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.

21/04/2017
DATE

SIGNATURE

25/4/2017

CASE NO: **74017/13**

In the matter between:

PAPARICH PROPERTY DEVELOPMENT CC	First Plaintiff
NDUMO GROUP PROJECTS CC	Second Plaintiff
KGELELE CONSTRUCTION SERVICES CC	Third Plaintiff

and

EKURHULENI METROPOLITAN MUNICIPALITY	Defendant

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] The first, second and third plaintiffs who had entered into a consortium agreement (hereinafter collectively referred to as "**Paparich**"), were appointed by the defendant to design, upgrade and construct storm water infrastructure under contract number SP01/ 2008 ("**the contract**"). Four instructions to proceed with work ("**IPW's**") were issued by defendant in respect of the contract being:

1.1 IPW 1, dated August 2008 for an estimated amount of R 4 500 000;

1.2 IPW2, dated March 2009 for an estimated amount of R 15 500 000;

1.3 IPW3, dated November 2009 for an estimated amount of R 4 150 000; and

1.4 IPW4, dated April 2010 for an estimated amount of R 7 000 000.

[2] Paparich completed the work in respect of IPW1, IPW2 and IPW3 and were paid for this work. The subject matter of this trial concerns IPW4. Paparich contends that it executed and completed the works in respect of IPW4 in the amount of R 7 857 258.69 (inclusive of VAT) and that a final payment certificate was issued by defendant on 28 June 2012 confirming that the work in respect of IPW4 had been performed. Paparich accordingly contend that they are entitled to payment together with interest thereon.

[3] Despite defendant's having issued the payment certificate, it has contested its liability to pay thereunder based on the wording of IPW4, which was accepted by Paparich on 10 May 2010. The relevant part reads :

> ' You are requested to liaise with the Programme Manager (Kgalaletso Consortium) and the Region regarding the details of the scope of work. The work should be practically complete on or before 30 June 2010. Where the Scope of the work is not descriptive, a list of stormwater systems should be finalised for approval in writing by the General Manager: 2010 & Special Projects before commencement of work.

Furthermore, please note that if you carry out any other work that has not been allocated as shown above, the work will be done entirely at your **own risk** and the Municipality will not be entitled to reimburse you for the work done.'

[4] The defendant contends that IPW4 should be construed as follows:

4.1. The work should be practically completed on or before 30 June 2010;

4.2. In the event of the work not being practically completed on or before 30 June 2010, Paparich would not be entitled to payment for any work done after 30 June 2010, at all;

[5] Paparich interprets IPW4 as follows:

5.1. The work should be practically completed on or before 30 June 2010;

5.2. In the event of the work not being practically completed on or before 30 June 2010, any work done after 30 June 2010 could attract penalties as provided for in the contract but Paparich would still be entitled to payment.

[6] As will become clear hereunder, I do not fully accept either party's interpretation of IPW4. In my view the portion that provides if Paparich carries out work that has not been allocated it does so at its own risk, relates to the allocated scope of work and not the allocated period in which it was to be completed. The consequences of late payment are separately regulated by the penalty provisions of the General Conditions of Contract ('**GCC**') which is the standard form contract adopted by the parties for these works. Although I consider the issue of the payment certificate pursuant to the provisions of the GCC to be determinative of the issue between the parties, I hereunder give consideration to the cases as presented in the trial.

THE PLEADINGS AND ISSUES

[7] Paparich argued that the defendant should be held to the case as pleaded. It contended that the defendant's claim was confined to the content of paragraphs 2.2.1 and 2.2.2 of the pre-trial minute which reads:

> ' 2.2.1 In terms of the defendant's plea, paragraph 14 thereof, the defendant's case (defence) is the following:
> 2.2.2.1 That the plaintiffs failed to comply with the IPW4;
> 2.2.2.2 That the work in terms of IPW4 should have been completed on/or before 30 June 2010;
> 2.2.2.3 That should the plaintiffs carry out work that had not been allocated, that work would be done entirely at plaintiffs risk and that defendant would not be entitled to reimburse the plaintiffs for the work done;
> 2.2.2.4 That on/or before 30 June 2010, the plaintiffs had not commenced with any work in terms of the IPW4;
> 2.2.2.5 That defendant during the first week of September 2010 became aware that plaintiffs proceeded with the work in terms of IPW4 after the indicated completion date without the defendant's knowledge;
> 2.2.2 In terms of paragraph 16 of defendant's plea, it also denied and (sic) in dispute that plaintiffs executed and completed the works in terms of IPW4, and that plaintiffs had not commenced with any work in terms of IPW. Further that on/or about (sic) the course of the first week of September 2010 the defendant became aware that the plaintiffs proceeded with work in terms of IPW after the indicated completion date without the defendant's knowledge.'

