



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 228/2024

In the matter between:

**NORTH WEST PROVINCIAL DEPARTMENT
OF AGRICULTURE, CONSERVATION,
ENVIRONMENTAL AND RURAL
DEVELOPMENT**

FIRST APPELLANT

**MEMBER OF COUNCIL, NORTH WEST
PROVINCIAL DEPARTMENT OF
AGRICULTURE, CONSERVATION,
ENVIRONMENTAL AND RURAL
DEVELOPMENT**

SECOND APPELLANT

and

**BOSIGO INVESTMENT
AND TRADING CC**

FIRST RESPONDENT/ CROSS APPELLANT

KEEWAVE TRADING 191 CC

SECOND RESPONDENT

Neutral citation: *North West Provincial Department of Agriculture, Conservation, Environmental and Rural Development and Another v Bosigo Investment and Trading CC and Another* (228/2024) [2025] ZASCA 191 (15 December 2025)

Coram: MATOJANE, KATHREE-SETILOANE and KOEN JJA, HENNEY and MODIBA AJJA

Heard: 2 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 15 December 2025.

Summary: Damages – claim for loss of profit arising from breach of contract – plaintiff bears onus to identify and prove saved expenses to be deducted from contract price – comprehensive disclosure of operational costs required – none produced – damages not proved.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Mtembu AJ, sitting as a court of first instance):

- 1 The late filing of the notice of appeal, the record of appeal and the replying affidavit in the reinstatement application is condoned and the appeal is reinstated.
 - 2 The appeal is upheld with costs including those of two counsel.
 - 3 The order of the high court is set aside and replaced with the following order:
‘The plaintiff’s claim is dismissed with costs including those of two counsel.’
 - 4 The cross appeal is dismissed with costs including those of two counsel.
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JUDGMENT

Kathree-Setiloane JA (Matojane and Koen JJA and Henney and Modiba AJJA concurring):

[1] During July 2006, the first appellant, the North West Provincial Department of Agriculture, Conservation, Environmental and Rural Development (the Department) issued an invitation to tender in respect of Bid Number 13 ACE 218/06. The tender was for the construction of large and small stock fencing as and when required, for a period of twenty-four months, commencing 1 November 2006 and terminating on 31 October 2008 (the tender).

[2] On 31 July 2006, the first and second respondents, Bosigo Investment and Trading CC (Bosigo) and Keewave Trading 191 CC (Keewave) respectively, submitted bids in respect of the tender. On 31 October 2006, the Department awarded the tender to Bosigo and Keewave and appointed them as joint service providers for a period of two years, commencing on 1 November 2006 and terminating on 31 October 2008.

[3] On 31 October 2006, Bosigo received a letter from the Department confirming the appointment (the letter of appointment). It reads, in relevant part:

‘SUBJECT: 13 ACE 218/06 – Construction of large and small stock fencing in the four regions of the Province for a period of two years on rotation basis @ R25 012-74 as and when the need arises.

(a) Your offer to the rand value of R25 012-74, regarding tender No. 13 ACE 218/06 has been accepted subject to all the requirements and conditions contained in the tender.

(b) This acceptance letter is not an official order, consequently no delivery should be carried out until an official order has been received from the Department of Agriculture, Conservation and Environment.’

Annexure ‘A’ to the letter of appointment provided details of the stock fencing for the various districts within the North West Province for a total of 926.2 kilometres.

It reads:

‘ANNEXURE ‘A’

Identified areas and kilometres to be done as listed below:

Region	Name of Project	KM's
Bojanala	Madikwe Sisal	9
	Witklip	14
	Cynthia Camper	0.5
Sub-total		23.5
Bophirima	Pitsong village	36
	Vaaltyn	26
	Radobil	40
	Lower Majeakgoro	36
Sub-total		138

