delivering a notice to immediately vacate the site, and this was the last communication between the parties.

[25] During cross examination it was put to Mr Matlala that the defendant's witness will testify that the plaintiff was informed about the appointment of Gosame Development Consultants as the new Principal Agent and Quantity Surveyor on 12th March 2014. Mr Matlala denied being informed as there was no notice sent to the plaintiff about the appointment of Gosame Development Consultants as the new Principal Agent. He further testified that there were some informal discussions between him and the defendant's project manager about appointing Gosame Development Consultants as the new Principal Agent as well as the architect, however there was no formal engagement

regarding this issue as stipulated in the contract. He stated that he vehemently objected against such appointment on the basis that there was a previous acrimonious relationship between the plaintiff and the proposed Principal Agent and also that the Mr Obugo was not an architect.

[26] Mr Matlala testified that he was informed that Gosiambe Development Consultants had attended at the site on the 12th March 2014 to be introduced as the new Principal Agent however he was not informed as stipulated in the agreement. He confirmed that the reason for the cancellation of the contract was the non-appointment of the Principal Agent.

[27] It was put to Mr Matlala that the witness for the defendant will testify that Gosiambe Development Consultants was appointed as Principal Agent on the 9th March 2014. Mr Matlala denied this and stated that it was never formally communicated to the plaintiff. It was further put to Mr Matlala that a witness for the defendant will testify that an inspection meeting was held at the site on the 12th March 2014 and Gosiambe Development Consultants was introduced as the Principal Agent and plaintiff was represented. Mr Matlala denied this.

[28] It was put to Mr Matlala that the plaintiff was required to comply with clause 15.3 of the contract. He responded by stating that yes, the clause is noted. It was also put to him that the witness for the defendant will testify that the project was 58.31% complete when the contract was cancelled, and therefore the plaintiff was not entitled to cancel as the plaintiff was in material breach of the contract. He responded that that is not correct and indicated that more than 70% of the work was completed. He further testified that when the project started there were design problems which needed to be addressed. This resulted in variations to the design and extensions of time for the completion of the project.

- [29] Mr Matlala further testified that there were many changes in the designs and the materials to be used, and this had financial implications. He stated that the Principal Agent did not factor some of these changes in his calculations hence the differences in the claim by the plaintiff and the issued payment certificate 27 in the value of the work done. He testified that the plaintiff raised these differences with the quantity surveyor, and the plaintiff did not declare a dispute as per clause 40.1 of the contract.
- [30] During re-examination Mr Matlala testified that the work still to be done by the plaintiff at the time of the cancellation of the contract included finishings (fitting cupboards, ceiling, counter and painting) and other things outside the building which still had to be completed, such as the installation of the septic tank, since the designs had to be changed by the Department's team.
- [31] The third witness was Mr Emeka Ogbugo who testified on behalf of the defendant. He testified that he has been a registered Quantity Surveyor since 1995 and has worked in over 50 projects as a Quantity surveyor in construction projects of a similar nature to the one in question. He further testified that he is a director in Gosiam Development Consultants.
- [32] Mr Emeka Ogbugo testified that Gosiam Development Consultants was appointed as the new Principal Agent on the 9th March 2014 and assumed the dual role of Principal Agent and Quantity Surveyor for the project. On the 12th March 2014 there was a site meeting, and minutes were taken. The minutes indicate that Gosiam Development Consultants was introduced to the attendees as the newly appointed Principal Agent and it was also indicated that they will also be the architects for the project.
- [33] It was put to Mr Emeka Ogbugo that Mr Matlala denies that Gosiam Developments Consultants was the newly appointed Principal Agent. He testified that on the first site visit all the parties involved on the project were invited and they all attended. The plaintiff was represented by Mr L Kgaditse, and he signed the attendance register on behalf

of the plaintiff. He further stated that the minutes were sent to the email addresses of the attendees as provided in the attendance register. He was adamant that Mr Matlala is not telling the truth when he says that the plaintiff was not aware of the meeting. It was further put to Mr Ogbugo that Mr Kgaditse was not the authorised representative of the plaintiff, he was an employee of the plaintiff who happened to be on site on the day in question and he could not speak due to a speech impairment and subsequently passed away during the Covid-19 pandemic. He insisted that the plaintiff was represented as stated earlier.

[34] He stated that the payment certificate relied upon by Ms Inge Pieterse in preparing her report does not originate from Gosiam Development Consultants. He further confirmed that the Quantity Surveyor is the one who issues the payment certificate and the Principal Agent then signs it when satisfied. He further testified that he is the one who did the evaluation and measurements for the valuation for payment certificate 27 and found that there was nothing owed to the plaintiff. Furthermore, according to his calculations as a quantity surveyor the percentage of the work completed by the plaintiff as at 26th February 2014 was 58.31% as indicated.

