IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 89831/2018
(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**
DATE:**27 JUNE 2023**
SIGNATURE

In the matter between:
LONEROCK CONSTRUCTION PLAINTIFF
(REGISTRATION NUMBER: 2[...])

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY (SOC LIMITED) DEFENDANT

JUDGMENT

NEUKIRCHER J:

[1] The present dispute has its origin in a contract entered into between the parties, which flowed from the award of a tender to the plaintiff pursuant to an open bid process. The defendant's letter to the plaintiff in which it was notified that the bid had been awarded to it is dated 17 October 2011. In essence, the bid was in respect of the upgrade of 2 km of road of the R61 through Tambo in the Eastern Cape. The works included upgrading the R61 to a kerbed dual carriageway, including a piped urban storm water drainage system and mechanically stabilized earth retaining walls.

It also included the construction of a public transport interchange and associated urban roads, as well as 3 km of low volume community access roads (the works).

[2] The original contract period was for 18 months, calculated from 17 October 2011 and was due to expire on 30 April 2013. The plaintiff however applied for, and was granted, an extension of the contract period. The revised completion date was 8 May 2014. Unfortunately, and this is common cause, the plaintiff overran that date by a further 11 months and only completed the works on 1 April 2015.

[3] It is common cause that plaintiff neither applied for, nor was granted, a further extension of the contract period and therefore that the defendant was entitled to levy penalties for the period the contract overran its completion date, which it did. The defendant however not only charged plaintiff penalties for the 11 months, it also refused to pay the plaintiff's Preliminaries and Generals (P&Gs) and contract price adjustment (CPA). This refusal constitutes part of the present dispute which centers around Interim Payment Certificate 36 (IPC 36) which was issued by the engineer appointed by the defendant under the parties' contract, one Henderson, who is employed by Hatch Goba (Pty) Ltd.[1] IPC 36 in its disputed form includes an amount of R4 585 549 in respect of P&Gs.

[4] Thus, at the heart of the issue is whether or not the plaintiff is entitled to be paid its P&Gs and CPA in the amount certified in IPC 36 dated 6 August 2015. I pause to mention that the full amount claims in IPC 36 is R5 731 344-19. It is however common cause that the defendant has paid an amount of R1 528 026-25, which is the amount it alleges is due, owing and payable to plaintiff. Thus, if successful, the plaintiff claims the balance (incl VAT) of R4 585 549-00.

[5] The contract itself consisted of three separate documents:

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1 The engineering firm appointed by defendant in terms of the contract.

(a) the FIDIC Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (1999) (FIDIC Conditions);[2]

(b) the COLTO Standard Specifications for Road and Bridge Works 1998 (Colto);[3] and

(c) the Project Document containing the tender notice, conditions of tender, tender data, returnable schedules, general and particular conditions of contract, project specifications, pricing schedule, form of offer and site information issued by the defendant.[4]

6] Whilst the plaintiff was responsible for the principal works set out in the main contract between it and the defendant, the tender also provided for an allocation of 30% of the contract value to be outsourced to local community contractors (the SMMEs). The plaintiff then entered into separate contracts with each SMME but on the same terms and conditions as the main contract between it and the defendant. The reason that this is relevant is:

(a) firstly, the plaintiff alleged that it was as result of the delays caused by the SMMEs that the works could not be completed in time; and

(b) the defendant insisted that the plaintiff pay the SMMEs in full and that the retention monies that the plaintiff was entitled to keep in terms of the contract, also be paid in full to the SMMEs. The SMMEs were thus not penalised- either by having to pay penalties, or in the disallowance of their P&Gs - for the contract overrun period despite their hand in the delays. The plaintiff however did not receive even-handed treatment from the defendant who applied penalties and refused to pay plaintiff's P&Gs and CPA. The defendant's version is that the contract between plaintiff and the SMMEs has

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2 Issued by the International Federation of Consulting Engineers
3 Issued by the Committee of Land Transport Officials
4 This comprises of two volumes

nothing to do with it and it cannot be held responsible if the plaintiff failed to enforce the terms of its contracts with the SMMEs.

7] It must be said that the actual chain of events is not in dispute and the facts giving rise to the present action are common cause. The issue lies in the manner in which the parties' rights and obligations under the main contract stand to be enforced. This being so, I am of the view that this issue is not one which rests on the credibility of the parties' respective witnesses, but rather on the manner in which they interpreted and enforced their respective rights and obligations.

