



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 9140/2021

In the matter between:

DEON GARDEN AND CONSTRUCTION CC

Plaintiff

and

STELLENBOSCH MUNICIPALITY

Defendant

Coram: Fortuin, J

Hearing dates: 2 September 2025; 5 November 2025;
24 & 25 February 2026; 24 March 2026

Delivered: 4 September 2026

JUDGMENT

FORTUIN J:

A. INTRODUCTION

1. This is an action for damages for breach of contract. The plaintiff, an invasive alien vegetation clearing contractor, sues the defendant, for payment of R4 374 192.67 arising from its cancellation, on 22 September 2020 of a written contract concluded between the parties on 30 May 2019 under tender BSM 07/19 for the clearing of invasive alien vegetation in the area designated as WC024.

2. At the commencement of the trial, by agreement between the parties this Court ordered that the merits of the claim be separated from the quantum of the damages in terms of Uniform Rule 33(4). It was recorded at the outset that, for the purposes of the merits, the plaintiff was required to establish not only the conclusion of the contract and its breach but also that it had in fact suffered loss. Plaintiff was not required to prove the amount of that loss at this stage. This judgment therefore deals with the merits only.

B. THE PARTIES

3. The plaintiff is Deon Garden and Construction CC, a close corporation registered in terms of the laws of the Republic, with its principal place of business at 2[...] D[...] C[...] Street, P[...] Village, Klapmuts. In all of its dealings with the defendant it was represented by its sole member, Mr. Deon Klaasen. Mr. Klaasen has been engaged in alien vegetation clearing for more than fifteen years.

4. The defendant is the Stellenbosch Municipality, a local municipality with its principal place of business at the Town House Complex, Plein Street, Stellenbosch.

C. RELIEF SOUGHT

5. In its particulars of claim the plaintiff seeks payment of R4 374 192.67, made up of R3 955 405.52 for lost earnings and R418 787.15 for what it describes as establishment costs, together with interest at 7.75% per annum a tempore morae and costs of suit.

1. The defendant denies that its cancellation of the contract constituted a breach and denies, in any event, that the plaintiff suffered any loss. The defendant seeks the dismissal of the action with costs on scale B. Alternatively, liability should be established, so that the question of costs stands over for determination with the quantum.

D. COMMON-CAUSE BACKGROUND FACTS

2. It is common cause that, on 10 March 2018 the Department of Environmental Affairs ("the DEA") informed the defendant that it had been approved as a registered implementing entity for the Natural Resource Management ("NRM") programme the successor to the earlier Working for Water programme. The approval letter expressly recorded that approval did not mean that the defendant's projects would be funded, or that they would be funded in full at the budget amounts submitted.

3. The defendant initially intended to implement the NRM project using its own Expanded Public Works Programme ("EPWP") workers, and 44 such workers were in due course appointed. Because of the DEA's spending deadlines and constraints within the defendant's human resources department, the decision was taken to procure the alien clearing services by way of a formal tender.

4. The defendant advertised tender BSM 07/19 for the clearing of invasive alien vegetation in the area designated WC024. A compulsory clarification meeting was held on 12 November 2018, which Mr. Klaasen attended. The tender closed on 7 December 2018. The tender was advertised before any memorandum of agreement had been concluded with the DEA.

5. The tender was framed as a panel appointment. Under the heading “Background” the specification recorded that the objective was to establish a panel of suitably qualified contractors “to be appointed per project/site that needs to be cleared, as and when projects and budgets are approved over the tender period, as and when required”, and that the panel would then be approached *“either by obtaining quotes on a rotation basis, or by obtaining quotes from specific contractors on the panel, when specific, specialised work is required, per project/site”*.

6. The pricing schedule recorded that “[a]s and when contracts become available successful tenderers will be pulled from a hat publicly [sic]” *and that “[a] roster system will be used with the hat system so that contractors are rotated fairly”*.

7. Bidders were required to meet a minimum functionality threshold of 70% and, for that purpose, to submit proof of trained and experienced staff, vehicles and compulsory equipment. The plaintiff submitted that proof and was assessed as functionally responsive. Pricing was on an all-inclusive “person day” basis. The contract form MBD 7.2 signed by the plaintiff records that the rates quoted *“cover all the services specified in the bidding documents”* and *“cover all my obligations”*.

8. A memorandum of agreement between the defendant and the DEA ("the MOA") governing the NRM project and the funding to be provided was concluded in February 2019. The plaintiff was not a party to the MOA and, until these proceedings, Mr. Klaasen had not seen it and was unaware of its terms. The MOA permitted the funding to be varied, reduced or withdrawn by the DEA. No provision is made for the withdrawal by the defendant.

9. The minutes of the defendant's Bid Adjudication Committee of 7 March 2019 record the source of funding for the tender as the DEA, in the amount of R11 850 000 over three years, tied to an identified budget vote and UKey. A UKey is a unique reference number or account code assigned to a specific budget line item, departmental expenditure, or capital project. The minute also records a resolution to appoint the qualifying bidders.

