IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION

Case no: EL601/2019

In the matter between:

BLUROCA TRADING CC Plaintiff
(Registration Number : 2006/162347/23)

and

AMATOLA WATER Defendant

JUDGMENT

Zilwa AJ

Introduction

[1] The Plaintiff issued summons against the Defendant, claiming payment of the total sum of R11 310 793.40[1] allegedly suffered as a result of an alleged breach of contract. The parties agreed on the separation of issues in terms of rule 33(4) of the Uniform rules. This Court is called upon to determine the issue of liability only.

[2] At the commencement of the proceedings, I invited the parties to address me on the issue of whether this Court had jurisdiction to hear this matter considering that

[1] *Comprising of Claim 1 in the sum of R1 044 533.87 in respect of site re-establishment and standing costs; Claim 2 in the sum of R7 266 259.52 in respect of repudiation and this amount comprises of loss of profit in totaling R4 785 559.52 and bank loans amounting to R2 480 700.00; and Claim 3 in the sum of R3000 000.00 in respect of patrimonial loss, being injury to the Plaintiff's reputation.*

the contract concluded stipulated that "*dispute resolution shall be through mediation only".* Both parties agreed that I should hear the matter as the clause is susceptible to be declared to be contrary to public policy if regard is had to the case of *Nino Bonino v De Lange*[2] where the then Appellate Division said the following:

> **"***If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against public law of the land."*

[3] In appreciation of the agreement reached by both parties, our jurisprudence and provisions of section 34 of the Constitution[3], I was persuaded to hear the matter.

[4] The first issue is the date of commencement of the contract which is germane to the dispute between the parties. The second issue is whether the Defendant terminated the contract within the prescripts of the law. The third issue is whether, if the Defendant terminated the contract lawfully, it is entitled to proven damages as pleaded in the counterclaim. The fourth issue is whether, if the Defendant has terminated the contract unlawfully, it is liable for the Plaintiff's damages as pleaded in the particulars of claim.

[5] The Plaintiff was a successful tenderer in respect of a contract for the reconstruction of Bulk Water Supply Infrastructure: Libode Corridor, Construction of 4.9km DN 300 GRP Megacom Gravity Main (SV 0 to SV 4900) under Bid No. AW2015/16/10.

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[2] *Nino Bonino v De Lange 1906 TS 120*

[3] Act 108 of 1996

[6] The Defendant was the implementing agent for the OR Tambo District Municipality and had released an invitation for that tender in 2015 for the King Sabata Dalindyebo Local Municipality Presidential Intervention Bulk Water Supply Infrastructure. The Defendant was thus regarded as the Employer for the purposes of the contract.

[7] The General Conditions of Contract for Construction Work (Second Edition – 2010) '*the GCC'* as published by the South African Institute of Civil Engineering is the instrument that regulates and prescribes the works as between the Contractor and the Employer and it formed part of Part 1 of the tender documents.

[8] Gibb (Pty) Ltd '*Gibb'* was appointed as Engineer by the Defendant on the works. In terms of Clause 3[4] of the GCC, Gibb is the Employer's agent and as such

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[4] 3. ***ENGINEER***

3.1 ***Functions of the Engineer***

3.1.1 the function of the Engineer is to administer the Contract as agent of the Employer, in accordance with the provisions of the Contract.

3.1.2 whenever the Engineer intends, in terms of the Contract, to exercise any discretion or make or issue any ruling, contract interpretation or price determination, he shall first consult with the Contractor and the Employer in an attempt to reach agreement. Failing agreement, the Engineer shall act impartially and make a decision in accordance with the Contract, taking into account all relevant facts and circumstances.

3.1.3 In the event of the Engineer being required in terms of his appointment by the Employer to obtain the specific approval of the Employer for the execution of any part of his functions or duties, such requirement shall be set out in the Contract Data.