8] As was stated in **Natal Joint Municipal Pension Fund v Endumeni Municipality**[5]

> *"The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in 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. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself',*

5 2012 (4) SA 593 (SCA) at para [18]

read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

9] It is as against this back drop that the events giving rise to the claim unfolded.

The facts

The contract

10] As stated supra, the contract consisted of three working documents. However they did not exist independently of each other and certain of the FIDIC Conditions were amended by the Particular Conditions.[6] What is relevant is that:

(a) the defendant was "the employer";

(b) the plaintiff was "the contractor"; and

(c) Hatch Goba (Pty) Ltd (as represented by Henderson) was "the engineer".

11] In terms of the FIDIC Conditions, incorporating the amendments introduced by the Particular Conditions, the engineer's duties and authority included the following:

(a) he had no authority to amend the contract;

(b) whenever he exercises a specific authority for which the defendant's approval is required, *"then (for the purpose of the contract) the (defendant) shall be deemed to have given approval."*[7]

(c) within 14 days after receiving a statement and supporting documents from the plaintiff, he

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[6] It is not necessary to set out each and every amendment individually as not all are relevant. Those that are will be highlighted during the course of this judgment.

[7] Clause 14.6 of FIDIC – whilst the Particular Conditions do amend clause 14.6, they do not do so substantively

"shall … issue to the Employer an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due,…

An Interim Payment Certificate shall not be withheld for any reason although:

(a) if any thing supplied or done by the Contractor is not in accordance with the Contract the cost of rectification or replacement may be withheld until rectification or replacement has been completed; and/or

(b) if the Contractor was or is failing to perform in work or obligation in accordance with the Contract, and has been so notified by the Engineer, the value of his work or obligation may be withheld until the work or obligation has been performed.

The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent or satisfaction.

The Employer shall pay to the Contractor:

(a) …

(b) The amount certified in each Interim Payment Certificate within 28 days after the Engineer receives the statement and supporting documents; and

(c) The amount certified in the Final Payment Certificate within 56 days after the Employer receives this Payment Certificate.";

(d) to issue a Final Payment Certificate[8] within 28 days of receiving the final statement and written discharge and

"…the Final Payment Certificate which shall state:

(a) the amount which is finally due; and

(b) after giving credit to the Employer for all amount(s) previously paid by the Employer and for all sums to which the Employer is entitled, the balance (if any) due from the Employer to the Contractor or from the Contractor to the Employer, as the case may be.

If the Contractor has not applied for the Final Payment Certificate…the Engineer shall request the Contractor to do so. If the Contractor fails to submit an application within a period of 28 days, the Engineer shall issue the Final Payment Certificate for such amount as he fairly determines to be due.";

(e) to settle any dispute lodged by the plaintiff in terms of clause 20.2 as follows:

"(a) The Contractor shall have a right to dispute any ruling given or deemed to have been given by the Employer or Engineer, provided that unless the Contractor shall, within 42 days after his receipt of the ruling or after the ruling shall have been deemed to have been given, give written notice (hereinafter referred to as a 'dispute notice') to the Engineer, referring to this Clause, disputing the validity or correctness of the whole or a specified part of the a ruling, he shall have [a] further right to dispute that ruling or the part thereof not disputed in the said Dispute Notice.

(b) All further references herein to a ruling shall relate to the ruling, or part thereof, specified in the Dispute Notice, as varied or added by

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8 Clause 14.13 of FIDIC

agreement between the Contractor and the Engineer, or by the Engineer's decision in terms of subparagraph (c) or by the Mediator's opinion to the extent that it has become binding in terms of Sub-Clause 20.3.

(c) The Engineer shall:

(i) before giving his decision on the dispute, consult the Employer thereon and give the Contractor a reasonable opportunity to present written or oral submission thereon, which latter shall be confirmed in writing within 7 days;

(ii) deliver his decision in writing to the Employer and to the Contractor; and

(iii) give his decision within 56 days of his receipt of a Dispute Notice, or within any further period as may be agreed between the Engineer and the Contractor, failing which it shall be deemed to have given a decision affirming, without amendment, the ruling concerned.

(d) Unless either the Employer or the Contractor, shall, within 28 days after his receipt of notice of the decision in terms of paragraph (c)(ii) or after the decision is deemed to have been given in terms of subparagraph (c)(iii), have given notice in writing to the Engineer, with a copy to the other Party, disputing the Engineer's decision or a specific part thereof, he shall have no further right to dispute any part of the ruling not specified in his said Notice."