10. In a letter dated 23 May 2019 the defendant appointed the plaintiff to a panel of thirteen contractors. The letter recorded that the defendant "reserves the right to accelerate the Project in the year in which the funds become available, subject only to the terms and conditions embodied in the tender specifications and the general conditions of contract".

11. The MBD 7.2 contract form was signed by Mr. Klaasen on 27 May 2019 and accepted on behalf of the defendant by Mr. Gary Boshoff, Director: Community

Services, on 30 May 2019. The contract period ran from 30 May 2019 to 30 June 2021.

12. A lot-drawing exercise took place on 7 June 2019. The plaintiff received one purchase order under the contract, dated 14 June 2019, for alien clearing at Paradyskloof. It performed that work and was paid. No further order was ever placed on the plaintiff. Before me three different figures for the value of this order were placed. I do not intend to deal with this discrepancy in this judgment as it is, in my view, immaterial at this stage of the proceedings, which only deals with the merits.

13. Ms. Tammy Leibrandt was appointed Manager: Environmental Management on 1 March 2019. On taking up her position, she identified discrepancies between the implementation of the tender and both the tender specification and the MOA. She mentions these discrepancies. The relevant ones are listed below:

- a. work was being performed otherwise than in accordance with the specification;
- b. the defendant's reporting cycle under the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA") did not align with the DEA's reporting cycle under the Public Finance Management Act 1 of 1999.

14. On MS Leibrandt's version, these matters gave rise to unauthorised and irregular expenditure. Ms. Leibrandt brought a charge sheet against an official and recommended his suspension. He was suspended and, ultimately, dismissed.

15. A meeting was held with the contractors on 30 August 2019 where they recorded their dissatisfaction with the tender, in particular that the time periods and densities allocated per block were unreasonable and that the average person-day rate would not cover their expenses.

16. Before the DEA's letter of non-compliance was received, Ms. Leibrandt instructed an administrator, Ms. Beverly September, to withdraw all contractors from the field. From that point no further work was performed by any contractor, including the plaintiff, until the contracts were formally cancelled. This withdrawal was done unilaterally without informing the plaintiff or any of the other small contractors.

17. On 12 September 2019 the DEA wrote to the defendant's Municipal Manager registering non-compliance with the MOA on six grounds, i.e.:

- a. financial reporting failures;
- b. health and safety and COIDA non-compliance;
- c. training issues;
- d. the suspension of Mr. Lourens;
- e. the withdrawal of the contractors from the field; and
- f. the failure to confirm clearing contracts.

18. On 8 October 2019 the defendant replied. The letter was drafted by Ms. Leibrandt, approved by senior management and signed by the Municipal Manager. Paragraph 4.1 reads: "Stellenbosch Municipality hereby instructs [the DEA] to cancel the NRM project with immediate effect." The same letter recorded that the defendant would absorb the EPWP workers and that the contractors would be used on the

tender “based on the Municipality's requirements”. It is noteworthy that this step was also not communicated to the plaintiff or any of the other contractors.

19. The MOA was cancelled by mutual agreement in February 2020, and the balance of the grant funds was repaid by the defendant to the DEA in March 2020.

20. The defendant advertised a replacement tender, BSM 102/20, for alien clearing and de-bushing of invasive species. Funding for that tender, from the defendant's own budget, was available from 1 July 2020. The replacement tender was drawn on a different basis from BSM 07/19. It was priced per hectare, whereas BSM 07/19 had been built on the Working for Water person-day standard. It is common cause that this step could only be done because funds were available.

21. The defendant's internal decision to cancel the contracts is recorded in an interoffice memorandum dated 21 September 2020. In a letter dated 22 September 2020, signed by Mr. Boshoff, the defendant informed the plaintiff that the contract was cancelled. The reasons given were a discrepancy between the application rate in the tender and the DEA's requirements, and that the tender specifications were not aligned with the MOA, which had led to the grant funding being withdrawn and the tender being declared invalid. Contractors were told that a new tender, BSM 102/20, was being issued and were invited to bid.

22. The plaintiff now performs the same category of work for the defendant under that replacement tender.

23. On 17 December 2020 the plaintiff's attorneys addressed a letter of demand to the defendant in compliance with section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. No payment was made.

E. WITNESSES

28. Three witnesses testified. Mr. Klaasen gave evidence for the plaintiff. Mr. Albert van der Merwe, a senior manager in the defendant's community services department, and Ms. Leibrandt gave evidence for the defendant. No expert evidence was led by either party.

F. ISSUES FOR DETERMINATION

29. The issues arising on the separate merits are the following:

- a. whether the defendant is confined to a pleaded case that the contract was dependent on its receiving DEA funding, and may not rely at trial on the withdrawal of that funding;
- b. the proper interpretation of the contract, and in particular whether the provisions requiring work to be allocated "as and when projects and budgets are approved over the tender period" obliged the defendant to allocate any work to the plaintiff at all;
- c. whether the defendant's cancellation of the contract on 22 September 2020 was lawful, and in particular whether the contract contained an express or tacit term entitling the defendant to cancel on the withdrawal of the DEA funding;

- d. whether the plaintiff has established, as a matter of fact, that it suffered loss as a result of the cancellation, in respect of lost earnings and of establishment costs respectively; and
- e. costs.