[8] The defendant admitted that its defence/s were contained in the aforegoing paragraphs of the pre-trial minute. The issues which thus fall for determination are:

8.1 The correct interpretation of IPW4;

8.2 Whether Paparich complied with IPW4 as properly construed.

THE CONTRACT

[9] Tender SP1/2008 was accepted by Paparich on 4 March 2008. As per the letter of appointment, the contract was to commence on 1 August 2008 to 30 June 2011. It is common cause between the parties that:

9.1. the contract was extended for 3 months to expire on 30 September 2011;

9.2. The GCC was applicable to the contract – a copy was handed to the court;

9.3. the contract had not been cancelled;

9.4. IPW4 was issued pursuant to such contract and accepted by Paparich on 10 May 2010.

THE EVIDENCE

Paparich's evidence

[10] Mr Paul De Fin ('**Mr De Fin**'), an engineer by profession testified that he had been so employed for a period of 15 years. Paparich was, in terms of the contract it had with the defendant, required to form another consortium with consulting engineers, in order to acquire the necessary technical capacity. This they did with Vela VKE Consulting Engineers Inc ('**Vela VKE**'), which is where Mr De Fin was employed during 2010.

[11] 'Engineer' is defined in clause 1.1.15 of the GCC and applied to the facts of this case is, Vela VKE. Mr De Fin is the representative of Vela VKE. Vela VKE is, in terms of clause 1.1.15, appointed by the defendant and thus, the representative of the defendant.

[12] Mr De Fin explained that when an engineer gets appointed as the principal engineer for an IPW, the general procedure would be for the engineer to meet with

the project manager, who is the agent of the client (commonly referred to in construction law as the employer), and the project manager would explain the brief to the engineer.

[13] The engineer would do a desktop study to get a feel for the type of work that needed to be performed and the engineer and the project manager would then agree on a design. It is only then that the engineer would do a detailed design and submit that design to the project manager for approval. Once the detailed design has been approved, the contractor, Paparich, could establish a site and set up camp.

[14] Mr De Fin testified that he was appointed the principal engineer for IPW4 which was being run out of the Pretoria office. IPW's 1, 2 and 3 had been run by their Johannesburg office by a different engineer. He did a desk top study to get a feel for the type of work that needed to be performed and an agreement was reached with the project manager as to the limit and scope of the work. He submitted a detailed design which was approved by the project manager on 8 June 2010. This was the second design which had been submitted. The first one was not approved as it had provision for water to be discharged under a railway line. Additional costs were going to be required for this.

[15] Way-leave applications then needed to be approved. These are advices which are issued to service providers such as Telkom, Eskom, Vodacom, essentially anyone who may have an interest in the road reserves who might have infrastructure such as cabling or piping running in the road reserve, an area designated for such purposes along the route of a road. The process of approving way-leaves takes an average of 2 to 3 weeks for everybody to respond.

[16] Mr De Fin opined that due to the inevitable delays that would be occasioned by having to issue the way-leave applications, which could only be done on or after 8 June 2010, and the delay inherent in the delivery of special pipes, which pipes had been authorised and approved of, and the scope of the contract, the project could not realistically be finished by 30 June 2010. He testified that it was very seldom that a contractor could spend R 7 000 000 in 3 weeks, even a highly qualified contractor.

[17] The work on the approximately 800 meters of pipes with manholes, commenced with his knowledge. However, when about 60% of the work had been done, and on 10 September 2010 Mr De Fin instructed Paparich to stop all work and to backfill and close all the excavations, pipe trenches, open manholes, junction boxes and exposed services. He testified that the reason the work had been stopped was because Paparich had been advised that the work forming the subject matter of IPW4, was a "mayoral budget project" and that the funds now had to be sourced from the next financial year. At a meeting on 8 September 2010 defendant's representatives told Paparich to wait. Their intention was to finalise the project.