Ngaka Modiri Molema	Makouspan	132
	Skoonlaagte	38
	Swartkopfontein	10.3
	Wilbebeeskop	5
	Braaklaagte	5
	Doorlaagte	18
	Nicolasdooring	7.8
	Schuinsdam	5
	Alwynskop	29
	Mafikeng East	28.3
	Khunwana	51.8
	Magokgwana	16
	Shiela/Mooifontein	332.2
Sub-total		678.4
Southern	Marela Goats	5
	Oersonskraal	16
	Sizamile Indawo CPA	13.25
	Leeudoringstad commonage	24.5
	Boikhutsong/Appeldraai	23.7
	Syferfontein/Sidepoint	10.5
	Boikhutsong/Bridegomskraal	27.6
Sub-total		86.3
	Total KM's	926.2

[4] On their acceptance of the terms of the appointment, a contract came into being between Bosigo, Keewave and the Department (the contract). However, neither Bosigo nor Keewave was given orders for the erection of fencing (orders) in the first year of the contract. In its second year, and after putting immense pressure on the Department, Bosigo was given official written orders for four projects in the Southern region reflected in annexure 'A' to the letter of appointment: Marela Goats, Oersonkraal, Sizamele Indawo CPA and Leeudoringstad commonage.

[5] Subsequent to discovering that the Department had re-advertised the tender without consulting it, Bosigo instituted an action for breach of contract, in the North West Provincial Division, Mahikeng (high court), against the Department and the

second appellant, the Member of the Executive Council: North West Provincial Department of Agriculture, Conservation, Environmental and Rural Development (the Member of the Executive Council). Bosigo cited Keewave as the third defendant in the action, but it did not seek any relief against it. Keewave did not participate in the litigation.

[6] Bosigo claimed contractual damages against the appellants on the basis that, in terms of the tender, Bosigo and Keewave would have jointly been allocated work:

(a)	In respect of the first year in the sum of	R 3 571 769.89
(b)	In respect of the second year in the sum of	R12 019 542.84
	Total	R15 591 312.73
(c)	In respect of the distances not reflected in Annexure ‘A’ to the letter of appointment	R 4 671 815.40
	TOTAL	R20 263 128.13
	Less payment received of	R 1 469 498.47
	Amount claimed	R18 793 629.66

[7] On 14 November 2022, the high court (Mtembu AJ) found that the Department had breached the contract it entered into with Bosigo, by placing orders with other service providers. It awarded Bosigo damages in the amount of R7 060 907.12 which it calculated as follows:¹

‘[Bosigo’s] damages in respect of the distance identified in annexure ‘A’ is the sum of R3 571 769.89 (for the projects in the first year) plus R12 019 542.84 (for the projects in the second

¹ The order of the high court reads as follows:

‘(i) The [Department] and [the Member of the Executive Council] are jointly and severally liable, the one paying the other to be absolved in the amount of R7 060 907,12.

(ii) Payment of interest on the abovementioned amount at the legally prescribed rate a *tempore morae* from date of demand to the date of the final payment.

(iii) Payment of costs, including the costs of employment of two counsel.’

year at an escalated price) which equals R15 591 312.73 (R3 571 769.89 + R12 019 542.84 = R15 591 312.73).

[Bosigo], however, did complete four projects in a distance of R58.75 km, listed in annexure A, and was duly paid in the amount of R1 469 498.47. This amount must therefore be deducted from the total profit amount of R15 591 312.73. [Bosigo's] loss would be the difference between R15 591, 321.73 and R1 469 498.47 which equals R14 121 814.20.

However, it is common cause that [Bosigo] would not have been awarded all the projects as listed in annexure 'A', since it was appointed with [Keewave] to render the services. Therefore, on the probabilities, [Bosigo] would have been awarded 50% of the projects as they were appointed on a rotational basis with [Keewave]. [Bosigo's] loss of profit is therefore R7 060 907.12 (R14 121 814 20 ÷ 2 = R7 060 907, 10).'