12] There was no evidence presented by any of the witnesses that the Final Payment Certificate was sought or presented as set out in terms of paragraph 11(d) *supra*. Nor was there any dispute that the plaintiff had followed the dispute procedure set out in paragraph 11(e) *supra*, although there was some argument as to whether the plaintiff was entitled to invoke the dispute procedure when it had failed to invoke clause 20.1 requesting a further extension of the contract period.

13] Importantly, under the contract:

(a) the defendant has no right to dispute an Interim Payment Certificate – that right is reserved for the plaintiff in terms of clause 20.2[9];

(b) any adjustments (in favour of or against any one of the parties) to amounts certified in an Interim Payment Certificate, may only be done in a subsequent Interim or Final Payment Certificate; and

(c) all final adjustments are accounted for in the Final Payment Certificate.

14] The entire can of worms was opened in July 2015 when the plaintiff submitted IPC 36 to Henderson for approval and in August 2015 he instructed the plaintiff to amend IPC 36 to incorporate certain amendments in accordance with his determination. The plaintiff agreed to do so and submitted the revised IPC 36 for an amount of R5 731 344-19, which was then submitted to the defendant for payment.

15] Defendant, however, refused to make payment. Instead, it returned IPC 36 to Henderson and objected to the amount reflected. This, so it pleads, and as was the evidence presented by it, was because IPC 36 contained *"an obvious error"* and because it would have been "*grossly prejudiced*" had it made payment without objecting to the Engineer's error of certifying the last certificate without taking into account its claim for delay penalties.

16] And it is these delay penalties that are the issue. It is not in dispute that the plaintiff overran the contract period by 11 months. It is also not in dispute that the defendant was entitled to levy penalties for this period, which it did[10] and that in every iteration of IPC 36, this amount appears as a line item titled "*Delay Penalties*". The problem arose as a result of the following:

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[9] Whilst clauses 20.2 and 20.4 of the original FIDIC made provision for the defendant to dispute, *inter alia*, the value of any certificate by referring the dispute to a Dispute Adjudication Board (DAB), both these clauses were deleted and replaced by the Particular Conditions in which no similar provision is made for the defendant to object

[10] In the amount of R4 706 326-25

(a) on 24 April 2015 the plaintiff[11] wrote to Henderson, set out the background to the matter and explained the difficulties experienced with the SMMEs that had allegedly led to the delayed completion. The letter then states:

"On a contract where our cumulative loss stands at R47m, the suspension of payment of our time related Preliminary and General (P&G), and the imposition of penalties has put severe financial pressure on our Company.

It must also be noted that Lonerock was penalized on the full contract value while the SMME's executed 31% of the contract value, and were paid their full P&G throughout the contract period. They were also not penalised for late completion.

The Contract was competed well within the amended contract value, It is our understanding that the extension of time did not adversely affect the Employer's budgeted amount for the Works.

The Contractor herewith requests a meeting with the Employer to allow the Contractor an opportunity to present a case, for the Employer to reconsider his stance on the payment of time related Preliminary and General Items and the application of penalties." (my emphasis)

b) the Contracts Committee however had already considered the plaintiff's request and agreed to a reduction in penalties, but were unmoving on the issue of disallowing the plaintiff's P&Gs – this was on 3 February 2015. But the defendant's project manager[12] was on maternity leave and the stand-in project manager was not copied in on the correspondence from the Contracts Committee and neither was Henderson;

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11 As represented by Mr Naude

12 Mrs Nel-Verwey

(c) thus, in April 2015 when the plaintiff sent the above letter to Henderson, neither it nor Henderson were aware of the fact that the Contracts Committee had refused the former and approved the latter requests;

(d) in an email to plaintiff dated 6 August 2015, Henderson informed the plaintiff that the Contracts Committee had approved[13] the request to pay plaintiff's P&Gs – this was of course incorrect, which Henderson conceded this in his evidence and in later correspondence with the plaintiff where he revised IPC 36 to exclude the 11 months claim for P&Gs. At the end of the day, the disputed IPC 36's reflect the following important differences relevant to the present dispute:

(i) IPC 36 dated 6 August 2015

Value of scheduled work to date (which includes P&Gs for 41 months – ie the entire contract period)	R59 665 315-28
Penalties	R 4 706 326-25
Due for payment by defendant	R 5 731 344-19