G. THE PLAINTIFF'S CASE

24. The plaintiff's case, in summary, is as follows. The contract was a fixed-term agreement running to 30 June 2021 which imposed a binding obligation on the defendant to allocate work to panel members on a rotation basis. On its version, the "as and when projects and budgets are approved" provision, properly construed in accordance with **Natal Joint Municipal Pension Fund v Endumeni Municipality**¹ ("**Endumeni**"), describes the mechanism by which work was to be allocated and does not extinguish the obligation to allocate work at all. Also that the word "budgets" in that clause refers to internal budgetary approval for specific projects and not to the continued existence of DEA funding.

25. It is the plaintiff's case that there is no express provision in the contract documents making the contract conditional on the continuance of DEA funding and that no tacit term to that effect can be imported. Relying on **South African Maritime Safety Authority v McKenzie**² and **Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books**³, the plaintiff submits that a tacit term

¹ 2012 (4) SA 593 (SCA)

² 2010 (3) SA 601 (SCA)

³ 2017 (3) SA128 (SCA)

must satisfy the officious-bystander test, and that it cannot do so here where the defendant;

- a. never disclosed the MOA or its terms to the plaintiff,
- b. never told the plaintiff that DEA funding was the exclusive source of funding for BSM 07/19, and
- c. was at the time of cancellation using internal municipal funds to advertise a replacement tender for the same services.

26. Where the parties have expressly limited the grounds of cancellation in writing, the plaintiff submits, a court should not supplement those grounds by importation.

27. The plaintiff submits that the reason given in the cancellation letter corresponds to none of the contractual grounds of cancellation. The cancellation was therefore unlawful and constituted a repudiation within the meaning of **Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd**⁴, which it accepted by its letter of demand of 17 December 2020. It further submits that the defendant may not rely on its own default which are:

- a. the withdrawal of the DEA funding was brought about by the defendant's own reporting failures,
- b. by the alleged misconduct of its own employee, and
- c. decisively, by its own instruction to the DEA of 8 October 2019 to cancel the NRM project with immediate effect.

⁴ 2001 (2) SA 284 (SCA)

28. In respect of loss, the plaintiff submits that at the merits stage it need establish only the fact of some loss and not its amount. It relies on the following factors:

- a. the contract was cancelled with a substantial part of its term still to run;
- b. the rotation mechanism was mandatory and Mr. van der Merwe confirmed in re-examination that “everybody would get work”;
- c. the work was ongoing and available;
- d. both witnesses for the defendant confirmed that there was always a need for alien clearing;
- e. Ms. Leibrandt confirmed that the replacement tender was for the same services; and
- f. Internal municipal funding was available from 1 July 2020, before the cancellation letter was issued.

29. In respect of establishment costs, the plaintiff relies on Mr. Klaasen's evidence that the brush cutters, chainsaw, bakkie, trailer and staff training were paid for after the contract had been received and specifically in order to perform it. He further submits that demonstrating capacity to perform at bid stage does not preclude separately incurring the cost of performing after the contract was concluded. Plaintiff seeks its costs on the ordinary scale.

H. THE DEFENDANT’S CASE

30. The defendant's case, in summary, is as follows. The elements of a claim for contractual damages are the contract, the breach, damage, a causal link between the breach and the damage, and that the loss is not too remote. Relying on inter alia

Combined Business Solutions CC v Courier & Freight Group (Pty) Ltd⁵, the defendant submits that where merits and quantum are separated the merits include the question whether the plaintiff sustained damage in consequence of the alleged breach, and that this was expressly recorded when the separation order was made.

31. In respect of interpretation, the defendant submits that the text, context and purpose of the “as and when” provisions are clear. They were included precisely to provide for the eventuality that the DEA funding might not materialise or might not continue for the full three-year term, and to protect the defendant against that uncertainty. On Defendant’s version, a decision to approve a project and a budget, there was no obligation to call for quotations or to place any order on any member of the panel. It submits that the plaintiff’s construction ignores the qualifying words “over the tender period”. The defendant relies on **Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd⁶** for the proposition that the parties’ conduct in implementing the agreement supports its interpretation i.e. for a full year before cancellation no work was allocated, and the plaintiff alleges no breach in that regard.

32. On Defendant’s pleaded case, it submits that its plea expressly links the withdrawal of the funding to its entitlement to cancel, so that no new or unpleaded defence arises. In respect of the tacit term, it relies on **Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration⁷**, **Adhu Investments CC v Padayache⁸**, **City of Cape Town (CMC Administration) v Bourbon-Leftley NNO⁹** and Exclusive Books, and points to the many respects in which the tender documents

⁵ [2001] 1 All SA 10 (SCA)

⁶ [2012] ZASCA 126

⁷ 1974 (3) SA 506 (A)

⁸ [2019] ZASCA 63

⁹ 2006 (3) SA 488 (SCA)

are tied to the DEA's Working for Water and NRM prescripts, and to Mr. Klaasen's admission that he knew before the contract was concluded that the funding came from the DEA.