[8] In calculating the damages, the high court took into account 'expenses in an amount of R17 300 per km' and an escalation of the net tender price from R25 018.74 to R43 254.53 in the second year. It also took into account that Bosigo and Keewave were entitled to work on all the projects listed in annexure 'A', which covered a distance of 926.2 km. And that half the distance i.e. 463.1 km would have been done in the first year of the tender at the original tender price, whilst the other half (i.e. 463.1 km) would have been done during the second year of the contract period, at the escalated tender price. In relation to the contention that Bosigo was entitled to orders across the whole of the North West Province, the high court found that the contract between the parties was restricted to the projects reflected in annexure 'A' to the letter of appointment.

[9] The appellants applied to the high court for leave to appeal its judgment and order. Bosigo applied for leave to cross-appeal the finding of the high court that the contract between the parties was restricted to the projects reflected in annexure 'A'

to the letter of appointment. The appeal and cross-appeal are before this Court with leave of the high court.

Application for the reinstatement of the appeal

[10] The appeal has, however, lapsed as the appellants failed to file the appeal record within the time frames prescribed in the Rules of this Court.² They have applied for condonation for the delay in filing the record and the reinstatement of the appeal (the reinstatement application). They have also applied for condonation for the delay in filing the notice of appeal and the replying affidavit in the reinstatement application.

[11] The standard for considering an application for condonation is the interests of justice. In *Van Wyk v Unitas Hospital*,³ the Constitutional Court said:

‘Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.’⁴

The Constitutional Court emphasised that:

‘An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.’⁵

² Rule 8 of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa (updated 19 June 2023).

³ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC).

⁴ Ibid para 20.

⁵ Ibid para 22.

[12] In the application for condonation for the delay in filing the notice of appeal, the appellants' attorney explains that the judgment of the high court granting leave to appeal did not come to her notice until service of a writ of attachment (the writ), on the Department, on 8 November 2023. It brought an urgent application to stay the writ and an order by consent was obtained on 14 November 2023. This afforded the appellants an extension of time to file the notice of appeal within ten days from 14 November 2023. On attempting to file the notice of appeal in this Court, the Registrar refused to accept it. The reason for this was that the order of the high court granting leave to appeal and cross-appeal lacked clarity in so far as the cross-appeal was concerned. The high court was approached to amend the order which it did on 7 August 2023. The notice of appeal was subsequently filed. It was a month late. This explanation is eminently reasonable.

[13] In the application for condonation for the late filing of the appellants' replying affidavit in the reinstatement application, the appellants' attorney explains why it was filed out of time. She says that Bosigo's answering affidavit was served on 18 October 2024, whilst she was away on leave from 7 to 20 October 2024. This was, however, not brought to her attention on her return from leave. She only became aware that the answering affidavit had been filed, after the appellants' counsel requested her to send him a copy of Bosigo's heads of argument in the appeal. She could not locate the heads and requested a copy from Noordmans Attorneys (Bosigo's correspondent attorneys). It was only during that process that she discovered that Bosigo's answering affidavit had been received on 18 October 2025, whilst on leave. On 22 January 2025, Noordmans Attorneys emailed Bosigo's heads of argument as well as its practice note to her. On the same day, she furnished the appellants' counsel with Bosigo's heads of argument, the practice note and their answering affidavit.

[14] In relation to the delay in filing the record, the appellants' attorney explains that on 13 June 2024, due to certain challenges in reconstructing the record, the appellants requested a two-month extension, from the Registrar of this Court, to file the record. The Registrar acceded to the request and gave the appellants an extension until 13 August 2024. The appellants' attorney was unable to meet this deadline as there were missing documents which the Appeal Document Services (ADS) had requested from her on 11 June 2024. She requested these documents from Bosigo's attorneys on the same day. On 14 June 2024, the latter furnished the office in Mahikeng with the required documents. They only came to her attention on 6 August 2024, when the Mahikeng office sent them to the appellants' counsel and forwarded them to her in Bloemfontein.