(ii) IPC 36 dated 1 September 2016

Value of scheduled work to date (which includes P&Gs for 30 months – ie the approved contract period)	R55 623 205-28
Penalties	R 4 706 326-25
Due for payment by defendant	R 1 528 026-25

17] Although much correspondence flowed between the plaintiff and Henderson between late 2014 and 3 September 2015, the above sets out the important events. The next important event is that on 9 September 2015 the plaintiff submitted a Notice of Dispute to Henderson. The gist of the dispute is the following:

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13 My emphasis

(a) that although Henderson determined that the plaintiff should pay penalties (albeit reduced) and that CPA and P&Gs be refused, he had certified the SMMEs certificates thereby effectively determining that they should receive payment in full despite the 11 months overrun and that their P&Gs be paid and no penalties be imposed on them;

(b) that the main contract makes no provision for dissimilar treatment of the plaintiff and the SMMEs and the terms of the main agreement were also applicable to the SMMEs;

(c) that the defendant had erred in not treating the plaintiff and the SMMEs in the same manner.

18] On 23 September 2015, and after Henderson had requested additional information from the plaintiff as regards the above issues and the overruns caused by the SMMEs, Henderson wrote to Mrs Nel-Verwey. In that letter he, inter alia, advised her that:

"The dispute revolves around the assertion that it is contractually incorrect to apply penalties, as stipulated in the contract documents, to the main contractor while mot applying penalties to the SMME contractors that were to undertake work under the supervision of the main contractor.

While no formal determination (in terms of FIDIC clause 3.5) is required in terms of FIDIC clause 8.7, the values of the final certificate was calculated in terms of the approved decision by the SANRAL Contracts Committee as signed on the 3 February 2015 and contained in Appendix B of this letter."

19] He then also states (and this explains the difference in calculation between the two IPC36's:

"The decision of the SANRAL Contracts Committee resolved that the penalties were to be limited to "i) the monthly supervision and site laboratory cost beyond the revised approved contractual completion date; and ii) that the

CPA be applied, but that the indices be fixed at the revised approved contractual completion date."

The COLTO project specification require the withholding of the 13.01(c) and (d) for the time required by the contractor for the completion of the works after the contract period.

The Engineer received correspondence from SANRAL that the13.01(c) and (d) should not be withheld. The Engineer calculated the final certificate value accordingly.

On submission of the revised payment certificate and invoice, the SANRAL finance department queried why the B13.01(c) and (d) items had been increased. The Engineer sought further clarity from SANRAL as to his interpretation of the initial request for clarity. The response received from SANRAL was that the B13.01(c) and (d) items could be released in so far as they relate to project specification B1303 on page C-204 where it states "…Such limitations to payments shall occur whenever the ratio of time to expenditure varies by more than 10%."

Following this, the final certificate was recalculated and Lonerock was informed of the reasons for the revised certificate. The revised certificate was in the value of R1 528 026-25 inclusive of VAT.

The difference between the certificates is the 13.01(c) and (d) items for the period June 2014 to March 2015."

20] Insofar as the SMMEs work is concerned, he concedes that an analysis of the expenditure related to the SMMEs shows that 33% of the total SMME works occurred after the revised completion date and also concedes that a number of SMMEs did not deliver production rates that were acceptable as they had worked slower than hoped. But ultimately, it appears that the blame for the contract overrun was laid at the door of the plaintiff for slowing down the SMMEs in their work by not

completing their preliminary work in time to allow the SMMEs to start and complete their work timeously.

21] Henderson then recommends that although he is of the view that plaintiff competed their portion of the works after the completion date, and that therefore penalties should be imposed, and although P&Gs may be withheld after contractual completion date, the purpose of this type of penalty is to incentivise timeous completion and therefore when comparing the provision to its purpose, a "*possible contractual ambiguity"* may arise. He therefore recommended[14] – as an *"expedient solution"* to the dispute - that SANRAL consider paying Lonerock its P&Gs as a final settlement of the dispute.

22] But the defendant refused. It is of the view that the recommendation is not binding on it as:

(a) plaintiff never applied for, nor was granted, a further contract extension in terms of clause 20.1, nor did it submit a claim or request for payment of P&Gs for the extended period;

(b) the plaintiff is contractually not entitled to P&Gs for the 11 months;

(c) the plaintiff's sole request was for the reduction of penalties and that is the request that was considered by the defendant and granted.

