REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: 4/4/2024

4/4/2024 [redacted]
DATE SIGNATURE

Case no: 23731/2018

In the matter between:

MMAMOLEBOGE INVESTMENTS CC	**First Plaintiff**
KOPANO CREATIVE CONCEPTS CC	**Second Plaintiff**
KGONI TRADING CC t/a KGONI CIVILS & ENGINEERING	**Third Plaintiff**

and

CRIMSON PROPERTIES 351 (PTY) LTD t/a CRIMSON KING DEVELOPMENTS	**First Defendant**
APIL & ASSOCIATES ARCHITECTS & PROJECT MANAGERS	**Second Defendant**
INSIKA QUANTITY SURVEYORS (PTY) LTD	**Third Defendant**

ONE G SERVICES (PTY) LTD **Fourth Defendant**

MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT

OF HUMAN SETTLEMENTS, GAUTENG **Fifth Defendant**

HEAD OF DEPARTMENT, DEPARTMENT OF HUMAN

SETTLEMENTS, GAUTENG **Sixth Defendant**

JUDGMENT

(The matter was heard on open court but judgment is delivered by uploading the judgment onto the electronic file of the matter on CaseLines and the date of the judgment is deemed to be the date of uploading it onto CaseLines)

Before: **HOLLAND-MUTER J:**

[1] The Plaintiffs claim payment from the First Defendant, the amounts alleged by the Plaintiffs to be outstanding under the construction contract entered onto between the Plaintiffs and the First Defendant. The outstanding amounts claimed are ***R 2 677 868-20*** (First Plaintiff); ***R 2 127 868-20*** (Second Plaintiff) and ***R 2 092 868-20*** (Third Defendant). These amounts are claimed as standing time fees and contract adjustment fees as prepared and presented to the Department (Fifth and Sixth Defendants). (***Par 25 of the Declaration,which is different from par 26; the Court awarding the former-see Vat issue).***

[2] The First Defendant was appointed by the Fifth Defendant (referred to as the 'Department") to construct subsidized houses in Westonaria, Westonaria situated in the West Rand District in Gauteng.

[3] The First Defendant appointed the First Plaintiff on 12 September 2012; the Second Plaintiff on 27 September 2012 and the Third Plaintiff also on 12 September 2012 to undertake the construction of the subsidized houses.

[4] The Plaintiffs were appointed in terms of a standard contract of the Joint Building Contracts Committee (JBCC, also known the Principal Building Agreement Standard JBCC 2000 Series Edition 5.0), with the Department as Employer and the First Defendant as the Contractor.

[5] The First Defendant does not deny (i) being appointed by the Department; (ii) that it appointed the Plaintiffs as subcontractors and (iii) that the Plaintiffs were appointed in terms of the JBCC Agreement and that the Plaintiffs received their respective appointment letters.

[6] It is also common cause that the Department issued an oral instruction during 2013 (whilst the construction was still underway and not completed), to suspend all construction activities for reasons not related to the construction work done by the Plaintiffs. The Department specifically requested that the contractors remain on site during the cessation of construction to prevent any damage be caused by disgruntled members of the local community and for the Contractors to protect material on site.

[7] Mr Manala on behalf of the Plaintiffs made the court aware that the matter was initially issued the application in the motion court before it was referred to oral evidence and trial and that the costs thereof was reserved for the trial court to adjudicate. I could not find any reference to any such application on the electronic file of the matter on CaseLines but for two court orders where the First Defendant argued an exception against the Declaration filed on behalf of the Plaintiffs substantiated by two court orders. The fact that the Plaintiffs issued a Declaration later indicates that the original application was referred for oral evidence. The Plaintiffs (i) were visited with a cost order for the wasted

costs occasioned by a postponement and (ii) that the First Defendant's exception was dismissed with costs. I have no other indication on reserved costs to address in this hearing. I see no need to address any other outstanding cost issues in this matter.