[15] On 18 July 2024, Bosigo's attorney wrote to the appellants' attorney advising that any further missing documents that were required to finalise the record, could be obtained from the court file in Mahikeng. However, by that stage a representative from the Mahikeng office had already checked the court file in Mahikeng for the missing documentation, but it was not in the file. On 31 July 2024, ADS sent the first version of the draft index and a Dropbox link to the draft record to the appellants' attorney. It raised queries in relation to certain unclear and illegible copies of documents.

[16] On 5 August 2024, the appellants' attorney raised these queries with Bosigo's attorneys in an email. On 6 August 2024, Ms Melissa Green (secretary to the appellants' counsel), provided ADS with the requested documents. On 7 August 2024, ADS provided the appellants' attorney with updated versions of the draft index and Dropbox links to the draft record of appeal and cross-appeal. ADS requested better and/or legible copies of some documents.

[17] On 9 August 2024, ADS provided the appellants' attorney with an updated version of the draft index and a Dropbox link to the draft record. On 12 August 2024, ADS advised the appellants' attorney that it was not possible to furnish it with the appeal record by 13 August 2024. This was because a number of documents in the court bundle were illegible and would not be accepted by the Registrar of this Court. Between 12 August 2024 and the date of filing the record with the Registrar, the appellants' attorney took steps to reconstruct the record. It, however, took longer than the period allowed by the extension to file the reconstructed record. It was filed a month later.

[18] In relation to the application for condonation of the replying affidavit, Bosigo takes issue with the statement of the appellant's attorney that 'on return from leave, the answering affidavit was not brought to her attention'. Its primary objection is that she had omitted to state who was responsible for bringing the answering affidavit to her attention, and why it was not brought to her attention for a period of two months. It points out that she gave the same unacceptable explanation in her founding affidavit in the reinstatement application. And she has failed to explain what measures she has implemented to ensure that her files are attended to whilst she is on leave, and that any new documents are brought to her attention. Bosigo also takes issue with the failure of the appellants' attorney to explain why it took more than a month to file the replying affidavit, after she became aware that the answering affidavit had been filed.

[19] The appellant's explanation for the delay in filing the replying affidavit and record is inadequate in the respects pointed out by Bosigo. Had it not been for the fact that its counsel requested Bosigo's heads of argument from the file, the appellant's attorney would not have taken notice of the file on her return from leave.

However, her dilatory conduct must be weighed against the prejudice that Bosigo would suffer should the applications for condonation be granted and the appeal be reinstated. I am of the view that any prejudice that Bosigo may suffer as a result of the delay in the prosecution of the appeal, would be mitigated, should this appeal succeed, by the high court's order in terms of which payment of mora interest, on the damages award of R7 060 907.12, was ordered to run from the date of demand and not from the date of judgment.

[20] As will become clear, the appellants also have a good prospect of success in the appeal. It is, therefore, in the interests of justice to condone their non-compliance with the rules of this Court and to reinstate the appeal.

Damages

[21] In order to succeed in its claim for contractual damages, Bosigo was required to prove the following requirements: (a) the existence of a legally valid contract between the parties; (b) the appellants' breach of one or more of the terms of the contract; (c) the appellants' breach caused damages recoverable in law; and (d) the actual, quantifiable, loss as a result of the breach.

[22] It is well established that in a claim for contractual damages the plaintiff must prove its damages on a balance of probabilities. It must prove its actual damages as best as it can with reference to available evidence. They cannot be presumed or estimated.⁶ A damages award for a breach of contract is not intended to compensate the innocent party for patrimonial loss but is rather to put it in the position it would

⁶ *Truth and Reconciliation Commission v Mpumlwana* [2001] 3 All SA 58 (CkI) at 66C-D; *Salviati & Santori (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd* 2001 (3) SA 766 (SCA); [2001] 3 All SA 172 (SCA) 176-7.

have been, had the contract been properly performed.⁷ The comparative method is used to calculate contractual damages. This involves calculating the monetary difference between the plaintiff's position after the breach, and the position it would have occupied had the contract been fulfilled. Thus, an award of contractual damages seeks to compensate a plaintiff for the difference between the actual position it is in as a result of the breach, and the hypothetical position that it would have been in had there been no breach: provided that this 'can be done by the payment of money and without undue hardship to the defaulting party'.⁸