23] Subsequent to Henderson's letter of 23 September 2015, he implemented clause 20.2(c)(i) of FIDIC and consulted with defendant. That outcome was then communicated to the plaintiff who provided its response. In this response, Henderson refers to IPC 36 as *"a penultimate payment certificate"*[15]. At the end of the day, his decision was that the plaintiff had not been unfairly prejudiced, that there was no unequal application of penalties and that therefore the plaintiff was not entitled to P&Gs after contract completion date.

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14 This is not a decision as provided for in the contract – that came later

15 My emphasis

24] Subsequently, the plaintiff gave notice that it disputed this decision and when the further dispute resolution mechanisms provided for in the contract failed[16] the plaintiff then gave notice of the intention to institute these proceedings which it did.

The argument

25] The plaintiff's argument centres around two main issues:

(a) that the defendant treated it in an iniquitous manner by disallowing its P&Gs and yet allowing those of the SMMEs; and

(b) that the defendant is bound by the IPC 36 issued by Henderson on 6 August 2015.

26] The defendant's argument is that:

(a) the plaintiff's contract with the SMMEs has nothing to do with it – it has no hand in any decisions taken in respect of payments to the SMMEs as it is not party to the sub-contracts and that if the plaintiff fails to levy penalties and paid P&Gs to the SMMEs, that is of its own doing;

(b) whatever Henderson may do he is bound by the contract and he cannot make a new one on behalf of the defendant – were he to have allowed the plaintiff's P&Gs this is precisely what he would be doing;

(c) IPC 36 of 6 August 2015 was incorrect, and it was entitled to point this out to Henderson;

(d) every iteration of IPC 36, including the reduced one of 1 September 2016 was signed by the parties and that this constituted an agreement such that each IPC 36 replaced the previous one;

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16 Being mediation and arbitration

(e) as plaintiff had never applied for, nor was granted, a further extension of the contract period, nor for a waiver of the refusal of P&Gs, it was not entitled to claim them and that the IPC 36 dated 1 September 2016 was therefore correct;

(d) that as IPC 36 was the final payment certificate, there was no other recourse available to the defendant other than the path followed by it; and

(e) as it has already paid the amount due, the plaintiff has no further claim against it.

The claim for P&Gs

27] In my view, the contract is clear: unless the plaintiff receives an extension of the contract period for the 11 month overrun, it is not entitled to its P&Gs for this period. It did not apply for one. However, in its letter of 24 April 2015 it did ask for a meeting with the defendant *"to reconsider his stance on the payment of time related Preliminary and General items and the application of penalties."* Thus the defendant's argument that plaintiff failed to invoke those provisions of the contract is not factually correct. But, in any event, the defendant did not grant the plaintiff's request.

28] The fact that Henderson incorrectly interpreted the outcome of the Contracts Committee decision of February 2015 is simply a precursor to his certification of IPC 36 on 6 August 2015.

29] I am further of the view that the fact that the SMMEs were treated differently is not a reason to disregard the terms of the main agreement – at best it was a consideration for Henderson and defendant to allow the plaintiff's P&Gs. The plaintiff's contracts with the SMMEs caters for penalties of whatsoever nature, including retention monies, which plaintiff did not enforce. The fact that plaintiff alleges that this was done at the behest of the defendant is also simply a motivation for its P&Gs to be allowed, but this does not bind the defendant contractually.

The amendment of IPC 36

30] The issue of the IPC 36 is however quite different. The defendant's argument is founded on the premise that IPC 36 was the last payment certificate in respect of which Henderson could take into account delay penalties. But this argument is flawed for several reasons:

(a) IPC 36 was an Interim Payment Certificate – this was as much stated by Henderson when he called it the penultimate payment certificate;

(b) the issuing of an Interim Payment Certificate is regulated by clause 14.6 of the amended FIDIC[17] from which it is clear: the amount may be rectified in a subsequent payment certificate – whether a further interim one or a final one. This much was conceded by Henderson in his evidence;

(c) the argument that IPC 36 is a final certificate is also untenable as clause 14.13 requires the Engineer to issue a final accounting exercise by determining all sums due by defendant to plaintiff, or vice versa, and capturing that in a Final Payment Certificate[18]. Thus, if Henderson was of the view that he had incorrectly allowed the P&Gs, that overpayment would be recovered in the Final Payment certificate – no evidence was presented that the procedure laid out by clause 14.13 was undertaken;

(d) given that the defendant had no right under the contract to object to IPC 36 of 6 August 2015, Henderson had no right to amend it – he had no right to do so anyway.

