IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA

CASE NO: 3574/2022

In the matter between:

NDLAMBE LOCAL MUNICIPALITY	**Applicant**
and	
QUALITY FILTRATION SYSTEMS (PTY) LTD	**First Respondent**
NEWGROUND PROJECTS CC	**Second Respondent**

JUDGMENT

LOWE J

INTRODUCTION

1. The applicant in this matter, under the cover of the certificate of urgency given by counsel on 7 October 2022, seeks an order that the matter proceed as one of urgency and that pending the final determination of the lawfulness of the first respondent's suspension of works ("*the suspension*") under the contract relevant to the Port Alfred Emergency Reverse Osmosis System ("*the* system") concluded between applicant and first respondent and any other disputes that the effect of first respondent's suspension notice dated 26 September 2022, be suspended itself and that first respondent be ordered to resume its obligations to applicant pursuant to the contract with immediate effect. The matter was brought as one of very considerable urgency and I

have similarly drafted the judgment accordingly in far less time than I would have liked.

2. As set out by first respondent in its heads an analysis of the papers indicates that the central issue relates to the following question:

> "Did the first respondent suspend work because it was not paid timeously, or did the applicant withhold payments that were due to the first respondent, because the first respondent had not done the work?".

3. As to urgency, the certificate sets out that insofar as applicant is concerned the matter arises from a patent breach of contract by first respondent relevant to the system invoking constitutional principles, first respondent being the entity contracted by applicant to provide the services relevant to the system, which, alleges applicant, first respondent being in breach of the contract between the two parties relevant to the operation of the system.

4. Port Alfred has a population of approximately 35 000 people previously supplied with a bulk water supply from the Kowie river and Sarel Hayward dam. Due to the drought these have been depleted and the current water demand of the community is some 6,54 ML/day with an increased demand during the festive season which is simply not being met. Port Alfred at the moment gets 3.1 ML/day from other sources and the closure of the system is, says applicant, as a result of first respondent's breach having an immediate negative impact on the availability of water to the community. In short temporary steps have been taken to alleviate the position by the trucking of

water at the cost of R111 000,00 per day as a so-called "*stop-gap arrangement*."

5. To put it shortly, applicant relies on the terms of the contract between the parties including what is referred to as the "FIDIC" document arguing in the context of its admitted non-payment of first respondent that this non-payment was justified, applicant being in breach of the agreement on the one hand, and on the other having failed to give the necessary twenty-one days' notice in terms of clause 16.1 of FIDIC before suspending its operations.

6. It is submitted then shortly, that being in breach of the agreement, and not being entitled to suspend the operations of the works, as it has done, applicant is entitled to an order compelling first respondent as a matter of specific performance to continue with the works and to perform its obligations, pending dispute resolution and arbitration in terms of the contract.

7. In response, first respondent submits, to the contrary, that first respondent is by no means in breach of the FIDIC agreement in any way, that it is in fact applicant whose failure to pay first respondent in terms of the contract that has precipitated not only the urgency but the dispute between the parties, that failure to pay being unjustified in terms of the facts, circumstances and contract, and that first respondent in turn and in terms of the FIDIC contract, particularly clauses 14.8 and 16.1 thereof, read with the correspondence, was entitled to suspend the works as it has done, pending compliance therewith.

8. It is argued further that the second string to applicant's bow is that first respondent failed to deliver the required output. This, says first respondent, is

unjustified, incorrect and simply an excuse not to pay first respondent. It is alleged in terms that it is first respondent's stance that applicant and the application is motivated solely by applicant seeking to compel first respondent to provide services without payment being made by applicant to first respondent for the amounts certified by applicant's own representative as being due and payable. The impasse says first respondent would be resolved, the suspension of the works would be lifted and the entire dispute eliminated, or if there were any remaining aspects referred to arbitration as required in the agreement, if applicant made payment as it is obliged to do.

9. Thus not only does first respondent challenge the urgency of the matter stating that this is self-created by applicant's unilateral conduct in breach of the contract, but further that applicant is simply wrong as to its attitude, in breach of its obligation to pay, entitling first respondent on notice to suspend which notice, first respondent alleges, was contractually given to suspend the works.

URGENCY: PRINCIPLES

10. Urgency must be judged against the background of Rule 6(12) of the Uniform Rules of Court and Rule 12(d) of the Eastern Cape Practice Directions[1].