3.1.4 The Employer may, by written notice to the Contractor and the Engineer, authorized an agent to act as his representative relating to the responsibilities imposed by the Occupational Health and Safety Act on the Employer. Such an agent, if not the Engineer, shall be responsible to the Engineer in terms of these Conditions of Contract.

obtained its mandate from Clause 3.2 of the GCC. Gibbs primary function was to administer the Contract as an agent of the Employer.

Date of Commencement of the Contract

[9] I must highlight from the onset that in terms of the Contract attached to the pleadings as annexure BCL 1, it appears to have been concluded on 10 August 2016. It is the Plaintiff's case that any contractual obligations between the parties commenced when the Contract became effective. On the other hand, the Defendant contends that the commencement date was 27 June 2016, and that the Plaintiff was given possession of the site on 11 July 2016.

[10] In my endeavour to resolve the impasse between the parties I should be guided by the principles laid down in *Napier v Barkhuizen*[5] where the sentiments of Cameron JA were echoed by Ngcobo J in the Constitutional Court in *Barkhuizen v Napier*[6] who had the following to propound:

> *"the Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates. It is also to recognise that intruding on an apparently voluntary concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties individual arrangements."*

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[5] *Napier v Barkhuizen 2006 (4) SA 1 (SCA) at para 13*

[6] *Barkhuizen v Napier 2007 (5) SA 323 (CC) at paras 7, 70 - 71*

[11] In trying to prove the date of commencement of the contract, the Plaintiff led the evidence of Mr Bless Martinson and Mr Richard King. On the other hand, the Defendant led the evidence of Mr Duncan Shaw and Mr Usanda Kewana. Their evidence discussed the contents of various correspondence in a form of letters and emails. One of the letters, being annexure AWB 2, written by Gibb to the Plaintiff had the following provisions:

> *"In the above-mentioned commencement procedures letter, we noted that the Commencement Date for the administration of this Contract would be taken to be the date you sign and receive a copy of the Agreement. As the employer has not yet made your original tender document available for signature, we propose taking your signed acknowledgement of the Employer's Tender Acceptance Notice letter as proof of there being a Contract in place and therefore propose to proceed with the Works in the meantime. We therefore propose setting the official Commencement Date for this contract as 14 calendar days prior to the date of this (letter being the 14 day period in which you had to submit the abovementioned documents); namely Monday* ***27 June 2016****."*(underlined for emphasis)

[12] Let me pause and highlight that, in my view, this matter can be decided by relying solely on one of the basic principles of contract, namely, that the contract gets concluded when both parties append their signatures to the contract document. This trite legal principle was canvassed with *Ms Brauns,* representing the Defendant, and she correctly conceded that generally the contract gets concluded when both parties append their signatures to the contract document.

[13] The contract in question contains clauses that assist me in arriving at a right decision on the issue of the commencement date of the contract. Clause C1.1 contains the following provisions:

"***B) THE OFFERED CONTRACT PERIOD IS 40 WEEKS CALENDAR WEEKS.***

This offer may be accepted by the Employer by signing the Acceptance part of this Form of Offer and Acceptance and returning one copy of this document to the tenderer before the end of the period of validity stated in the Tender Data, whereupon the Tenderer becomes the party named as the Contractor in the Conditions of Contract identified in the Contract Data."

[14] On the Clause that deals with acceptance, the Contract provides as follows:

"***ACCEPTANCE (Page 2 of 5)***

By signing this part of this Form of Offer and Acceptance, the Employer identified below accepts the Tenderer's Offer. In consideration of, the Employer shall pay the Contractor the amount due in accordance with the Conditions of Contract identified in the Contract Data and for the contract period offered. Acceptance of the tenderer's offer shall form an Agreement between the Employer and the Tenderer upon the terms and conditions contained in this Agreement and in the Contract that is the subject of this Agreement.

Deviations from and amendments to the documents listed in the Tender Data and any addenda thereto as listed in the Returnable Documents as well as any changes to the terms of the Offer agreed to by the Tenderer and the Employer during this process of offer and Acceptance, are contained in the Schedule of Deviations attached to and forming part of this Agreement. No amendments to or deviations from said documents are valid unless contained in the schedule which must be duly signed by the authorized representative(s) of both parties.