[18] He explained that on 27 September 2010 he received a communication from Mr Nico Nel ("**Mr Nel**") employed by the defendant, confirming that Paparich was the appointed contractor and that they were still responsible for the safety of the site. Mr De Fin also explained that Kgalaletso consortium were the appointed project managers during May 2010, that their contract was terminated or came to an end June/July 2010 but that they had also stayed on for about 2 months thereafter and that the new project managers, Monde Skade, were only appointed on or about 4 February 2011.

[19] On 18th of July 2011 Mr De Fin communicated with Paparich and advised them that the contract with the defendant had been extended by 3 months to 30 September 2011.

[20] He testified that the contract ran from 1 August 2008 until 30 June 2011 but had been extended for 3 months to 30 September 2011. Work forming the subject matter of IPW4 was completed in November 2011 and on the 28 June 2012 he, on behalf of the defendant issued the final payment certificate which provided:

> **"Final Payment Certificate 30'**
> In terms of Clause 49.1 of the General Conditions of Contract (GCC) 2004, we hereby certify that the amounts claimed for works done as set out in the attached invoice (Paparich Invoice nr 30), is a true reflection of the works completed. The total amount payable is therefore R7,857,258.69 (Seven Million Eight Hundred and Fifty Seven Thousand and Two Hundred and Fifty Eight South African Rand and Sixty Nine cents including VAT."

[21] The reconciliation of the account reflected that R 265 566.49 was invoiced on 30 June 2010 and paid. This amount was for the designs, which had been completed by 8 June 2010. He stated that Vela VKE had inspected all the works, that it had been done properly and in accordance with the specifications. Mr De Fin concluded that IPW4 meant that any works done, not approved of by the project manager, such as excavating or laying of pipes which did not correlate to the design, would be done at the risk of the contractor. I shall refer below to other features of Mr De Fin's evidence when dealing with the interpretation of IPW4 and his role in resolving ambiguities.

[22] Mr Irvin Ndumo ("**Mr Ndumo**"), testified that he understood clause IPW4 to mean that if the work was not allocated in terms of IPW4, the contractor would not be paid for such work. He also explained that the building site had been established

even before the drawings had been approved. The local ward council was approached and had given permission for the site to be set up.

[23] He testified that material could not have been ordered before the approval of the final drawings, which happened on 8 June 2010. He also explained that there was a delay in obtaining the way leaves. The pipes were of a specific size (1500 x 75d) as per the approved drawings and it took time to order these pipes.

[24] After the drawings had been approved, Paparich ordered the first batch of pipes and started to expose the surface of the ground by hand so as to ensure not to damage existing services as the way leave applications had not all been finalised. A number of problems were encountered such as the fact that they hit rock and had to appoint a blasting company after consulting with the defendant and then receiving the defendant's approval in this regard. There was an unexpected existing sewer pipe which had not been factored into the approved drawings such that the drawings had to be revised. There was also a problem with a leakage in the trenches. The 75d pipes provided for in the drawings were out of stock and approval was sought and refused for an alternative sized pipe.

[25] He had contacted Mr Mogorosi (representative of the Project Manager) on about 10 June 2010 who had instructed Paparich to proceed. The Project Manager, so he testified, was a representative of the defendant. The work in respect of IPW3 and IPW4 were running together.

[26] On 18 July 2011 Mr De Fin wrote to Paparich and told them the contract with the defendant had been extended for 3 months. He also told Mr Ndumo that he had the name and number of a contact person to resolve the IPW4 payment issues.

[27] In a procedure report dated 17 August 2011, Mr Ndumo placed the defendant on terms. He wrote:

> 'The consortium have been waiting for the Municipal management to issue an instruction to continue with the completion of IPW4. We are humbly, requesting the Council response within 14 days working days. If there is no **response, we will COMPLETE THE REMAINING PORTION OF IPW4 and submit our fees claim.'** (emphasis as per original text)

[28] No response to this was received. On 16 November 2011 Paparich's attorneys wrote to the defendant recording that prior to the request to stop work on site, Paparich had completed a substantial amount of work, that they had indulged them by waiting to the next financial year for them to sort out the financial difficulties but that they were now holding them to the contract.