11. Urgent applications require an Applicant to persuade the Court that non-compliance with the Rules, and the extent thereof, is justified on the grounds

[1] ***Bobotyana supra***

of urgency. Applicant must demonstrate *inter alia* that it will suffer real loss or damage were it to rely on normal procedure.

12. The Rules adopted by an Applicant in such an application must, as far as practicable, be in accordance with the existing Rules both as to procedure and time periods applicable.

13. A Respondent faced with an urgent application, and to avoid the risk of judgment being given against it by default, is obliged provisionally to accept the Rules set by Applicant and then, when the matter is heard, make its objections thereto if any[2].

14. In **Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC and Others** [3] Plasket AJ (as he then was) said as follows:

> "[37] It is trite that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. It is also true that when Courts are enjoined by Rule 6(12) to deal with urgent applications in accordance with procedures that follow the Rules as far as possible, this involves the exercise of a judicial discretion by a Court 'concerning which deviations it will tolerate in a specific case'.
>
> [38] … it is not in every case in which the applicant may have departed from the Rules to an unwarranted extent that the appropriate remedy is the dismissal of the application. Each case depends on its special facts and circumstances. This is implicitly recognised by Kroon J in the *Caledon Street Restaurants CC* case when he held - looking at the issue from the other

[2] ***Caledon Street Restaurants CC v D'Aviera*** [1998] JOL 1832 (SE). ***In re: Several Matters on the Urgent Roll*** [2012] 4 All SA 570 (GSJ) [15]
[3] 2004 (2) SA 81 (SE) [37], [38] and [40].

> perspective, as it were - that the 'approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the Rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a time or not'.
>
> …
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> [40] … Indeed, the erstwhile Appellate Division has on a number of occasions turned its back on such formalism in the application of the Rules. For instance, in *Trans-African Insurance Co Ltd v Maluleka* Schreiner JA held that 'technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits'. … in *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket,* Harms JA held that the Rules 'are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right' contained in s 34 of the Constitution."[4]

15. There are degrees of urgency of course. An Applicant must set out explicitly the circumstances which render the matter urgent such as to justify the curtailment of the Rules, procedures and time periods adopted. That there will be a loss of substantial redress, if not heard on the basis chosen, must be shown.

[4] But see: **Murray & Others NNO v African Global Holdings (Pty) Ltd & Others** 2020 (2) SA 93 (SCA) [35], [38], [39] and [40]

16. An Applicant cannot create its own urgency by simply waiting till the normal rules can no longer be applied.[5]

17. If the above is satisfied other issues come to be considered, some of which are:

17.1 Whether Respondent can adequately present its case in the time given;

17.2 Other prejudice to Respondent and the administration of justice;

17.3 The strength of Applicant's case and any delay in asserting its rights (self-created urgency).

THE APPROACH

18. Having set out the basic situation between the parties and their submissions in each case, and referring to the principles of urgency, I intend dealing with the merits of this matter together with the issues of urgency determining both insofar as is necessary.

19. It must be said, however, that certainly the issue of the provision of water to a community is necessarily one of great urgency having regard not only to the constitutional issues involved but also simply that water is a necessity in

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[5] **Lindeque and Others v Hirsch and Others, In Re: Prepaid24 (Pty) Limited** (2019/8846) [2019] ZAGPJHC 122 (3 May 2019) [10]; **Masipa & Another v Masipa 2020** JDR 1054 (GP); **Edrei Investments 9 Ltd (In Liquidation) v Dis-Chem Pharmacies (Pty) Ltd** 2012 (2) SA 553 (ECP); **Bandle Investments (Pty) Ltd v Registrar of Deeds and Others** 2001 (2) SA 203 (SE) 213; **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others** (11/33767) [2011] ZAGPJHC 196 (23 September 2011) [6] and [9] – The fact that Applicant now wants the matter resolved urgently does not render the matter urgent; **Ntozini and Others v African National Congress and Others** (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) 415.

respect of both life itself and relating to health, safety and standards involving sewerage as an example.

20. As to urgency the main issue raised by first respondent is really limited to the submission that it is, as I have said, applicant that has created the impasse by its non-payment and therefore created its own urgency. I will deal with this in due course at an appropriate place hereafter.

21. It must be said, however, that one's inclination is to treat the matter as one of urgency, in the context of the dispute, as a decision made on the merits in this matter will undoubtedly assist in resolving the impasse between the parties in the interests of all.

22. It is perhaps worth mentioning that first respondent also contends that the dispute between the parties has been building for months and that this of itself contributes to the lack of urgency contended for.