EVIDENCE:

[8] The court finds it not necessary to repeat the evidence in detail but rather to concentrate on important aspects favouring the case of each party. The court is well aware of the approach to evidence where it is faced with contradicting versions. the test is well founded in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others 2003 (1) SA 11 SCA at par [5-7]** as reiterated in **Dreyer v AXZS Industries 2006 (5) SA 548 SCA at 558 C-G** where it was held that *"in resolving factual disputes in a civil case, particularly when it comes to an evaluation of the witnesses for the party who bears the onus. The proper approach in resolving factual disputes where there are two irreconcilable versions is that the court should also have regard to the probabilities inherent in the respective conflicting versions".*

[9] The court will also make a finding on credibility of the witnesses, any contradictions in the respective versions, external contradictions pleaded and the probabilities or improbabilities of a version. The court will search for reliabilities in the factors mentioned, the demeanour of the witnesses and other relevant aspects to safeguard when accepting or rejecting a version. The facts before the court need be examined and after weighing all aspects, find on a version.

[10] The uncontested issues before the court are the following:

* The Department issued a cessation order, the cessation remained in place for about 9 months;

* The Plaintiffs were requested by the Department to remain on site for various reasons;

* The cessation was for reasons beyond the control of the Plaintiffs. The First Defendant made some noise about sub-par construction by the Plaintiffs but no evidence was tendered to substantiate this allegation. This allegation is unfounded and rejected.

* The cessation was ended some nine months after implemented, and according to the Plaintiffs, the parties at a meeting a week after the cessation was ended, where the issue of standing time and price adjustment was discussed. The First Defendant elected not to present any evidence denying this aspect.

[11] The Plaintiffs called two witnesses and the First Defendant only one witness. The other Defendants did not participate in the proceedings but Plaintiffs do not seek any relief against them. They were cited to prevent any unnecessary delays and the attendance of the Department's representatives were secured to possibly testify should the need arise. The Plaintiffs called Samuel Themba and Melitha Molebane Modibe while the First Defendant called only Anet Nagel to testify. Modibe is employed by the Fifth Defendant.

[12] The court finds it very strange that the First Defendant elected and/or failed to call any direct witnesses as to the negotiations between the parties leading to the conclusion of the original agreement. More important, no evidence was tendered by the First Defendant to contradict the now uncontested evidence by Themba about the two meetings after the cessation

of construction by the Department and the later continuing by the Plaintiffs to complete the construction.

[13] The uncontested evidence of Themba is that the Department requested the cessation of the construction and that the contractors remain on site to protect the already constructed houses and the guard against any damage to be caused by members of the community and to safeguard building material already on site was confirmed by Modibe. The First Defendant did not call on any of its people to contradict this version. This evidence by Themba is uncontested.

[14]Me Modibe, the representative of the Department, testified that the Department indeed ordered the cessation of the construction for reason beyond the doing of the Plaintiffs. The request to cease with construction was because of beneficiary related issues with the community experienced by the Department. This request was forwarded to the First Defendant who conveyed it to the Plaintiffs. She also made no mention that the cessation was also necessary because of poor workmanlike performance by the Plaintiffs. The First Defendant pleaded such reason but tendered no evidence to support the allegation.

[15] Themba testified that at the first meeting was held at the head office of the First Defendant a week after the cessation was uplifted, and it was accepted that the Plaintiffs were entitled to claim standing time and adjustment of prices of the original contract. The reason that because of the long cessation, prices increased and expenses were incurred to inter alia safeguard the site during the cessation. This evidence is uncontested by the First Defendant. Themba's version that the Plaintiffs submitted their claim, together with supporting documents, to the Principle Agent as they were obliged to do in terms of the JBCC Agreement, was never contradicted by evidence.

[16] Modibe confirmed during her evidence that the Department received such claim on behalf of the Plaintiffs from the principle agent of the First Defendant (the Fourth Defendant) and that the Department received, considered, approved and ultimately paid the claims of the constructors. She was adamant that although payment was made to the First Defendant, the Plaintiffs were entitled to payment. Her evidence is undisputed and accepted. The Fourth Defendant was appointed as the First Defendant's Principle Agent on the project.

[17] Nagel was the quantity surveyor appointed by the First Defendant but she was not present at any of the two meetings after construction resumed. Her evidence with respect is riddled with improbabilities. She inter alia denied that the calculation that she prepared was for the Plaintiffs but insisted it was only a generalized calculation to determine a daily average of costs upon being asked to do so by the Project Manager. She averred it was prepared for the First Defendant. This makes no sense as the Plaintiffs were the contractors and not the First Defendant.