31] The reason for this is clear – an interim payment certificate is a liquid document[19] that is capable of enforcement without any need for a contractor to go beyond the certificate or to rely on the contract under which it was

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17 Which provides that *"The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate."*

18 See paragraph 11(d) supra

19 Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) at para [27]

issued.[20] Of course, that does not mean that an employer cannot raise a defence based on the contract[21] as such an issue will give rise to the proper interpretation of the particular contract before the court.[22] In **Ocean Diners (Pty) Ltd v Golden Hill Construction CC**[23] the court stated:

"…If the effect of a building contract is to confer finality upon a certificate…, a certificate validly issued… cannot, in the absence of a contractual provision to the contrary, or agreement or waiver by the parties (neither of which s suggested), be withdrawn or cancelled by an architect in order to correct mistakes of fact or value in it... Once therefore the architect had issued the certificate, he is functus officio insofar as the certificate and matters pertaining thereto were concerned…That being so, he was not entitled unilaterally to withdraw or cancel it."

And

"A final certificate is not open to attack because it is based on erroneous reports of the agent of an employer or the negligence of his architect…The failure of the quantity surveyor properly to scrutinise the claims put forward and to rectify any errors, and the possible negligence of the architect in failing to satisfy himself as to the correctness of the claims and valuations before issuing the certificate, would accordingly not have provided a defence to an action on the certificate. A fortiori it cannot provide a basis for cancellation or withdrawal of the certificate by the architect."[24]

32] Thus the fact that Henderson was incorrect in his interpretation of the Contracts Committee decision is of no moment once he certified IPC 36 to allow the plaintiff's P&Gs.

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20 Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd 1988 (2) SA 546 (AD) at 562E-G

21 Thomas Construction (supra) at 562G-I

22 SA Builders and Contractors v Langeler 1952 (3) SA 837 (N); Smith v Mouton 1977 (3) SA 9 (W) at 12C-D and Mouton v Smith 1977 (3) SA 1 (A)

23 1993 (3) SA 331 (A) at 341H – 342B

24 Ocean Diners *supra* at 342B-D

33] This leads then to the defendant's argument that, by signing the subsequent IPC 36 of 1 September 2016, the plaintiff had agreed to its terms. In this regard it appears that the defendant is attempting to argue either that the plaintiff acquiesced in the last iteration of IPC 36 or it waived its existing rights. But this argument must also fail as waiver was not pleaded, nor was it proven.[25] Even were the defendant to rely on acquiescence, that too must be pleaded and proven as it is not distinguishable from waiver.[26]

34] The fact is that the IPC 36 of 1 September 2016 was signed after the plaintiff had filed its dispute notice on 9 September 2015, after Henderson's decision of 28 February 2016, after the plaintiff gave notice on 18 March 2016 that the decision was disputed and after the dispute resolution mechanisms had been unlocked. There is no indication that plaintiff had abandoned or waived any of its rights under the contract – in fact, all the evidence points to the contrary.

35] This being so, and it being so that in the absence of a contractual provision that the IPC may be withdrawn or cancelled by Henderson in order to correct mistakes or the value, it cannot be withdrawn[27] and its only amendment is to be in the form of a further Interim or Final Payment Certificate.

36] This being so, the plaintiff's claim must succeed.

The order

37] The order I grant is the following:

1. The defendant is ordered to pay to the plaintiff the amount of R4 585 549-00.

2. Interest is payable on the aforesaid sum *a tempore morae* from 10 September 2015 to date of payment.

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25 Montesse Township and Investment Corporation (Pty) Ltd v Gouws NO 1965 (4) SA 373 (A); Borstlap v Spangenberg 1974 (3) SA 695 (A)

26 New Media Publishing (Pty) Ltd v Eating Out Web Services 2005 (5) SA 388 (C)

27 Ocean Diners supra at 334E

3. The defendant is ordered to pay the plaintiff's costs of suit.

B NEUKIRCHER
JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 June 2023.

Appearances:

For Plaintiff	:	Adv C Acker
Instructed by	:	Pagel Schulenburg Inc
For Defendant	:	Adv G Badela
Instructed by	:	Rambevha Morobane Attorneys
Date of hearing	:	28 November 2022
Date of final argument	:	1 February 2023
Date of judgment	:	27 June 2023