THE ISSUES RELEVANT TO THE SUSPENSION OF THE WORKS AND THE DISPUTE BETWEEN THE PARTIES

23. The tender implicated in this matter was awarded and the contract was signed between the parties with a commencement date on 10 December 2020.

24. The tender involved two projects namely:

    24.1 a sea water reverse osmosis plant to provide 2 mega litres per day; and

    24.2 a reclamation reverse osmosis plant to provide 3 mega litres per day.

25. The two plants were, says first respondent, inter dependant, water from the reclamation reverse osmosis plant being required to dilute the sea water brine, the two plants accordingly not being separate units but inter dependant.

26. Second respondent (who does not oppose the matter) was appointed as applicant's representative and has no authority to release either party from its obligations.

27. The contract, importantly incorporates the FIDIC DBO Contract Guide first edition 2011 being conditions of contract for design, build and the operation of projects (FIDIC).

28. The principle issue between the parties is whether first respondent was contractually entitled to suspend all works at the two water reverse osmosis works in Port Alfred on 30 September 2022, it accordingly presently not performing any of its contractual duties in terms of the contract between applicant and first respondent, this drastically affecting the production of water from the plant.

29. The contract has terms relevant to payment certification this being particularly in FIDIC paragraph 14.7 relating to the issue of advance and interim payment certificates.

30. Once a payment certificate has been given, clause 14.8 of FIDIC provides the manner in which payment is to take place namely:

> "*The employer shall pay to the contractor:*
> *a. ….*

b. The amount certified in each Interim Payment Certificate within 56 days after the Employer's Representative receives the corresponding Statement and supporting documents, including any amounts due in accordance with a decision of the DAB which have been included in the Interim Payment Certificate; and

c. …"

31. In respect of payment certificate 12 the Employer's Representative, Mr. L. Fourie, issued a payment certificate 12 on 21 June 2022 for R2 155 975,00. This certificate had no payment qualifications and in terms of clause 14.8 of FIDIC was then due 56 days from the date when the payment certificate was submitted to the Employer's Representative. On 22 August 2022 first respondent notified the applicant of the fact of non-payment in terms of clause 14.8 of the FIDIC contract. This is dealt with in annexure FA6 to the papers, a letter addressed by first respondent to the Employer's Representative dated 20 September 2022 (subsequent to notification allegedly of the fact of non-payment). This document is said to be a notice in terms of the contract described as follows:

"*Notice: PC12 - Subclause 16.1: Contractor's Entitlement to Suspend Work (2)".*

32. There follows a recitation of communications having reference including LoC135 described as "*Notice 14.8 delayed payment – 1* …"

33. There is also reference to LoC142 Notice being described as "Notice: PC12 – Sub-clause 16.1; Contractor's Entitlement to Suspend Work".

34. The background in the document is clearly set out relevant to payment statement 12 and it is said that first respondent did not receive payment and proceeded to notify the employer on 22 August 2022 of its failure to make payment. It was said that this was "… *done as per the requirement of Sub-clause 14.8 of FIDIC DBO.*" It is then said:

> "*On 13 September 2022, QFS notified (See LOC142) the Employer of its duty to pay and stated that should the Employer fail to action the payment of PC12, by the 20th September 2022, then QFS will exercise their right to suspend the works as per Sub-Clause 16.1 of FIDIC DBO*."

35. The last paragraph under heading "*Suspension*" informs with reference to Sub-Clause 16.1 of FIDIC, the employer that the right would be to exercise to suspend at 18h00 on 20 September 2022 due to non-payment. It is important to note that there is no reference to any amounts due by way of a DAB decision.[6] Importantly the founding papers in this regard accept in annexing the notice that it was given in terms of clause 16.1 and 16.2 by FIDIC, and applicant would accrue a right to terminate on the expire of 21 days, and made payment accordingly.

36. Moving forward it is common cause that applicant did not pay the sum of R2 155 975,00 by 20 September 2022, though the payment certificate was in fact paid at a later date and is currently settled.

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[6] This is important as there was reference in argument to a DAB decision against first respondent which is not referred to in the payment certificate 12 or payment certificate 13. This is of fundamental importance to each certificate and the amount due.

37. Perhaps more important, is that the Employer's Representative issued payment certificate 13 in the amount of R1 323 273,00 on 25 July 2022.