[23] Bosigo's case for breach of contract is premised on the Department having re-advertised numerous open and closed bid invitations for work which it contends should have been allocated to Bosigo and Keewave under the contract. These bid invitations included:

- (a) Closed Tender Invitation Bid Number 13 ACE 10/07 (Department of Agriculture, Conservation and Environment: Supply, Debushing and Construction of Fencing on Approved Agricultural Projects) dated 09 July 2007;
- (b) Open, alternatively Closed Bid Invitation Bid Number 13 ACE 36/07 (Supply, Debushing and Construction of Fence on Approved Agricultural Projects) dated 06 November 2007;
- (c) Open Bid Invitation Bid Number 13 ACE 19/08 – 1 (Debushing, Supply and Construction of Fence in Bophirima District – Kgokgole Fencing Project (19km)) dated 11 June 2008;

⁷ *Novick v Benjamin* 1972 (2) SA 842 (A) at 860A-B; *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* [2011] ZASCA 22; 2011 (4) SA 276 (SCA); [2011] 3 All SA 362 (SCA) paras 26-27.

⁸ *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) para 15.

- (d) Open Bid Invitation Bid Number 13 ACE 19/08 – 2 (Debushing, Supply and Construction of Fence in Bophirima District – Mannerheim Fencing Project (52km)) dated 11 June 2008;
- (e) Open Bid Invitation Bid Number 13 ACE 19/08 – 3 (Debushing, Supply and Construction of Fence in Bophirima District – Maganeng Fencing Project (15km)) dated 12 June 2008;
- (f) Open Bid Invitation Bid Number 13 ACE 19/08 – 4 (Debushing, Supply and Construction of Fence in Bophirima District – Rosenhof Fencing Project (18km)) dated 12 June 2008;
- (g) Open Bid Invitation Bid Number 13 ACE 19/08 – 7 (Debushing, Supply and Construction of Fence in Bophirima District – Shaleng Fencing Project (26km)) dated 13 June 2008;
- (h) Open Bid Invitation Bid Number 13 ACE 19/08 – 8 (Debushing, Supply and Construction of Fence in Bophirima District – Tshepaneng Fencing Project (20km)) dated 13 June 2008; and
- (i) Open Bid Invitation Bid Number 13 ACE 19/08 – 10 (Debushing, Supply and Construction of Fence in Bophirima District – Bokamoso Farming Trust Fencing Project (30km)) dated 13 June 2008.

[24] In addition, Bosigo pleaded that it had come to its knowledge that the Department had appointed numerous other parties during the tender period, to the exclusion of Bosigo and Keewave, to conduct the work specifically included in annexure 'A' to the tender. The service providers who were appointed during the tender period included:

- (a) Closed Bid Invitation Bid Number 13 ACE 36/07 awarded to Selehogoa Trading CC (Selehogoa);

- (b) Open Bid Invitation Bid Number 13 ACE 19/08 – 1 awarded to Botlhale Technologies;
- (c) Open Bid Invitation Bid Number 13 ACE 19/08 – 2 awarded to P Haai & Nicky Motty;
- (d) Open Bid Invitation Bid Number 13 ACE 19/08 – 7 awarded to Abuomo Construction;
- (e) Open Bid Invitation Bid Number 13 ACE 19/08 – 8 awarded to Gom Investments; and
- (f) Open Bid Invitation Bid Number 13 ACE 19/08 – 10 awarded to Mofutho Construction.

[25] There is common ground between the parties that the contract price for the first year of the contract with Bosigo was fixed at an amount of R25 012.74 per kilometre, as per the letter of appointment. The question, however, is whether Bosigo was entitled under the contract to provide fencing, as a matter of course, exclusively in all the areas (projects) listed on annexure ‘A’ to the letter of appointment.