[35] It was put to Mr Emeka Ogbugo that Mr Matlala says that his calculation for the percentage of work completed is conservative. His response was that there is a formula stipulated on the valuation for payment certificate which was used to make the calculations and the plaintiff had overclaimed on some of the work completed.

[36] During cross-examination it was put to him that ever since Gosiam Development Consultants was appointed as the Principal Agent, there wasn't any document issued and signed. It was further stated Gosiam Development Consultants had never acted in the capacity of a Principal Agent as the payment certificate was not signed nor was any other work done in that capacity. His response was that it was incorrect to say that since the appointment as Principal Agent no work has been done by the plaintiff. He

reiterated that the appointment was on the 9th March 2014 and on the 12th March 2014, there was a site meeting and minutes for that meeting were produced.

- [37] It was put to him that the minute referred to did not have the email address for Mr Kgaditse. He was asked if he had sent the minute to the plaintiff and his response was that it was not sent by him personally.
- [38] It was put to Mr Emeka Ogbugo that the valuation payment certificate 27 that was signed by the Quantity Surveyor meant nothing as the payment certificate 27 was not signed. His response was that there was no work done on site by the plaintiff and as a result there was no need for payment.
- [39] It was put to him that the contract obliges the Principal Agent to issue a payment certificate even if it is a nil certificate every month until the final payment certificate. He was asked if he did this. His response was that he did not, and the reason was because there was no contractor on site and no work done by the plaintiff. He further stated that you obey the law to the extent that it makes sense to you. He stated that one does not go on site when the site is empty and there is no work taking place as you would be returning the same certificate or even less due to work degradation and possible vandalism.
- [40] He was requested to indicate what he regards as the duties of a Principal Agent when a contract comes to an end and also whether the Principal Agent's duties also come to an end at that time. His response was that in normal circumstances, a Principal Agent in a contract that comes to an end prepares a final account, which indicates the financial transactions that took place during the project and who is owed and when they will be paid. However, in a situation where the project was abandoned, the first and immediate duty is to secure the site and start the process of obtaining a new contractor to complete the project.

- [41] He was requested to point out in the JBCC agreement the obligation he had described above. His response was that his appointment by the Department is what guides him and further pointed to paragraph 39.3.5 which stipulates that the Principal Agent shall timeously commence and complete a final account. Counsel for the plaintiff stated that should reliance be placed on section 39 for the cancellation by either party, the Principal Agent shall forthwith issue a contract instruction specifying the continuation of the work and protective measures to bring the works to the specific point of cessation. He asked Mr Ogbugo if he had issued such an instruction. He responded that his instruction from the Department was for him to conduct a site inspection and compile a report, which has been done. He further stated that since there was no contractor on site it did not make sense to issue an instruction to a non-existent contractor. He also stated that he had compiled a close out report which was submitted to the Department.
- [42] It was put to Mr Ogbugo that he had disregarded his duties as Principal Agent by not ensuring that the contractor received the status report as required by the JBCC agreement under clause 38. His response was that he understood the clause to mean that he had to do a final account of the project at hand to establish what is due to the employer as it is relevant for the completion of the final account.
- [43] He insisted that he did compile a final account and also prepared a payment certificate. He further stated that the invitation for the meeting of the 12th March 2014 was sent to the companies, and the companies chose for themselves who they sent to represent them. He denied that he deliberately excluded Mr Matlala from the meeting.
- [44] Mr Ogbugo further testified that in his capacity as Principal Agent he had issued two recovery statements for penalties, both in the amount of R4 000. He also stated that when he was conducting his investigation of the site, he does not recall seeing anything of value left in site by the plaintiff.

- [45] During re-examination he reiterated that he received a letter of appointment as Principal Agent via telefax from the Department dated the 9th March 2014. He further stated that after the appointment as Principal Agent there were no architectural problems.
- [46] He further confirmed that before the plaintiff sent their letter of the 9th March 2014, giving notice of their intention to cancel the contract, the position was that there was very little activity on site as stated in payment certificates 26 and 27. He stated that for the plaintiff to achieve practical completion of the work, the value of the work per month that would have to be done for it to complete on time would be approximately R900 000 per month.
- [47] He further stated that the purpose of the payment reduction was to provide security for the completion of the project should the work not be completed by the contractor. The employer can rely on the security for the completion of the project.
- [48] The plaintiff argued that the defendant had breached the contract by not complying with clause 38.1.1 which requires the defendant to appoint a new Principal Agent within 10 days of the need arising. The defendant on the other hand insists that by the time the plaintiff sent its notice of intention to cancel the contract on the 12th March 2014 and the subsequent cancellation on the 28th March 2014, it had already appointed the Principal agent on the 9th March 2014.
- [49] The plaintiff further argued that the letter of appointment was not sent or copied to Mr Matlala on its behalf. The plaintiff submitted that one would have expected the defendant to immediately act when they received the letter from the plaintiff on the 12th March 2014. The site was no longer operational during that time and the meeting that was held on the same day on site to introduce the new Principal Agent was not attended by it.