[18] Her explanation as to why the names of the three Plaintiffs appeared on her calculation but that it was to the benefit of the First Defendant is without any substance. The inherent improbability is that why would the First Defendant benefit from the cessation called upon the Plaintiffs.

[19] She could not deny the version of the First Plaintiff that it was the main point of discussion on the two meetings after construction resumed that the Plaintiffs would be able to claim standing time and adjustment of prices as provided for in clauses 29.2.3 and 32.5 & 32.5.1 of the JBCC Agreement providing for payment of compensation to a contractor for delay not occasioned by a contractor's conduct.

[20] She further testified that her report was on all accounts intended for use as supporting a claim for adjustment of contract price and standing time ***but*** this was only in relation to the developer and not the contractors. Her assumption makes no sense and is rejected.

[21] She testified that she made the calculations merely conducting a generalized calculation at the request of the Project Manager for an "unspecified purpose". This is also farfetched and cannot stand the test for reliability. She tried to further down side her calculation averring that she only prepared the first and the last pages thereof and that Dougall Wesley.

[22] This does not make any sense at all. when perusing the ***Quantity Surveyors report supporting the Standing Time Claim*** **(annexure A)** as on CaseLines 04-58, it is clear that she was the author and that she addressed it for the attention of Dougal Wesley (representing the Fourth Defendant). The court would have expected Wesley to testify if this was true. As is, she is the author thereof.

[23] The calculation is clearly for the time related preliminary and general (P&G) cost as per contractor, as calculated by her. See p 58 CaseLines 04-61. The reasonable inference from this document is that the calculation was done with regard to the three contractors (the Plaintiffs) and not in the interest of the First Defendant.

[24] A further mysterious improbability in her evidence was that her calculations were solely based on the contract figures of the Plaintiffs but insisted that it was done to claim compensation for the Developer and not the Plaintiffs. Even worst for her is that she accepted the tables relating to professional and ancillary fees due to the professional team for contract price adjustment and standing time, expenses and loss. I fail to understand her reasoning that it could be for the benefit of the developer (First Defendant)

when the expenses and loss were for the account of the contractors (Plaintiffs).This assumption of her is stillborn.

[25] Even if Nagel was of the view that the claims were not premised on any calculation of input from the Plaintiffs, she calculated at a market related rate and if that was her view, she did not need any information from the Plaintiffs although she accepted the standing time delay of 270 days (nine months) as claimed by the Plaintiffs.

[26] I fail to understand how it can be argued that Nagel was an honest and credible witness. When comparing her version with that of Themba, there is but only one choice to accept the version of Themba to be true and to reject her version.

[27] The court is satisfied that the Plaintiffs succeeded in proving that the First Defendant is indebted towards them. In par 29 below mention is made to payments made by the First Defendant towards the Second and Third Plaintiffs in the amounts of R 550 002-27 and R 585 000-00 respectively. This result in that the First Defendant is still indebted towards the Plaintiffs in the amounts of R 2 667 868-20 (First Plaintiff); R 2 117 865-93 (Second Plaintiff) and R 2 092 868-20 (Third Plaintiff). These payments were not made as part of the amount(s) due in terms of the final certificates with regard to the initial agreement. If it was, the First Defendant ought to have pleaded it and tendered the necessary evidence to satisfy the burden of he who alleges payment needs to prove. This did not happen.

PRESCRIPTION:

[28] The calculation is dated 14 August 2014, and the initial application was issued during December 2016, well within two years from the claims for

standing time arising. A copy of the original urgent application was handed up as exhibit "C" during the trial and is sufficient proof that the claims were instituted within time to erupt prescription. The First Defendant did not lead any evidence to bolster this defence. The defence of prescription cannot fly.

VAT CLAIM:

[29] The Plaintiffs abandoned any claim for VAT during the trial proceedings and the court need not attend thereto further.

CLAIM FOR INTEREST:

[30] The Plaintiffs claim interest at the prescribed rate (*"a tempore morae"*). In terms of section 31.10 of the JBCC agreement, the Defendant ought to make payment of amounts due within 31 calendar days. The First Defendant received payment for the claimed standing time from the Department on 19 September 2016. Payment was therefor due on 22 October 2016.