33. With regards to loss, the defendant submits that the plaintiff led no admissible evidence that:

- a. any contracts were available, or
- b. that any projects or budgets were approved, at any time after the cancellation;
- c. that section 15 of the MFMA precluded the defendant from applying funds appropriated for the replacement tender to BSM 07/19;
- d. that the plaintiff's pleaded measure of damages, relying on historical monthly turnover of R160 000 under a different and earlier tender, is not a permissible measure and was in any event not proved; and
- e. that the plaintiff led no evidence that work under BSM 07/19 would have yielded a profit at all if regard is had to Ms. Leibrandt's unchallenged evidence that the contractors complained that the average daily rate would not cover their expenses.

34. In respect of the establishment costs, the defendant submits that the plaintiff was required to demonstrate at bid stage that it had the necessary staff, equipment and vehicles and did so. Also the contract permitted recovery only in terms of an all-inclusive person-day rate which covered wages, personal protective equipment, tools, equipment, transport and administration, with no price item for any of the

components claimed. In addition, the acquisition of assets which the plaintiff still owns does not establish loss. Finally, the claim as now formulated is one for special damages which was neither pleaded nor proved in accordance with **Shatz Investments (Pty) Ltd v Kalovyrnas**¹⁰. It asks that the action be dismissed with costs on scale B.

I. THE APPLICABLE FRAMEWORK

35. The following legal issues are applicable in this action and will be discussed below.

- a. The interpretation of contracts;
- b. Tacit terms
- c. Repudiation;
- d. Damages for breach of contract;
- e. Pleadings, and
- f. The statutory framework.

a. Interpretation of Contracts

36. The approach to the interpretation of a contract is trite. In *Endumeni* at para 18, the following was said:

“[18] ... Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own.¹³...The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a

¹⁰ 1976 (2) SA 545 (A)

document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence....”

37. Endumeni therefore holds that text, context and purpose are considered together and from the outset, as stated in **University of Johannesburg v Auckland Park Theological Seminary**¹¹ as follows:

“[65] This approach to interpretation requires that “from the outset one considers the context and the language together, with neither predominating over the other”.^[44] In Chisuse, although speaking in the context of statutory interpretation, this Court held that this “now settled” approach to interpretation, is a “unitary” exercise.^[45] This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.

[66] The approach in Endumeni “updated” the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text.^[46] The Supreme Court of Appeal has explicitly pointed out in cases subsequent to Endumeni that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous.^[47] A court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.^[48]

[67] This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could

¹¹ 2021 (6) SA 1 (CC)

include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded. As the Supreme Court of Appeal held in Novartis:

“ . . . A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.”[49]...

b. Tacit terms

38. A tacit term is an unexpressed provision derived from the common intention of the parties, actual or imputed, as inferred by the court from the express terms of the contract and the surrounding circumstances. In this regard see **Alfred McAlpine, supra**. The following positions are clear from the authorities relied on by both parties:

- a. The first question is whether, having regard to the express terms of the agreement, there is any room for importing the alleged tacit term. A court will be slow to import a tacit term where the parties have concluded a comprehensive written agreement dealing in detail with the subject matter, and where the term is not necessary to give the contract business efficacy. See **Adhu Investments at para 15**.
- b. In deciding whether a term can be inferred, a court has regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into. In this regard see **City of Cape Town (CMC Administration) v Bourbon-Leftley NNO, supra**.
- c. The classic test is that of the officious or innocent bystander, who “is neither naive nor foolish” and who “takes into account the facts”. See

Exclusive Books para 53. The term must be so obvious that it goes without saying and must be capable of clear and exact formulation.

- d. A party may not rely on its own act or default to bring about, or to escape, a contractual consequence.

c. Repudiation

39. The issue of repudiation and its consequences was at issue in the matter of **Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd**¹².

40. It is trite that repudiation occurs where a party, by word or conduct and without lawful excuse, exhibits a deliberate and unequivocal intention no longer to be bound. The test is objective. The question is how a reasonable person in the position of the innocent party would understand the conduct, and whether that person would conclude that proper performance will not be forthcoming.

d. Damages for breach of contract

41. The object of an award of contractual damages is to place the innocent party; in the position it would have been had the contract been properly performed. Damage in this sense means patrimonial loss. Our law does not allow a claim for damages for a breach of contract not resulting in patrimonial loss to the aggrieved party. See **Dominion Earthworks, supra at 234**.

42. It is trite that a plaintiff cannot be placed in a better position than it would have been had the defendant performed in the manner authorised by the contract.