38. Again, in summary, this as set out previously was due within 56 days and on this occasion and in terms of annexure FA8 the sequence of events is set out. In short this communication, dated 26 September 2022, had the same heading as the previous notice in respect of statement 12 but referred to statement 13 and specifically the heading under "*Notice*" stated and referred to the contractor's entitlement to suspend works in terms of sub-clause 16.1.

39. The documents to which reference was made contained *inter alia* reference to payment certificate 13 and reference to LoC140 being a "*notice*" in terms of clause 14.8 referring to "*delayed payment*". The background, as previously, is set out in detail relevant to the interim payment statement 13 having been submitted on 4 July 2022 being approved by applicant's representative and payment certificate 13 being issued as well as an invoice. Payment was due within 56 days thereof, the contractual date for which it being stated as 29 August 2022. The following paragraph then sets out that:

> *"On the 9th of September 2022, QFS notified the Employer (See LoC141), as per the requirements of Sub-clause 14.8 of FIDIC DBO, about its failure to pay them for Statement 13 (PC13). The payment was already 11 days overdue."*

40. The notice then continues to set out that as at the date of the notice, 26 September 2022, 17 days after LoC141, only part of the sum had been paid leaving R692 862,71 still due to the contractor. It is then said that in terms of sub-clause 16.1 of FIDIC the contractor was entitled to suspend the works, 21

days after notice of failure to comply with sub-clause 14.8, giving notice of their exercise of the right on 30 September 2022 should payment not be made by that date.

41. First respondent argues that this was contractually justified and the notices compliant with FIDIC. Applicant on the contrary argues that the notices were not contractually compliant and did not set the basis for suspension.

42. Turning to the contract itself, there is no doubt that clause 14.8 thereof required payment of Interim Payment Certificates (as in this matter) within 56 days of receipt of the corresponding statement and supporting documents. There seems to be no dispute that the payment certificates were given as indicated in respect of 12 and 13. Payment certificate 13 remains partially unpaid. That certificate is the basis for the decision to finally suspend the works by first respondent.

43. Clause 14.8 itself does not provide for or require any notice. It however provides strict time limits upon the employer (applicant) within which to pay and if applicant fails to meet those dates affords first respondent contractual rights in terms of clause 16.1. Those rights are to firstly suspend the work until payment is received and then if payment has not been received within 42 days after the period stated in clause 14.8 the first respondent may terminate the contract.

44. Turning to clause 16.1, upon failure to make clause 14.8 payment timeously "…*the Contractor may, not less than 21 days after giving Notice to the Employer, suspend work … unless and until the Contractor has received the*

Interim Payment Certificate, reasonable evidence or payment as the case may be and as described in the Notice."

45. This is the main provision in FIDIC entitling the contractor to suspend work. It is clear that this enables first respondent to put pressure on applicant to honour its payment obligations without taking the step of terminating the contract or unlawfully refusing to work if not paid.

46. The concept of giving notice as provided in clause 16.1 requires reference back to clause 1.3 of FIDIC which in summary requires the notice to be identified as a "*notice*" and must be such as to "*include reference to the Clause under which it is issued*".

47. Perhaps the main issue between the parties is whether the notices and particularly that relevant to payment certificate 13, which remains unpaid, complies with FIDIC entitling suspension.

48. In my view "FA8" more than clearly identifies the document as a "*notice*" and refers again more than clearly to LoC140 being "*Notice 14.8 Delayed Payment*". In terms, the notice then continues to set out the time line being a due date for payment on 29 August 2022 in respect of payment certificate 13. However, there was a delay in respect of the issue of a notice, and LoC141 is referred to being a letter of 9 September 2022 "*as per the requirements of sub-clause 14.8*". It is clear in the context of the papers and annexures that this is a notification to applicant concerning its failure to pay payment certificate 13 then being "*already 11 days overdue*".

49. It cannot be seriously contested, in my view, that on 9 September 2022 there was written notice given by first respondent to applicant that there had been a failure to pay payment certificate 13, then 11 days overdue, the time line then commencing to run from 9 September 2022 affording applicant not less than 21 days to make payment. The letter of 26 September 2022 also being a "*notice*" referred to all of the above and repeated in terms of clause 16.1, a special reference thereto, of its entitlement to suspend within 21 days after notice of failure to comply with clause 14.8 referring to the fact that this right would accrue on 30 September 2022.