[26] Ms MMP Matsheka testified at the trial for the Department. She was employed by the Department, at the time of testifying, as a Director in Supply Chain Management. In her testimony she expressed an opinion on the nature of the contract. She testified that it was clear from the letter of appointment that Bosigo and Keewave were not awarded a tender but were instead appointed to a panel. Ms Matsheka’s evidence was objected to by Bosigo on the basis that it was inadmissible, as Ms Matsheka had no personal knowledge of the award of the tender to Bosigo. She was, in this regard, not employed by the Department at the time that the tender was awarded and had no involvement in it. The point is well-taken. This Court is, however, entitled to interpret the letter of appointment as it forms part of

the contract. The interpretation of a contract is a legal matter and not a factual one. It is, therefore, the court that must interpret the contract and not the witnesses.⁹

[27] As with statutory interpretation, the starting point when interpreting a contract is its text. It must be construed contextually and with due regard to the purpose of the contract.¹⁰ As this Court has held, context ‘is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text’.¹¹ The text of the letter of appointment makes plain that Bosigo was appointed to carry out the ‘construction of large and small stock fencing in the four regions of the [North West] Province for a period of two years on (a) rotation basis @ R25 012.74 as and when the need arises’. It is clear from the text of the letter that Bosigo was awarded an order-based tender that was dependent on need. This interpretation is supported by paragraph (b) of the letter of appointment which expressly states that the ‘acceptance letter is not an official order, consequently no delivery should be carried out until an official order has been received from the [Department]’.

[28] It is common cause that annexure ‘A’ to the letter of appointment was received by Mr Bosigo at the same time as receiving the letter. As indicated, annexure ‘A’ sets out fencing sites and/or projects with their distance in kilometres. Any fencing orders that the Department was to place with Bosigo could only be in respect of these sites or projects. Moreover, Bosigo could only erect fencing on a site or project listed on

⁹ *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA) para 39.

¹⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18.

¹¹ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 51. See also *Mbambisa and Others v Nelson Mandela Bay Metropolitan Municipality* [2024] ZASCA 151; (2025) 46 ILJ 277 (SCA); 2025 (3) SA 112 para 41.

annexure 'A', on receipt of an official order from the Department. Orders would be placed on a rotation basis. The word 'rotation' in context would mean to take turns providing the service. In other words, when the need arose for fencing in an area listed on annexure 'A', the Department was required to rotate those orders between the appointed service providers.

[29] As the tender documents indicate, Bosigo and Keewave were the only service providers that were awarded the tender. That being the case, the Department had to rotate orders between them. However, since the tender was order-based, neither Bosigo nor Keewave had the right to receive orders in respect of all the projects listed on annexure 'A'. As pleaded, the Department would only place an order for the erection of fencing in an area listed on annexure 'A' when the need arose. It is apparent from the correspondence exchanged between the parties prior to the institution of the action, and the minutes of the pre-trial conference, that this is common cause between the parties.

[30] Thus, on a proper construction of the letter of appointment, Bosigo had no vested contractual right to erect fencing over the total extent of 926.2 km (or half of that as found by the high court) as listed on annexure 'A'. It would have only been entitled to erect fencing, in the listed areas, on receipt of an official order to do so from the Department. Put differently, Bosigo's appointment was an order-based one for the specific areas, and distances, listed on annexure 'A' as and when formally required per official order. The high court thus erred in concluding that Bosigo together with Keewave were entitled to erect fencing over a total distance of 926.2 km. There was no basis on the evidence for this conclusion.

[31] This did not, however, release the Department from the obligation to rotate orders between Bosigo and Keewave, when it needed fencing to be erected in an area listed on annexure 'A'. Where there was a need, the Department was obliged to rotate the orders between Bosigo and/or Keewave to the exclusion of other service providers. This was common cause between the parties. Therefore, if the Department were to request fencing in the areas listed in annexure 'A' from any service provider other than Bosigo and Keewave when the need arose, and after it had placed such order with either of them, it would be in breach of the terms of the contract.