The Defendant's evidence

[29] Mr Nel, an engineer employed by the defendant since 1976, testified that the defendant was not liable to pay the IPW4 as it had expired on 30 June 2010. He said that all work is linked to the availability of funds and to the budget itself. He compared IPW4 to IPW1, IPW2 and IPW3. He said that IPW's 1, 2 and 3 did not have completion dates and were thus linked to the contract (being 30 June 2011) whereas IPW4 had a practical completion date which was 30 June 2010.

[30] He said that he had been unaware that work had been done after 30 June 2010. On 8 September 2010 he had received a call from a local councillor enquiring about the nature of the work being done. He had then convened a meeting with Mr De Fin and Paparich and they were requested to backfill the trenches.

[31] He explained that he had never attended site meetings and in particular that he had never inspected any works executed by Paparich. He conceded that if it were established that IPW4 did not expire on 30 June 2010, then the defendant was liable to pay. He conceded further that IPW4 had never been cancelled and that the risk clause contained in IPW4 was standard. Such risk clause only applied to work not allocated and to work which fell outside the scope of work as defined in such IPW. Mr Nel explained that the project manager was responsible for the administration of the entire contract which included site meetings, information, liaison, payment certificates and the like.

[32] The back filling had been completed by 4 February 2011 and Mr Strydom, the regional director was the only party who could stop the project.

[33] Mr Vermeulen (**'Mr Vermeulen'**), a civil technician who had started working at the defendant during 1991, testified that his understanding of IPW4 was the same as Mr Nel's. He agreed that the risk clause referred to in IPW4 only pertained to work which fell outside the scope of the work ie work which had not been allocated in terms thereof. He knew that the work could not be completed before 30 June 2010. He denied that the defendant had instructed Mr De Fin to write a letter to Paparich on 10 September 2010 in which they were instructed to stop all further work.

[34] On 15 October 2010 Mr Vermeulen received a progress report from Mr De Fin in which Mr de Fin had recorded that Paparich had removed all excess material from site and that they were in a position where they had to import material to close and backfill the excavations. Mr De Fin suggested that the defendant allow Paparich to obtain quotes for a subcontractor to complete the back filling and for Paparich to claim it back from the contract when the works proceeded in 2011. On 1 November

2010 Mr De Fin advised Mr Vermeulen that Paparich had appointed subcontractors to complete the back filling.

[35] On 18 October 2010 Mr De Fin advised Mr Vermeulen that he wanted to discuss the design of IPW4 works with Mr Tom van Zyl. Mr Vermeulen couldn't explain why this would be necessary if the project wasn't going to continue.

[36] Ms B S Mabisela, a chartered accountant and the divisional head within the financial group at the defendant, explained that she had no personal knowledge regarding the matter. She was called to testify about the general procedure which was followed when payment was made and how payments accrued.

INTERPRETATION OF IPW4

[37] In *Adventure Golf Properties CC v Redefine Properties Ltd & Another* (6836/20130 [2014]ZAGPJHC 314 (2 Sept 2014), the relevant principles of interpretation as they have evolved since *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) were summarised as follows:

> '.....In *Bothma Batho (supra)*, the Supreme Court of Appeal confirmed in para [12] (with reference to the summary in paragraph [18] of *Endumeni (supra)*), that the approach to interpretation summarised in *Coopers & Lybrand v Bryant,* 1995 (3) SA 761 (A) "*is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts ...*". The " *new* " approach, which has been followed in a number of subsequent cases, may be summarised as follows:
>
> 15.1 Interpretation is an exercise in ascertaining the "*objective*" "*meaning of the language of the provision itself* " - it is not aimed at determining the intention of the parties, whether common or otherwise, which is an "*unrelated*" concept, that has "*no bearing on the analysis*" and is "*irrelevant*".

15.2 "*Interpretation is a matter of law and not of fact and ... is a matter for the court and not for witnesses*".

15.3 The meaning of a provision is determined with reference to its language and in the light of its factual context, which includes what has previously been referred to as "background circumstances" and "*surrounding circumstances*". Since interpretation is "*one unitary exercise*", the process requires the court "*from the outset*" to consider the language and context of the provision together, "*whether or not there is any possible ambiguity*".

15.4 The factual context is ascertained by reading the provision having regard to:

15.4.1 the document as a whole; and

15.4.2 the circumstances attendant upon its coming into existence.