¹² 2001 (2) SA 284 (SCA)

43. As stated above, where the merits and the quantum of a contractual damages claim are separated, the merits include the question whether the plaintiff sustained damage in consequence of the alleged breach. What is postponed is the determination of the amount, not the fact, of the loss. In this regard see **Combined Business Solutions CC v Courier & Freight Group (Pty) Ltd**¹³. That is also how the separation was framed in this matter.

e. Pleadings

44. It is trite that the function of pleadings is to define the issues so that each party knows the case it has to meet, and so that the court knows what it is called upon to decide. A party may not plead one case and pursue another at trial, and a court may not decide a case on a basis not raised on the pleadings and not fully canvassed in evidence. See in this regard **Molusi v Voges NO**¹⁴. The enquiry is ultimately one of prejudice: whether the opposing party was, in truth, taken by surprise. A detailed discussion on this issue follows under Evaluation below.

J. EVALUATION

a. The Pleading

45. The plaintiff's first submission is that the defendant pleaded that the contract was dependent on its "receiving" DEA funding, and not on its "retaining" that funding, and that it may not now advance a defence resting on the withdrawal of the funding.

¹³ [2011] 1 All SA 10 (SCA) paras 18 to 20)

¹⁴ 2016 (3) SA 370 (CC)

46. The submission cannot succeed. In paragraph 4.2 of the plea, the plaintiff pleads in three linked subparagraphs that it was an express, alternatively tacit, alternatively properly construed term that:

- a. tender BSM 07/19 was dependent on the defendant receiving funding from the DEA in terms of a service provider agreement;
- b. that there was a direct link between the cancellation of that agreement and the cancellation of the contract with the plaintiff; and,
- c. in paragraph 4.2.3, that “[a]s a result of the withdrawal of the funding by the DEA, the defendant was entitled to cancel the contract with the plaintiff”. Read as a whole, the plea plainly raises the withdrawal of the funding as the event that entitled the defendant to cancel.

47. In plaintiff's own notice in terms of Uniform Rule 35(14) delivered on 9 September 2021, a notice given, “for the purposes of replying to the Defendant's Plea”, the plaintiff required the defendant to produce “[a] copy of the letter from the DEA dealing with the withdrawal of the funding from the DEA to the Defendant as per para 4.2.3 Defendant's Plea”. The plaintiff therefore understood that the withdrawal of the funding was part of the case it had to meet, and it prepared accordingly. This was clear more than four years before the trial. There are no surprise and no prejudice.

48. I find for this reason that the defendant is not precluded from relying on the withdrawal of the DEA funding.

b. The interpretation of the contract

49. On the plaintiff's own pleaded case the contract is the document annexed as POC2. The two provisions at the center of the dispute appear, first, under the heading "Background" in the tender specification and, second, in the pricing schedule.

50. The language of the specification does not say that contractors will be appointed to sites. It says that they are "to be appointed per project/site that needs to be cleared, as and when projects and budgets are approved over the tender period, as and when required". The pricing schedule is to the same effect: the drawing of lots and the roster are what happens "[a]s and when contracts become available". The plaintiff's construction, in my view, is incorrect.

56. The tender was advertised before the MOA had been concluded. Mr. van der Merwe's evidence, which was not gainsaid, was that the clause was included precisely to provide for the eventuality that the DEA funding might not materialise, and because the defendant could not assume that it would receive funding for the full three years. There is no evidence that the plaintiff was aware of why the clause was included into the agreement between the defendant and the DEA.

57. I find, however, that the contract did not oblige the defendant to approve any project or any budget, and did not guarantee the plaintiff any quantum of work.

58. I need to mention that there are qualifications to the above position. I now turn to the question on whether the cancellation was lawful.

c. Was the cancellation lawful?

59. The contract expressly regulates cancellation. It permits the defendant to cancel only if the plaintiff, during the tender process:

- a. fraudulently obtained preference points,
- b. made a false declaration,
- c. committed a corrupt or fraudulent act, or
- d. failed properly and truthfully to complete the schedule relating to the payment of municipal services; or
- e. if the plaintiff failed to fulfil any of the conditions of the contract, i.e.
 - i. rendered services in a manner that was not satisfactory or not strictly in accordance with the specified conditions,
 - ii. failed to commence work within seven working days of an instruction to do so, or
 - iii. became bankrupt or otherwise insolvent.

60. Every one of those grounds is directed at default or misconduct on the part of the contractor.

61. It is not alleged that the plaintiff did any of these things. The reason given in the letter of 22 September 2020 i.e. misalignment between the tender specification and the MOA, which led to the withdrawal of the grant funding, evidently corresponds to none of them.

62. The defendant's answer is that the contract contained a tacit term that it was dependent upon the DEA funding, so that the withdrawal of that funding entitled the defendant to cancel. In my view, there are two difficulties with this answer.

63. The first is whether, having regard to the express terms, there is room for importing the term at all. Here the parties did not leave cancellation unregulated. They addressed it expressly by listing eight specific grounds. Where parties have recorded those circumstances in writing, a court should not readily supplement those grounds by importing an additional and quite different ground. In casu, that would be the defendant's own funding position.