Notwithstanding anything contained herein, this Agreement comes into effect on the date of signature of this document, including the Schedule of Deviations (if any). Unless the Tenderer (now Contractor) within five days of the date of such receipt notifies the Employer in writing of any reason why he cannot accept the contents of this Agreement, this Agreement shall constitute a binding contract between the parties." (my underlining)

[15] Clause 1.4 has the following provisions:

> "***1.4 Non variation Clause***
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> *1.4.1 This Contract is the entire contract between the parties regarding the matters addressed in this Contract. No representations, terms, conditions or warranties not contained in this Contract shall be binding on the parties. No agreement or addendum varying, adding to, deleting or terminating this Contract including this clause shall be effective unless reduced to writing and signed by both parties."*

[16] Having regard to the Clauses I have extracted above, the clear intention of the parties can be deduced from the terms of the Contract. It is common cause that the Contract stipulates the date of contract to be 10 August 2016 and I have not been provided with any document or *addendum* signed by both parties varying any of the terms of the Contract save for the written communication referred and relied on by the Defendant. This also cuts across the contention by the Defendant's counsel Plaintiff's conduct ratified the change of the terms of the contract. This is incorrect, to say the least, if regard is had to the non-variation clause.

[17] In each case it will be necessary to consider the terms of the offer to determine the mode of acceptance required. Where, however, the offer takes the form of a written contract signed by the offeror, the inference will more readily arise in the absence of any indication to the contrary that the mode of acceptance required is no more than the offeree's signature. This is particularly so where provision is made in the written contract for the offeree to specify the date on which he or she signs the contract.

[18] In *Reid v Jeffrey's Bay Property Holdings (Pty) Ltd*[7] the following was propounded:

> "However, even when writing is not a formal requirement, written contracts are an everyday occurrence in the commercial world. The object of reducing a contract to writing (whether voluntarily or required by statute) is normally to achieve certainty and to facilitate proof (cf, eg, *Woods v Walters 1921 AD 303, Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (A)*). It is presumable for the same reason that the date and place of signature is normally specified in written contracts. The signing of a contract is the usual manner in which parties indicate their agreement to its terms and certainty as to the place and date of the conclusion of the contract can be equally as important for the parties to the contract as certainty is to its content. Consequently it is inherently improbably that any of the parties to such a contract would intend that the time and place of the conclusion of the contract would be determined not from the document itself but by way of evidence *aliunde*."

[19] I readily share and endorse the same views expressed by the learned judge which accord with common sense and commercial practicalities. Indeed, if the position were otherwise, the consequence would be to defeat the very object of reducing the contract to writing. Quite apart from certainty as to the terms of the contract, that object in a case like this one would be to avoid disputes as to the date upon which the offer was accepted.

[20] On the same issue, Flemming J had an occasion to consider the case of *Reid (supra)* in the case of *Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd*[8] when he said the following:

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[7] *Reid v Jeffrey's Bay Property Holdings (Pty) Ltd 1976 (3) SA 134 (C) at 137D - G*

[8] *Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd* 1983 (4) SA 296 (T) at 305 C - F

> "The considerations mentioned in Reid v Jeffreys Bay Property Holdings (Pty) Ltd 1976 (3) SA 134 (C) at 137D - G. The relevant reasoning is as follows: Written contracts are frequently concluded; the purpose is usually to promote certainty and facility of proof; it is probably for that reason that contracts have execution clauses; signature is the usual manner of intimating consent and may be of the same importance as certainty about the contents of the contract; it is resultantly inherently improbable that the parties would intend that the time and place of conclusion of the contract is not ascertainable from the contract itself. It seems to me that this reasoning would apply to any written contract with an execution clause. If so, it is difficult to see why in any such a case the appropriate conclusion would not be that communication of acceptance is not necessary. However, in the absence of proof that an execution clause was inserted with the intention that that in itself should prove the date and place of conclusion of the contract, such an intention may not, I believe, be presumed."