15.5 Consideration must be given to the following four aspects:

15.5.1 "*the language used in the light of the ordinary rules of grammar and syntax*", although it must be recognised that words seldom have a single meaning;

15.5.2 "*the context in which the provision appears*" (including the provisions of the "*document as a whole*");

15.5.3 "*the apparent purpose to which [the provision] is directed*"; and

15.5.4 "*the material known to those responsible for its production*".

15.6 The "*inevitable point of departure*" is the language of the provision and where "*more than one meaning is possible each possibility [i.e. each possible meaning] must be weighed in the light of all these factors*". Where the court "*is faced with two or more possible meanings that are to a greater or lesser degree available on the language used ... the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation*".

15.7 It is, however, inappropriate to "*do violence to the language ... by placing upon it a meaning of which it is not reasonably capable*" and the language should not be "*unduly strained*". Thus, while context may no longer be sacrificed at the altar of language, a cautionary note should be sounded against overcorrecting by giving context an exaggerated importance in order to distort and strain the language used in a document. The document should be given a meaning of which it is reasonably capable. The language adopted must be respected and some measure of fidelity must be shown towards it.

15.8 Although extrinsic evidence of a provision's context, purpose and material known to those responsible for its production is admissible, "*one must use it as conservatively as possible*". The reason for this admonishment is clearly to avoid unnecessarily taking up court time and parties' costs in pursuit of extrinsic evidence in cases where a clear answer is provided by the intrinsic evidence such as the document as a whole, the provision's immediate context or its apparent purpose.

15.9 Finally, a sensible meaning should be preferred to one "*that leads to insensible or unbusinesslike results*", or one that undermines the apparent purpose.' (footnotes omitted).

[38] The intention of the parties, common or otherwise, is irrelevant when interpreting a provision/document unless it is expressed in the document or the circumstances are such that it stands to be rectified. See *Endumeni* (supra) paras [20] – [24]. Although Mr Nel and Mr Vermeulen share the same view about the interpretation of IPW4 (the aspect relating to the consequences of non-compliance with the completion date of 30 June 2010), such expressed view may, arguably, be inadmissible for purposes of construing the document, by virtue of the application of the parol evidence rule. See *Padayachee v Adhu Investments CC and Others* [2016] 2 ALL SA 555 (GJ).

[39] However, Mr De Fin's view on the topic is highly relevant and potentially decisive. This is so by virtue of the operation of the consensus between the parties as expressed in their agreement. Clause 3.1 of the GCC provides:

> 'If an ambiguity or discrepancy between the documents is found, the Engineer shall issue any necessary clarification or instruction'.

[40] Mr De Fin's "clarification (or instruction)" appears from his conduct and correspondence: It is clear that he knew that Paparich had worked after 30 June

2010. When asked to contextualise the mail he had written on 10 September 2010 in which he had instructed Paparich to stop work he testified:

> '....the contractor started working. We were hit by delays. They continued. Hit by delays. We were then in a position where these huge pipes and pipe excavations were standing open to the community.....Now there had been discussions on getting the contractor to move quickly, to install the pipes. He was saying I need payment, so what happened was we had a meeting with EMM [defendant] on the 8th.....on the 8th we discussed this project in detail and we agreed that the finances were not available in this financial year and they were going to find the finances from another budget.....we were told by the EMM....we should hold out and wait.....so what we agreed was to make the site safe because the contractor was standing'.

[41] Mr De Fin was at pains to explain that he had no authority to instruct the contractor to stop work other than under three circumstances – when there was a health and safety issue, a quality issue and a design issue. He gave an instruction to stop work as there was a safety issue.

[42] In respect of the 'own risk' clause, Mr De Fin testified: *'....any works that are not approved by the project manager'*, the contractor would be doing at it's own risk.

'....If you excavate or lay pipes or buy pipes which do not correlate to the approved design, drawings then you run the risk of those works not being paid for.'

[43] Mr De Fin on 5 April 2011 and in a mail to the defendant draws attention to the IPW4 project and records

> *'.....he has not been compensated nor has to date has (sic) received any communication from the EMM on the monies owing or way forward for the project. Again the contractor has been waiting in good faith for this to be resolved.'*

[44] On 29 April 2011 Mr De Fin called for a meeting with one Tom of the defendant to discuss the revisions to the designs in respect of IPW4 to accommodate the bulk sewer line.