50. The argument for applicant, that this notice (of 26 September) was uncontractual as not giving sufficient period, and in addition not sufficiently referring to clause 16.1 and relying on 14.8, is objectionable and falls to be rejected. Whilst it is true that LoC141 is not included in the papers, and purports to be given in terms of sub-clause 14.8 of FIDIC, it is clear on any sensible reading of the notice of 26 September which sets out fully to those involved and who would have been in possession of all the correspondence and notices, the entire time line and there can be no doubt, in my view, that on a proper reading thereof, applicant would have been more than fully aware that it had received notice in respect of the non-payment of an amount due in terms of clause 14.8, warning of the failure to pay within 21 days of the giving of the notice as being such as to entitle suspension, a reminder hereof being given on 26 September 2022, the 21 days period expiring as of 30 September 2022.

51. There was no dispute between the parties in argument as to the proper interpretation of the clauses of the contract relevant, but rather whether there had been strict compliance therewith.

52. In my view, to hold to the contrary, would be an exercise in futile formality, in circumstances in which the notices clearly referred to would have left no doubt whatsoever in applicant's mind as to the fact that demand for payment was being made, that notice of non-payment had been given, and that absent payment within the stipulated contractual 21 day period this would result in the suspension of the works.[7]

53. In my view, accordingly, the applicant's argument in this regard, that first respondent was not entitled to suspend the contract pending payment, is such as to be rejected. A further consequence of this, is that on the face of it, applicant is indebted to first respondent in respect of at least payment certificate 13 which remains unpaid in part.[8] Again I am not able to see any DOB deductions in the certificate which is significant, the amount certified is what is to be paid in terms of FIDIC.

54. Whilst the founding papers set out what is contended by applicant as the history of the matter, the contract commencing on 10 December 2020, with the extension of the completion date in respect of the second component of the works to 31 July 2021, and says applicant, completion date not being

[7] Clearly reading clause 14.8 and 16.1 together and referring to same in terms there cannot have been any misapprehension in this regard.
[8] In this regard I do not overlook that first respondent's answering affidavit is terse and does not on occasion do more than put applicant to the proof. However this perhaps not unexpected given the stringent time line imposed in the urgent application.

achieved this being finally achieved "*after July 2021*", the breaches relied upon in the application are:

54.1 That the output generated by the sea water osmosis component was lower than the required design output, being alleged that the plant did not meet the production requirements prescribed and thus was a breach of first respondent's obligation;

54.2 That there was a demand by applicant upon first respondent flowing from its failure to make good within 14 days;

54.3 That in fact first respondent's failure to deliver the required output relieves applicant of the obligation to pay amounts certified in payment certificates but that the issue need not detain this court as it will be ventilated in dispute resolution proceedings in due course;

54.4 Thus without identifying any "breach" linked specifically to the relief sought in the matter (specific performance), applicant then joins issue on the question of non-payment particularly in respect of payment certificate 13;

54.5 Thus, coming back to the first relevant "breach" referred to above, applicant states that in fact first respondent failed to comply with its obligations under clause 16.1, was not entitled as I understand it to suspend and is thus in breach of the contract.

55. Applicant's papers are somewhat confusing, inasmuch as it seeks specific performance but contends for an entitlement to terminate whatever the position is with certificate 13, first respondent being alleged to be in default. Indeed, applicant has issued a notice of breach dated 5 October 2022 "FA10".

56. Applicant concedes that the court is not required to make a "*final pronouncement*" on the lawfulness of the conduct of first respondent or any issue arising out of it as the contract requires the parties to refer such disputes to adjudication and thereafter arbitration if necessary. It is said then

that applicant seeks interim relief pending the final resolution of the disputes between the parties, that being so it is said, that first respondent must be ordered to continue with (resume) its obligations to applicant in providing the services envisaged in the contract pending the final resolution of those disputes, this being interim relief.

57. The above analysis whilst in many ways self-contradictory, establishes that in essence applicant seeks an order compelling compliance as one of specific performance, pending whatever may happen in the dispute resolution mechanism provided for in the contract.

58. First respondent's answer that it is entitled to suspend the works for lack of payment, is met by way of a technical analysis of the notices given and the submission that they were not given in terms of the contract, something I have already dealt with and dismissed.

59. That being so, it follows, that applicant cannot succeed in the relief sought even on an interim basis in this application, as the entitlement to suspend vested in first respondent defeats the relief sought.

60. Indeed, Mr. Olivier for applicant, in setting out the common cause facts in his heads of argument, states that the disputes of facts evident from the lengthy papers are irrelevant, having regard to the works suspension adverted to above, referring to clause 16.1 of the contract, to the correspondence (I have already referred to) and the allegation that first respondent had failed to adhere to clause 16.1 and had not given the necessary 21 days notice before suspending.