[21] It is common cause that the Contract in question had the execution clause which required the Contractor to commence executing the Works within 21 days from the Commencement Date. For that reason, the reasoning as propounded by Flemming J finds perfect application in this case.

[22] In *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*[9] the Supreme Court of Appeal reaffirmed the principle of the privity and sanctity of contracts and stated the following:

> "[23] The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the

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[9] *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176 (1 December 2017)*

> requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract."

[23] The Court continued and quoted with approval a passage in *Wells v South African Alumenite Company*[10] wherein the Court stated as follows:

> "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice."

[24] Not long ago the Constitutional Court in *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others*[11] also had an opportunity to emphasize the principle of *pacta sunt servanda* and stated the following:

> "[84] Moreover, contractual relations are the bedrock of economic activity, and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.
>
> [85] The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*."

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[10] *Wells v South African Alumenite Company 1927 AD 69 at 73*

[11] *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others CCT 109/19 [2020] ZACC 13*

[25] In my view the problem all started in the disagreement about the date of the Contract and that has perpetuated the confusion up to the determination of the date of completion. It is for this reason that, in my view, as soon as the contract date has been determined, a considerable number of contentions should fall by the wayside.

[26] The evidence of Mr Richard King who is the Project Director and who is also the main member of the Plaintiff revealed that the Plaintiff has been receiving contracts from various municipalities. He relied on the date referred to in the contract being 10 August 2016. His evidence was that there could not have been any activities on site without the signed contract as it is a prerequisite for one to secure guarantees and insurances. Again, as a professional, he is not allowed to commence working because he can be held personally liable for anything that may happen. He referred to annexure 'AWB 2', being a letter dated 11 July 2016 authored by GIBB which had the following provision:

> "*In the above-mentioned commencement procedures letter, we noted that the Commencement Date for the administration of this Contract will be taken to be the date you sign and receive a copy of the Agreement.*

[27] This was echoing what was contained in annexure 'AWB 1', being letter dated 28 April 2016 penned by GIBB which provided as follows:

> *"This Commencement Date for this Contract shall be the date on which you receive a signed copy of the Contract Agreement."*

[28] It is Mr Kings's evidence that the contents extracted above were in full appreciation of the fact that the contract date can never be another date other than the date of signature. The upshot of his evidence was that there could not have been any expectation that any other date given in the letter prior to the date of signature could be applicable. I am in full agreement with this disposition.

Was the contract terminated within the prescripts of the law?

[29] As indicated above, the mistaken determination of the date on which the Plaintiff should take occupation of the site and commence work has a ripple effect on the issue at hand. GIBB decided to give possession of the site to the Plaintiff on 11 July 2016 and this was before the contract came into existence.

[30] The question that needs to be answered is whether GIBB had the authority to make a unilateral determination of when the Plaintiff should take possession of the site before the parties had concluded a valid agreement. To answer this question, it is necessary to have regard to the empowering instrument, being Clause 3 of the GCC. Proper reading of this clause does not suggest any power or authority given to the Engineer in this regard. To the contrary, the Engineer's function is to administer the Contract as agent of the Employer, in accordance with the provisions of the Contract. Needless to mention that no function in terms of the contract can be performed by the Engineer before any contract has come to existence. By parity of reasoning, GIBB acted *ultra vires* in making a determination of the commencement date of 11 July 2016. He equally acted beyond his powers in suggesting that the

Contract can be backdated and be given life that precedes the date on which the signatures were appended.

[31] By the same parity of reasoning, the assessment of progress by the Engineer was ill-conceived since it was based on an incorrect date of commencement. Equally, the termination in question was a product of an incorrect completion date being 28 April 2017.

[32] The Plaintiff's incontrovertible evidence that he received a signed Contract Document on 10 August 2016 nullifies the date of completion as stipulated by GIBB moreso that the letters written on the issue of commencement date are in consonant with the Plaintiff's version.