[32] The high court found that the Department breached the contract with Bosigo because Bosigo was only given four projects totalling 58.75 km on annexure 'A', and that 'it is not in dispute that several projects were given to other parties to do fencing construction during [Bosigo's] tender period after the re-advertisement'. The high court did not name these parties/service providers or the fencing orders that they had received from the Department. Nor did it state whether these projects fell within the scope of the projects listed on annexure 'A'.

[33] The high court was wrong in arriving at this conclusion for the following reasons. The evidence of Mr Bosigo, the Managing Director of Bosigo, reveals that of the various tender invitations that the Department had purportedly advertised for the erection of fencing, it actually only awarded one tender for the supply, debushing and construction of fences on construction projects listed on annexure 'A'. This tender – Bid number 13 ACE 36/07 – was awarded to Selehogoa in 2008. That Selehogoa received an appointment letter to which was attached an annexure, identical to annexure 'A', was not challenged by the Department in the trial.

[34] The question, however, is whether Bosigo has been able to prove, on a balance of probabilities, that the Department had placed orders with Selehogoa for the erection of fencing in the areas listed on annexure 'A', that Bosigo and Keewave were entitled to. As concluded above, the tender properly interpreted, required that an official order first be issued to Bosigo and Keewave before they would be entitled to insist, as of right, to perform the work specified in the order. They had not received orders in respect of the work for which the appellants had issued orders to Selehogoa. Selehogoa received those orders. Bosigo and Keewave were not entitled to that work. It might be that they should have been awarded those orders but that is, at best, an administrative law issue, which was not the relief pursued and would involve considerations other than issues of contract only.

[35] However, even assuming this latter conclusion to be wrong and that Bosigo and Keewave were entitled to have received orders and to do the work on the orders issued to Selehogoa, the position is as follows. According to the testimony of Mr Bosigo, on 8 August 2008, the Department had placed an order with Selehogoa to erect fencing over a distance of 36 km in Lower Majeakgoro in the Bophirima District. Mr Bosigo maintained that he was entitled to the order in respect to the Lower Majeakgoro fencing project, as it is listed on annexure 'A' to the letter of appointment. Mr Bosigo's testimony on this aspect including that Selehogoa had completed the work on the Lower Majeakgoro project, and had received payment from the Department, remained unchallenged in the trial.

[36] Any damages Bosigo could have suffered would be restricted to its loss of profit in respect of the Lower Majeakgoro project only. Its measure of damages would be the difference between the contract price contained in the letter of appointment and the hypothetical expenses it would not have incurred in not having

to perform on the Lower Majeakgoro project. The expenses that it would have saved by not getting this order, would have to be taken into account in calculating the damages as a benefit accruing to Bosigo.¹²

[37] Bosigo had not presented any evidence of the actual expenses it would have saved by not performing the work on the Lower Majeakgoro project. Moreover, it failed to provide proof of saved expenses for any of projects listed on annexure ‘A’, to which it claimed an entitlement. In a claim for loss of profits, the type of evidence that a plaintiff is expected to produce, in the trial, would include accounting records such as audited financial statements for the relevant years, as well as details of salaries and wages paid (including PAYE and UIF documentation), site establishment costs, fuel and transport expenses, head office costs, equipment hire, insurance, bank charges, finance charges, and other relevant expenditure. The list is not exhaustive.

[38] The high court found that the parties had agreed that Bosigo’s expenses would amount to R17 300 per km inclusive of VAT, resulting in a net tender price before escalation of R25 012.74 (being the original tender price) less the said amount of agreed expenses, which left a net tender price before escalation in the amount of R7 712.74 per km inclusive of VAT. However, in his testimony, Mr Bosigo simply referred to, but failed to elaborate on how he calculated the saved expenses. The document he claimed depicted his saved expenses, is entitled ‘Seven (07) Strand Large – and Small Stock Fencing Quantity List (per 900 metres)’. This document was submitted as part of Bosigo’s bid application on 27 July 2006. I shall refer to it as tender document 024, as it is referenced as such in Bosigo’s particulars of claim.