64. The second is the officious-bystander test. I accept a good deal of what the defendant says by way of background. The tender documents are indeed saturated with references to the DEA, the Working for Water standard and the NRM project e.g.

- a. the conditions of contract were based on the Working for Water Code of Conduct;
- b. the eligibility criteria were to be evaluated according to the DEA's prescripts;
- c. successful tenderers were to be admitted to the Nature Conservation database "as required by the Department of Environmental Affairs"; and
- d. quotation packages were to be provided "as per DEA instruction". Mr. Klaasen accepted that he knew, before the contract was concluded, that the funding for the project came from the DEA.

65. Had the officious bystander asked these parties in May 2019 whether the contract could survive if the DEA withdrew its funding for reasons outside the defendant's control, I think it likely that both would have answered that it could not.

66. But that is not the question this case raises, because that is not how the funding came to be withdrawn. The evidence, most of it from the defendant's own

witnesses, establishes the following. The reporting difficulties which lay at the heart of the DEA's complaint arose from the misalignment between the defendant's obligations under the MFMA and the DEA's requirements under the PFMA. This is a misalignment apparent from the MOA itself, which Ms. Leibrandt accepted the defendant would have seen before concluding it.

67. The six grounds of non-compliance in the DEA's letter of 12 September 2019 were, without exception, matters within the defendant's own control, i.e.:

- a. its financial reporting,
- b. its health and safety and COIDA compliance,
- c. its training arrangements,
- d. the suspension of its own employee,
- e. its own instruction withdrawing the contractors from the field, and
- f. its failure to confirm clearing contracts.

68. Most importantly though, it was the defendant which, by paragraph 4.1 of its letter of 8 October 2019, instructed the DEA to “cancel the NRM project with immediate effect”. Ms. Leibrandt confirmed that she had drafted that letter and that the instruction to withdraw the contractors had been hers.

69. I am unable to accept the submission that the defendant was, in these circumstances, the passive recipient of a funder's unilateral decision. In my view, the defendant was the deciding party. The officious bystander claimed in Exclusive Books is “neither naive nor foolish” and “takes into account the facts”. Such a bystander, asked in May 2019 whether the plaintiff was agreeing that the defendant might escape a fixed-term contract by itself requesting the funder to terminate the

funding, would not have answered “of course”. Mr. Klaasen would not agree to such. He would have been entitled to say so.

70. Even more important is the principle that a party may not rely on its own act to bring about the very state of affairs on which it then seeks to rely. Whatever the merits of the defendant's administrative predicament, the answer to it was not to transfer the consequences to a contractor who was not a party to the MOA, had never seen it, and had no means of securing compliance with it.

71. I have not overlooked the defendant's submission that the cancellation of the MOA was a mutual termination which was in the circumstances unavoidable, and that the DEA itself acknowledged the difficulty of implementing the NRM model in municipalities. In my view though, this does not assist the defendant.

72. I find that the contract contained no express or tacit term entitling the defendant to cancel on the withdrawal of the DEA funding, and that the cancellation of 22 September 2020 was not authorised by the contract. It follows that the cancellation was a breach.

d. Has the plaintiff established the fact of loss?

73. The plaintiff's success on the question of cancellation is not the end of the matter. Because the separate merits include the fact of damage, the plaintiff must show that the breach caused it patrimonial loss, i.e. what would the plaintiff have received had the defendant not cancelled on 22 September 2020?

74. Had the contract not been cancelled it would have expired on 30 June 2021. The period lost was therefore nine months and eight days, not the “approximately 15 months” asserted in the plaintiff's heads of argument, and certainly not the twenty-five months over which the pleaded computation of R4 000 000.00 is calculated. The only breach pleaded occurred more than fifteen months into the contract period.

e. Lost earnings

75. Had the defendant not cancelled, it was contractually entitled to allocate no work at all. As stated earlier, the plaintiff is entitled to be placed in the position it would have occupied had the defendant performed as the contract permitted it to perform.

76. This is what actually happened for a full year. From Ms. Leibrandt's instruction of about September 2019 until the cancellation in September 2020, no work whatever was allocated to the plaintiff or to any other contractor on the panel. The plaintiff does not allege that the failure to allocate work during that year was a breach of contract. Its pleaded case identifies one breach only i.e. the cancellation of 21 or 22 September 2020. The plaintiff therefore accepts that he might lawfully have received nothing.

77. The plaintiff seeks to answer this by pointing firstly to the availability of internal municipal funding from 1 July 2020. Secondly, to the constant need for alien clearing, and thirdly to the fact that the replacement tender covered the same services. The answer does not withstand scrutiny, for two reasons.

78. Section 15 of the MFMA confines a municipality to expenditure in terms of an approved budget and within the limits of the amounts appropriated for the different votes in that budget. The existence of money in a different vote for a different tender does not establish that money was, or could lawfully have been, made available under this one.