[33] Ironically, the termination was only triggered by the Plaintiff's insistence on getting payment for the re-establishment of the site notwithstanding the fact that the Engineer found that the Defendant was in default of its obligations. The Defendant, being in breach, is the first one to invoke the cancellation clause. It is my view that this is against public policy and it offends the principle developed in *Beadica 231 CC and Others v Trustees of the Oregon Trust and Others*[12] where Theron J had the following to say in paragraph 87:

> "*…There is no basis for privileging pacta sunt servanda over other constitutional rights and values. Where a number of constitutional rights and*

[12] *Beadica 231 CC and Others v Trustees of the Oregon Trust and Others [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC)*

values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances."

[34] It is concerning that the Defendant, after having been made aware that he was in breach – instead of rectifying the breach – he proceeded to cancel the Contract. Inasmuch as the principle of *pacta sunt servanda* should be honored, the fact that it offends a constitutional right, I should employ a balancing exercise. It is for this reason that the termination of the Contract by the Defendant was unlawful.

[35] Now that I have concluded that the Defendant unlawfully terminated the contract, it automatically follows that the counterclaim cannot be sustained. It also follows as a matter of course that the Plaintiff should be entitled to the damages as it may be able to prove.

[36] It is therefore reasonable to conclude that the delay in delivery of material, wrongful instructions issued by the Engineer which led to a flawed assessment of the rate of progress and disestablishment of the site all led to the Plaintiff being unable to perform in accordance with the works program.

Non-payment of Certificate No. 11

[37] I do not find any legal basis for the Defendant's refusal or neglect to pay this certificate. It is common cause that the Engineer issued this payment certificate amounting to R1 483 411.02 and on 11 December 2018 the Defendant issued a

dispute notice objecting to the approval of the certificate. No meeting was ever held to reach amicable settlement as contemplated in Clause 10.3.2 of the GCC and the Defendant proceeded to terminate the Contract without any indication that the Engineer's ruling will be put in abeyance.

[38] Clause of 10.3.3 of the GCC provides as follows:

> "*In respect of a ruling given by the Engineer, and although the parties may have delivered a Dispute Notice, the ruling shall be in full force and carried into effect unless and until otherwise agreed by both parties, or in terms of an adjudication decision, an arbitration award or court judgment."*

[39] If regard is had to the above provisions, it is incontrovertible that there is no agreement between the parties not to carry the ruling into effect and there is no adjudication decision, arbitration award or court judgment that suspended the Engineer's ruling. For that reason and in appreciation of the GCC provisions, the Defendant is liable to satisfy and make good of this certificate.

[40] Both parties allege and highlight breaches by both sides ranging from late payment certificates and late delivery of the pipes. These breaches were conceded by the Engineer in his letter that dealt with CLAIM NO. 4 : RE – ESTABLISHMENT COSTS DUE TO DELAY IN PAYMENT where the following appears:

> "*We refer to our Engineer's Ruling dated 20 April 2018 on your Claim No. 4 (re-establishment costs due to delay in payment). In light of further representations on your part, we have reviewed your claim from the point of view that the lengthy period of non - availability of pipes had consequential effect of cash strapping your business to the extent that additional costs were incurred when you could not pay your creditors and you could not resume work until paid your Claim No. 3.*

ENGINEER'S RULING IN TERMS OF CLAUSE 10.1.5

We hereby rule the following for Claim No. 4:

- *The direct costs associated with the non-availability of pipes (period 7 June 2017 up to 15 December 2017 inclusive), namely extension of time costs and standing time costs, are fully covered by our Engineer's Ruling on Claim No. 3 (and eventual payment on our Ruling).*
- *We accept that, in addition to the direct costs (above), the lack of being able to generate an income working on this Contract for such a long period waiting for pipes and payment had the unavoidable effect of causing your Company to become cash strapped.*
- *We accept that, being thus cash strapped, you could neither pay your creditors until payment for Claim No. 3 had been received, nor proceed with the Works.*
- *We accept that this had the direct consequence of not being able to pay your creditors in time to prevent them from removing their facilities and equipment on 2 March 2018 (payment in respect of Claim No. 3 was received on 25 March 2018).*
- *We accept that, having not being able to pay your creditors in time, you thus incurred costs to re-establish.*
- *We accept that you could not resume meaningful activity on site from 10 January 2018 (the official end date of the builder's break) because, apart from being cash-strapped as noted above, if you had not kept your site locked and had continued to work, your creditors would have immediately removed their plant (you were hoping to avoid this by receiving Claim 3 monies in time).*
- *We therefore accept that, as a consequence of the lengthy non-availability of pipes:*
    - *You incurred the reestablishment costs; and*
    - *You could not resume work until you had been paid and had re-established on site.*
- *We note that the removal of plant was carried out by the creditors and at no cost to yourselves, therefore no de-establishment costs are due.*
- *We accept that the re-establishment costs, after such a long period of forced inactivity, was equivalent of almost the full establishment costs of the relevant*