¹² Visser & Potgieter *Law of Damages* 3 ed (2012) at 260-261.

[39] The Department admitted in its plea (as per tender document 024) that Bosigo's expenses would amount to R17 300 per kilometre inclusive of VAT, resulting in a net tender price before escalation of R25 012.74. Properly construed, this was not an admission that tender document 024 sets out the expenses that Bosigo would have actually saved in not performing the work on the Lower Majeakgoro project. As appears from the body of the document, the information that the applicant (Bosigo) for the tender was required to provide in the document, was the '[t]otal material cost per metre (to be used in the calculation for the summary amount) Section 7'. Tender document 024 was, therefore, clearly not intended to be a reflection of what a tenderer's saved expenses would be for a damages claim in the future.

[40] The manuscript insertions that Mr Bosigo, admittedly, made to the document relating to '11 Labour and 12 Transport and Site Establishment' costs do not alter the fact that this document does not reflect Bosigo's saved expenses. There is also more than one version of this document in the record, the presence of which Mr Bosigo was unable to explain in his testimony. The three other versions of the document do not include the manuscript insertions made by Mr Bosigo on tender document 024. The latter documents reflect a total amount of R10 994 as the 'total material costs per metre (to be used in the calculation for the summary amount) in Section 7' of the tender documents. But for the manuscript insertions of the costs of labour, transport and site establishment in tender document 024, the total material costs per metre in that document would also add up to R10 994. All four documents feed back to the net tender price before escalation of R25 012.74, which is set out in the document entitled 'Section 7: SUMMARY FOR THE CONSTRUCTION OF ... (metre) FENCING'.

[41] It follows from this, that tender document 024 is not an agreement between the Department and Bosigo on the calculation of saved expenses for determining any future loss of profit claim. Therefore, tender document 024 did not relieve Bosigo from the onus to prove its saved expenses for the purposes of quantifying its damages in its claim for damages. To establish its loss of profit, Bosigo needed to present evidence, supported by discovered documentation, that detailed each expense item it would have saved by not performing the fencing work on the Lower Majeakgoro project. It was necessary for Bosigo to identify, quantify, and deduct from the agreed price per kilometre all costs that would have been incurred but were not, and thus were saved. Comprehensive disclosure of the company's operational costs, as reflected in its accounting records, as a bare minimum, was required as proof. This was not done. Instead, the supposed agreed-upon expenses were sought only to be used as a substitute.

[42] The expenses that Bosigo would have saved were entirely within Mr Bosigo's knowledge. As indicated, the Department had given Bosigo orders in four projects listed on annexure 'A'. It completed those projects and was paid. This evidence should have been produced to prove its actual damages, but it was not. For all these reasons, the high court erred in awarding Bosigo damages arising out of a breach of contract. The appeal must, accordingly, succeed.

The cross-appeal

[43] The high court concluded, correctly so, that Bosigo was not entitled to erect fencing across the whole of the North West Province. As is apparent from the appointment letter, it gives Bosigo no entitlement to receive orders from the Department to erect fencing across the whole of the North West Province. The cross-appeal accordingly falls to be dismissed.

[44] In the result, it is ordered that:

- 1 The late filing of the notice of appeal, the record of appeal and the replying affidavit in the reinstatement application is condoned and the appeal is reinstated.
- 2 The appeal is upheld with costs including those of two counsel.
- 3 The order of the high court is set aside and replaced with the following order:
‘The plaintiff’s claim is dismissed with costs including those of two counsel.’
- 4 The cross-appeal is dismissed with costs including those of two counsel.

F KATHREE-SETILOANE
JUDGE OF APPEAL

Appearances:

For the appellant:

RA Solomon SC and MJ Gumbi SC

Instructed by:

The State Attorney, Mahikeng

The State Attorney, Bloemfontein

For the respondent/cross appellant:

JHF Pistor SC and GV Maree

Instructed by:

Labuschagne Attorneys, Mahikeng

Noordmans Attorneys, Bloemfontein.