[50] The defendant on the other hand argued that there were discussions with Mr Matlala where the intentions of the defendant to appoint the new Principal Agent were disclosed and he also had the opportunity to raise his objections and concerns regarding the proposed new Principal Agent. The defendant also argued that the new Principal Agent did hold a meeting on site to introduce itself to all the stake holders on the project including the plaintiff. The plaintiff was represented by Mr Kgaditse on the same day that the plaintiff sent their notice letter of cancellation of the contract. The minutes were produced and sent to all in attendance. Coincidentally the plaintiff's witness unwittingly corroborated the defendant's evidence, that there were discussions regarding the appointment of a new Principal Agent, although it insists that these discussions were informal.

[52] I am of the view that in order to properly adjudicate whether the plaintiff validly cancelled the contract, the court has to follow the principle laid out in the matter of **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)** at paragraph 7 where the court stated as follows:

"...Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document".

[53] After careful consideration of the pleadings, the evidence and the arguments by the legal representatives of the parties, it is probable that the plaintiff was aware that the defendant had appointed a new Principal agent on the 12th March 2014. This is so because there were earlier discussions between Mr Matlala and the representative of the defendant about the intention to appoint Gosame Development Consultants as the

new Principal Agent as well as the architect. Mr Matlala had an opportunity to raise his objections, during the first site visit on the 12th March 2024 for the new Principal Agent to introduce itself to all the stakeholders in the project, the plaintiff was represented. Save to dispute that plaintiff never received the minutes of the meeting, the presence of one of its employees at the meeting was not disputed.

[54] In applying the **Endumeni** principle in interpreting the contract at hand one must not be overly technical in interpreting the contract. The contract must be interpreted in a businesslike manner which takes into consideration all the aspects including the conduct of the parties during the critical time after the initial Principal Agent was placed under liquidation. The plaintiff was in discussions with the defendant regarding the appointment of a new Principal Agent. The plaintiff cannot now claim that it was not given an opportunity to object on the appointment of Gosiambe Development Consultants when by Mr Matlala's testimony, he had vehemently objected to the appointment of Gosiambe Development Consultants. The defendant's witness had testified that all the stakeholders were invited to the site visit on the 12th March 2014 and they were all in attendance when Gosiambe Development Consultants introduced itself as the new Principal Agent who was appointed on the 9th March 2014. Despite this knowledge the plaintiff did not take the opportunity to object as indicated in clause 5.4 of the agreement.

[55] The court is therefore of the view that the plaintiff did not validly cancel the contract as by the time it issued the notice of intention to cancel the contract on the 9th March 2014 and its subsequent cancellation of the contract on the 28th March 2014, the defendant had already appointed the new Principal Agent on the 9th March 2014.

[56] The other issue that the court has to determine is whether the plaintiff was entitled to cancel the contract. The defendants pleaded and argued that clause 38 states that the contractor may not cancel the agreement if it is in material breach of the contract. It

was submitted that the purported cancellation of the agreement by the plaintiff smacks of opportunism on its part.

[57] Mr Ogbugo testified that at the time of the cancellation of the contract, the plaintiff had only completed 58.31% of the works for purposes of practical completion. This percentage was established by the quantity surveyor by applying a formula clearly indicated on the Valuation payment certificate 27. Furthermore, his evidence was not contested during cross-examination, and it remained unchallenged. The plaintiff without submitting anything more expects the court to accept that it has completed 70% of the works.

[58] After careful consideration of the pleadings, testimony and arguments in court the court finds that the plaintiff was in material breach of the agreement and was therefore not entitled to cancel the agreement in terms of clause 38 of the agreement.

[59] In the circumstances, I make the following order:

1. The action by the plaintiff is dismissed with costs including the costs of two counsel.



LENYAI J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

Counsel for Plaintiff:	:	Adv P Ellis SC
Instructed by	:	Weavind & Weavind
Counsel for Defendant	:	Adv T W Bester SC
		& Adv A M Jozana
Instructed by	:	State Attorney Pretoria
Date of hearing	:	4 & 5 February 2025
Plaintiff's Heads of Argument.	:	17 February 2025
Defendant's Head of Argument	:	17 February 2025
Closing Arguments	:	25 April 2025
Date of Judgment	:	22 September 2025