[31] The First Defendant made interim payments towards the Second and Third Plaintiffs in the amounts of R 550 002-27 and R 585 000-00 respectively before 22 October 2016. No payment was made towards the First Plaintiff in this regard.

FULL AND FINAL SETTLEMENT:

[32] The First Defendant pleaded that it final payment certificates *in full and final settlement of all claims under the PBA in October 2014* were accepted by the Plaintiffs and thereby compromised their claims under the PBA. It was put

to Themba that by accepting the final certificates in October 2014, any reliance on the alleged claims for standing time and cost adjustments were compromised by the acceptance of the certificates by the Plaintiffs. Themba denied this.

[33] The First Defendant initially pleaded in tis par 13.2 of the Plea that the *Plaintiffs never attended the stages of practical works completion, and no certificates to that effect were ever issued to the plaintiffs.* This is clearly in contradiction with the argument that final certificates were issued and a compromise reached.

[34] A further contradiction between the plea and the written arguments is that the First Defendant pleaded in par 13.2.3 of the plea that *the certificates of final completion and final accounts were solely issued to the plaintiffs in order to terminate the plaintiffs' involvement in the project and to finalize the parties' contractual relationship and all claims between the parties".* This was not substantiated by any evidence during the trial.

[35] The final certificates were issued after the work was finalised and has no relation to the additional claim for standing time as set out in the claim therefore **and** approved by the Department. Modise's evidence is clear that the cessation was not because of any conduct by the Plaintiffs and they should be rewarded therefore. This is a mere last futile grasp by the First Defendant to escape liability. This defence is rejected.

[36] The Department only made payment in the amount of R 10 566 036-43 towards the First Defendant on 19 September 2016. The certificates of final completion were issued during October 2014 long before any claim for standing time was considered or approved and paid by the Department.

COSTS:

[37] The purpose of an award of costs to a successful litigant is to indemnify the party for the expenses which he to which he was put through having been compelled to initiate action or defend action. **Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa 4th ed p 701.**

[38] The award of costs is within the discretion of the court. **Herbstein & Van Winsen supra p 703.** In exercising its discretion, the court will as a general rule award costs to the successful party. Success is determined by looking at the substance of the judgment. A court may also in exceptional cases, depart form the normal rule and award costs against a successful party. This is seldom done and will entail special circumstances to prevail. I am of the view that there is no need to depart from the general rule to award costs to the successful party. **Herbstein & Van Winsen supra p 704.**

[39] The court will further consider the scale on which the awarded costs is taxed or agreed. The normal scale is a party-and-party-scale. This will be awarded if no special circumstances exist to depart therefrom and to award costs on a punitive scale such as on attorney-and-client-scale. This may be when for instance the court wants to voice its disapproval with the conduct of a party or its representative against whom the cost order is granted. I am of the view no grounds exist to award costs on a punitive scale.

[40] Having considered the case as a whole, I am of the view that costs on a party-and-party-scale is the appropriate scale. After considering all aspects of the matter (inclusive of the pleadings, the evidence and documents on CaseLines, the Plaintiffs' claims are awarded with costs on a party-and-party-scale.

ORDER:

The First Defendant is ordered to pay the following:

1. Pay the First Plaintiff the amount of R 2 677 868-20.

2. Pay the Second Plaintiff the amount of R 2 127 868-20.

3. Pay the Third Plaintiff the amount of R 2 092 868-20.

4. The First Defendant is to pay Interest on the said amounts in 1, 2 & 3 *a tempore morae,* as from 22 October 2016 until date of last payment.

5. The First Defendant is to pay the costs of the Plaintiffs on a party-and-party-scale.

6. No order is made with regard to the Second to Sixth Defendants

HOLLAND-MUTER J
4/4/2024
JUDGE OF THE PRETORIA HIGH COURT

MATTER HEARD ON 20 & 21 NOVEMBER 2023

Written Heads of Arguments filed:

Obo Plaintiffs: 24 November 2023

Obo First Defendant: 1 December 2023

Obo Plaintiffs: 5 December 2023

Judgment uploaded onto CaseLines: 4 April 2024

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NO APPEARANCES OBO SECOND TO SIXTH DEFENDANTS

(Uploaded onto CaseLines)