61. Secondly, Mr. Oliver points to the dispute between the parties relating to first respondent's compliance with the terms of the agreement, which was referred to the Dispute Adjudication Board in terms of clause 20 of FIDIC which findings were provided on 13 October 2022. He points out that first respondent was found not to have complied with the requirements stipulated in the tender relevant to the production specifications of the plant. The remedy was to impose penalties and to recover these from the amount due on contract as payment certificates.

62. Mr. Oliver points out that this decision by DAB is enforceable and stands until set aside. The difficulty with this argument is that the certificates do not discernibly reflect any amount owing by first respondent to applicant in this regard, nor is same deducted from the certificate.

63. The second difficulty with the argument, is that this is not raised in the founding papers as any basis for the relief sought, or indeed as a defence to the claim for payment such as to disentitle first respondent from suspending the works. This is raised in reply but nothing is pointed to in the payment certificates as per clause 14.8.

64. Indeed, the adjudication referred to dated 13 October 2022, comes subsequent to the launching of the application and is dealt with only in reply. The adjudication is raised in reply for the first time in the context that it is argued in the papers, that there can be no failure on the part of the applicant to make payment where first respondent alleged that it met the requirements

of the contract and that first respondent had been found to be in breach of its design and construction obligations.

65. It seems to me, that this entirely misses the point, and that one has to look to the founding papers to determine whether the case made out is sustainable, with such legitimate reply to the answering papers as may be found to be in place.

66. It must be remembered, that in the founding papers, there is no suggestion made that payment was not due in payment certificate 13, or that a claim was being set off against such payment certificate justifying non-payment thereof.

67. The payment certificates were issued by applicant's own representative as being due and payable.

68. It is, it must be remembered, first respondent's case and this set out in annexure FA13 that first respondent tendered performance of its obligations against payment which was repeatedly delayed, first respondent stating that it could not sustain these services absent payment.

69. Indeed, it is plain from the papers, and the correspondence, that immediately payment is made in respect of outstanding payment certificates as certified, the work will recommence.

70. On an overall consideration of the basis of the application, and the arguments made, there can be no doubt, that applicant was indebted to first respondent in respect of payment certificate 13, and was in breach of the contract and subject to clause 16 notice accordingly. On the construction of that notice

against the terms of the contract, as I have already concluded, the provisions of clause 16.1 came into operation affording first respondent the right to suspend the works in the event of non-payment being persisted in for 21 days post notice. This seems to me to be clearly established. It is clear from the contract that if applicant fails to comply with its payment obligations in terms of clauses 14.7 and 14.8 and upon proper notice being given under clause 16.1 first respondent accrues the right to suspend.

71. In the result, and on the basis of the allegations made by applicant, and having regard to the conclusion I have reached above in respect of non-payment and notice, first respondent has more than sufficiently demonstrated its entitlement to suspend.

72. In those circumstances, applicant consequently is not entitled to the relief it seeks compelling first respondent to suspend its suspension notice or that it should be ordered to resume its obligations.

URGENCY: RESULTS

73. Having considered all the papers as a whole, and the disputes between the parties, it seems to me that having regard to the importance of water delivery to the citizens relevant within the area of the municipality, and the constitutional obligations in this regard, the matter was of sufficient urgency to warrant being heard, even though the issues arose consequent upon applicant's unjustified non-payment to first respondent of certificate 13 in its remaining amount.

74. I say so in addition having regard to the need to reach a basis for resolving the continued conflict between applicant and first respondent, and to afford a basis for the parties to reach a situation where service delivery may be recommenced as soon as possible – which would not have been the case had the matter not been heard and struck off the roll for want of urgency.

75. As already pointed out above the urgent time line has required this judgment to be produced under considerable pressure and in less time that I would have liked.

COSTS

76. As to costs, it seems clear that the usual order that costs follow the result must follow.

ORDER

77. In the result the following order issues:

1. The application is dismissed.
2. Applicant is to pay first respondent's costs of the application.

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M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant:	Adv. Olivier, instructed by Moletsane PN Attorneys Inc, East London, c/o Yokwana Attorneys, Grahamstown, Mr. Moletsane
Appearing on behalf of the First Respondent:	Adv. Cole S.C. instructed by Netteltons Attorneys, Grahamstown, Ms. Pienaar.
Date heard:	18 October 2022
Date delivered:	25 October 2022