79. Moreover, the availability of funds does not establish the approval of a project and a budget under BSM 07/19. Both of the defendant's witnesses testified that the defendant had decided not to make further use of BSM 07/19 at all. This, they say, because its specification, built on the Working for Water person-day standard and an average density rate, did not suit the defendant's requirements. In addition, the replacement tender was deliberately drawn on a different, per-hectare basis for that reason. The plaintiff led no evidence that any project or budget was approved, or would have been approved, under BSM 07/19 after September 2020. The burden of proving this was on the Plaintiff.

80. Even assuming that some work would have been allocated, the plaintiff led no evidence that such work would have yielded it a profit. Its pleaded measure rests on the assertion that it had "[h]istorically ... provided such services to the average value of R160 000.00 ... per month". This relates to an earlier and different tender. No evidence was led as to the terms of that earlier tender, or as to whether they were in any respect comparable to those of BSM 07/19. When it was put to Mr. Klaasen in cross-examination that the earlier tender was a different tender with its own specification, he did not answer.

81. His evidence on profit rose no higher than the statement that “[t]he benefit out of that, if I work I get a profit out of it”. He performed one order under this contract and led no evidence of the profit, if any, that he derived from it.

82. On the other side we have Ms. Leibrandt's evidence, which was not challenged in cross-examination and therefore stands unanswered, that the contractors' complaint was, in effect, that the average daily wage under this tender would not cover their expenses. On this record I cannot find that performance of BSM 07/19 would have been profitable to the plaintiff.

83. I have considered whether the plaintiff might nonetheless have established loss of a different kind eg.the value of the lost opportunity, over the remaining nine months of being included in a rotation for such work as the defendant might have chosen to allocate. Loss of that character can, in principle, be compensated. But it is not the case the plaintiff pleaded, it is not the case it advanced in argument, and no evidence was directed at it. I am therefore constrained, in the absence of any evidence, from considering these factors.

84. I find that the plaintiff has not established, on a balance of probabilities, that the cancellation caused it any loss of earnings.

f. Establishment costs

85. The plaintiff claims R418 787.15 in respect of brush cutters and a chainsaw (R106 152.15), a Toyota Hilux and trailer (R192 000.00) and staff training (R120 635.00), on the basis that this expenditure was rendered futile by the cancellation. The claim fails for several reasons, each of which is independently sufficient.

86. First, wasted expenditure is compensable in contract only where the plaintiff shows that the expenditure would have been recovered out of the performance of which it was deprived. Since the plaintiff has not shown that it would have received any work, or that any work would have been profitable, it cannot show that the cancellation is what caused the expenditure to be futile.

87. Second, the contract affords no basis for the claim. The tender required the plaintiff to demonstrate, as part of a 70% minimum functionality threshold, that it had the requisite trained staff, equipment and vehicles. The plaintiff submitted proof that it did and was assessed as responsive on that basis. Pricing was on an all-inclusive person-day basis expressly covering wages, personal protective equipment, tools and equipment, transport and administration, and the MBD 7.2 form records that the rates quoted cover all of the plaintiff's obligations.

88. There is no price item in the contract for equipment, vehicles or training. These costs were, on the terms the plaintiff accepted, for its own account.

89. Mr. Klaasen's evidence that the items were paid for after the contract had been awarded does not assist him. The question is not when the expenditure was incurred but who, under the contract, was to pay it. The answer is that the plaintiff was. Nor does his evidence about being told that this was an EPWP project requiring workers to be drawn from a municipal database assist him. When pressed during his testimony, he was unable to identify any term of the contract to that effect.

90. The brush cutters, the chainsaw, the bakkie and the trailer remain the plaintiff's property and retain value, and the plaintiff continues to perform alien

clearing for the defendant under the replacement tender. No evidence was led of any diminished value. This court is therefore in no position to ensure that the plaintiff suffered any loss.

91. Finally, this claim was ultimately formulated in argument. It is a claim for special damages.

92. I find that the plaintiff has not established that it suffered loss in respect of establishment costs.

K. ACCOUNTABILITY

93. The outcome I have reached is an uncomfortable one, and I find it necessary to state why I concluded as I did.

94. The defendant is an organ of state. Section 195(1) of the Constitution requires public administration to be accountable and to maintain a high standard of professional ethics, and section 217 requires an organ of state contracting for goods or services to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Those obligations do not end when the tender is awarded. As the Constitutional Court observed in **MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd**¹⁵ there is a higher duty on the State to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.

¹⁵ 2014 (3) SA 481 (CC) para 82,

95. Measured against that standard, the defendant's conduct in this matter calls for criticism by this court. This is evident from findings drawn from the evidence of its own witnesses. Firstly, it advertised and awarded a tender before it had concluded the funding agreement on which the tender depended. Secondly, its own officials instructed the contractors out of the field before the funder had said anything. Thirdly, its own letter of 8 October 2019 instructed the funder to cancel the project with immediate effect. Fourthly, its own letter to the funder states inaccurately that the contractors would continue to be used. Fifthly, it then left thirteen contractors bound to a contract under which no work would ever again be allocated for a further eleven months before informing them. This was done in a letter attributing the outcome to a specification "discrepancy", that their contracts were cancelled. Lastly, it re-procured the very same category of work, from its own funds, on a fresh tender advertised before the cancellation letter was sent.