> *BoQ items at the start of the Contract (see Engineer's assessed breakdown given as an annexure to this letter). This amounts to* ***R687 513.43*** *(excluding escalation and Vat)."*

[41] Deducing from the contents of the above extract it is abundantly clear that there was an inordinate delay in the delivery of the pipes and that resulted in the delays in keeping up to speed with the project *albeit* that the time frames were based on an incorrect commencement date. The Defendant's contentions that the Plaintiff was to blame for the late delivery of the pipes is not in harmony with the overwhelming evidence which is even confirmed by the Engineer's correspondence. The Engineer acknowledged that the Plaintiff wrote a letter on 19 January 2018 informing him of delays in the delivery of pipes by Defendant. He further acknowledged that there was a trail of emails revealing requests and orders for the pipes and fittings.

[42] Even the Site Diary, which was signed by one Malaki on behalf of the Contractor and co-signed by B. Ntshinga on behalf of GIBB, bears the following recordal:

> "*Contractor instructed to rather wait for fittings instead of skipping the section and continue laying. It has been 36 days since the Order was placed for fittings."*

[43] The evidence led by the Plaintiff further revealed that after taking possession, the site was established and Works commenced with the digging of farrows. When the pipes were delivered, there were no bends to complete the laying of the pipes and that posed problem and it is for that reason that the Plaintiff was instructed to

stop the Works. During the waiting period for delivery of the bends, the farrows had to be filled up to avoid danger to animals and people. The non-delivery of the pipes and other fittings caused enormous delays which had consequential standing time costs and ultimately led to the disestablishment of the site. When the bends were ultimately delivered, the Plaintiff had to undo the work it had already done as the bends could not be affixed to the already laid pipes. I am therefore satisfied that the Defendant, who had a duty to make the pipes available – this being common cause - delayed the project and that had an adverse effect on the critical path.

[44] One of the Defendant's contentions is that the Plaintiff failed to issue dissatisfaction or dispute notices, as envisaged in the GCC, during the entire negotiation and commencement of works. The Defendant further contends that some weight needs to be attached to this failure against the Plaintiff. I disagree. As I have indicated earlier in this judgment, there is not even a need to address further peripheral issues as they have automatically fallen by the wayside after the finding on the commencement date. It is therefore my view that the rest of the issues I have not discussed fall under the peripheral which do not warrant any further consideration.

Costs

[45] Both parties have contended that the costs should follow the event and I also do not find any departure from the general rule.

[46] In the circumstances the following order shall issue:

1. That the Plaintiff's claim against the Defendant succeeds.
2. That the Defendant is liable for the damages as claimed by the Plaintiff in Claims 1, 2 and 3 insofar as the latter may be able to quantify them.
3. That the issue of quantum is postponed *sine die* for later determination.
4. That the Defendant be and is hereby ordered to pay costs of suit.

H ZILWA
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant:	Adv B Metu
Instructed by:	Chitha T Inc. Attorneys, Pretoria c/o MP Ncame Attorneys Inc., East London
For Respondent:	Adv L Brauns
Instructed by:	Clark Laing Inc., East London
Dates Heard:	17 November 2023; 06 – 07 December 2023 and 25 January 2024
Date Reserved:	25 January 2024
Date Delivered:	21 April 2024