96. This conduct has a cost, and it is not only a cost to the defendant alone. A panel of small contractors organised itself, at its own expense, around a two-year municipal contract. The defendant then rendered it worthless and then terminated it. These matters are not raised in order to enlarge the plaintiff's claim. The lawfulness of the cancellation and of the defendant's responsibility for the withdrawal of the funding were squarely raised for decision on the merits before me.

97. I find that the defendant's treatment of the plaintiff and the other affected small contractors points to a disregard by the defendant of these small contractors. These are not well seasoned businesspeople. They were, on the defendant's own version, drawn from the Working for Water program. The Working for Water programme has a

transformation and empowerment focus, providing jobs and contractor opportunities to historically disadvantaged communities.

98. These are the contractors that the municipality was dealing with. Historically disadvantaged people.

99. I don't make any finding on the conduct of any individual official. Mr. Lourens was disciplined and dismissed by the defendant and is not a party to these proceedings. He has accordingly had no opportunity to be heard before me. Whether the matters recorded above call for any further step under sections 32 and 62(1)(d) of the MFMA is for the defendant's accounting officer, and not for this Court, to determine. I direct that this judgment be brought to his or her attention.

L. CONCLUSION

100. To summarise my findings on the merits. The defendant is not precluded by its pleadings from relying on the withdrawal of the DEA funding. On the proper construction of the contract, the defendant was obliged to allocate work only as and when it approved a project and a budget, and it guaranteed the plaintiff no quantum of work. The contract nevertheless permitted cancellation only on the listed grounds of contractor default. None was present. No tacit term entitling cancellation on the withdrawal of funding can be imported on these facts. This is so, in particular where the defendant itself instructed the funder to cancel the project. The cancellation of 22 September 2020 was accordingly a breach and a repudiation.

101. As damage is an essential element of the plaintiff's cause of action, and as the trial on the merits have run its course, the claim for damages must be dismissed as the plaintiff did not provide any evidence that he suffered any loss.

102. The lawfulness of the cancellation was one of the issues separated for decision. The plaintiff's particulars of claim pray for further and alternative relief. This Court has power under section 21(1)(c) of the Superior Courts Act 10 of 2013 to grant a declaratory order. A declarator will serve a practical purpose.

M. COSTS

103. It is trite that all costs are in the discretion of the Court, to be exercised judicially upon a consideration of the facts of each case, the question being essentially one of fairness. The ordinary rule is that costs follow the result.

104. I take the following factors into account:

- a. The litigation was occasioned by the defendant's own breach. I have found that the cancellation of 22 September 2020 was not authorised by the contract, that the ground on which it was purportedly effected corresponds to none of the eight grounds the parties agreed upon, and that the withdrawal of funding on which the defendant relied was procured by the defendant itself. Had the defendant not cancelled as it did, this action would not have been brought.
- b. Where a successful party's own conduct has occasioned the litigation, that is a recognised ground for depriving it of some or all of its costs.

- c. Success was divided. The plaintiff in my view succeeded on the most important issues. It succeeded to show that the contract was not lawfully cancelled by the defendant. The defendant succeeded on the fact of loss.
- d. The defendant is an organ of state which, for the reasons set out above, bears a higher duty in its dealings with those who contract with it. A cost order which required a contractor to subsidise the cost of the defendant's successful resistance to a claim that the defendant's own unlawful conduct had provoked would not, in my view, be fair.

105. I am also conscious that a cost order against a municipality is met from public funds, and that the ratepayers of Stellenbosch have no voice in these proceedings. That consideration does not immunise the defendant from an adverse order. It is precisely because public money is at stake that public bodies are expected to honour their contracts.

106. Balancing these matters, I consider that justice will be done between the parties if the defendant is ordered to pay 75% of the plaintiff's taxed party and party costs of the action, and each party is to bear the rest of its own costs.

107. Bearing in mind that the trial occupied only a few days and that a single counsel appeared on each side, I consider scale B to be appropriate.

N. ORDER

108. In the circumstances I make the following order:

- a. It is declared that the defendant's cancellation, by letter dated 22 September 2020 of the contract concluded between the parties on 30 May 2019 under tender BSM 07/19, was not authorised by that contract, constituted a breach, and constituted a repudiation of it.
- b. The plaintiff's claim for damages is dismissed.
- c. The defendant is directed to pay 75% of the plaintiff's taxed party and party costs of the action, including the costs of the trial on the separated merits, such costs to include the fees of counsel on scale B as.
- d. Save as provided in paragraph 3, each party is to bear its own costs.
- e. The Registrar is directed to bring a copy of this judgment to the attention of the Municipal Manager of the Stellenbosch Municipality.

FORTUIN J
JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff : Adv J Barlow

Instructed by MRT Law Inc

For the Defendant : Adv J Whitaker

Instructed by Rufus Deckerson Inc