[45] On 18 July 2011 he communicated with Paparich advising them that the contract had been extended to 30 September 2011 and providing the name and number of a person who might be able to resolve the "payments etc" in respect of IPW 4.

[46] From the aforegoing it is clear that Mr De Fin, being the defendant's appointed engineer, considered IPW4 to create obligations for the defendant beyond 30 June 2010 provided Paparich performed work which fell within the parameters of the work approved in the designs. His conduct is clear and is to be construed as a '*clarification or instruction*' as defined in clause 3.1 of the GCC.

[47] If I am wrong in this approach, another route leads to the same result: The parties were *ad idem* that the completion date was 30 June 2010. The only question is what the consequences are for late performance.

[49] Paparich argues that the consequences are provided for in clause 43, which deals with penalties for delays. It provides:

"43. **PENALTY FOR DELAY**

43.1 If the Contractor shall, by the Due Completion Date, fail to complete the Works to the extent which entitles him to receive a Certificate of Practical Completion in terms of Clause 43.2, the Contractor shall be liable to the Employer for the sum stated in the Contract Data as a penalty for every day which shall elapse between the Due Completion Date and the actual date of Practical Completion.

The imposition of such penalty shall not relieve the Contractor from his obligation to complete the Works or from any of his obligations and liabilities under the Contract."

[50] The defendant effectively argues that such penalty clause has been deleted from the contract as a failure by Paparich to perform by 30 June 2010 does not merely entitle the defendant to raise a penalty, but it entitles defendant to withhold payment completely despite complete or partial performance after such date.

[51] The way-leaves were only completed on 26 June 2010. Mr Vermeulen conceded that the defendant knew of this. Both Mr Nel and Mr Vermeulen conceded that the defendant knew that the designs had only been approved of on 8 June 2010 and that on 8 June 2010, Paparich would not have been able to complete the works forming the subject matter of IPW4 by 30 June 2010. The special pipes that had been approved of on 8 June 2010 would take 4 – 6 weeks to be delivered. This fact alone would take the project way beyond 30 June 2010. The conclusion is inevitable - everybody understood that IPW4 would be performed after the cut-off date of 30 June 2010. This however, has limited value in interpreting the objective meaning of IPW4 which should be done separate from the subjective intentions of the parties.

[52] The defendant argues that IPW4 was linked to a so-called Mayoral Budget. During cross-examination it was put to Mr Nel, why the money was available on 30 June 2010 but not on 1 July 2010. The response was that it reverts back into the National coffers. The defendant argued that it is a creature of statute and that it is governed by the provisions of the Municipal Finance Management Act 56 of 2003 ('MFMA'). The monies had been made available. The IPW4 was properly authorised but the monies were only available until 30 June 2010. On the 26th of April 2010 when IPW4 was issued, the expenditure was properly authorised and approved by the relevant structures within the defendant. Mr De Fin was unaware of the fact that it was a mayoral budget allocation. He testified that he only became aware of this at the meeting on 8 September 2010. The defendant paid for the designs which were completed by 8 June 2010. The question is, why if the project had not reached practical completion stage, did the defendant pay for the designs? Why was Paparich asked to backfill and not told to remove their pipes and to restore the site to its pre-

existing condition? Why would Paparich incur costs in employing sub-contractors to do the backfilling if the contract was not going to continue? These are but some of the considerations relevant to a contextual interpretation.

[53] The GCC spells out specific consequences for a failure to perform timeously. The defendant did not argue that the contract was cancelled or terminated at 30 June 2010. It is clear that the contract was simply suspended, an indulgence granted by Paparich to the defendant. That being so, there is no basis to suggest that the penalty provision does not have application and that Paparich is not entitled to payment for work performed after 30 June 2010.

[54] Mr De Fin, Mr Ndumo, Mr Nel and Mr Vermeulen all agreed that the 'Own Risk' reference in IPW4 only applied to work, which hadn't been approved ie additional work, falling outside the ambit of IPW4 and not allocated in terms thereof. I agree with this construction. Such a construction can be reconciled with the provisions of the GCC and does not lead to an un-business-like result. Although a different interpretation was pleaded, it was not persisted with in argument.

[55] I thus find that IPW4 provides that the works should've been completed by 30 June 2010 and that non-compliance with that requirement would lead to the potential of a penalty being raised but would not on it's own, lead to an inability to recover any funds for work performed after such cut-off date.

COMPLIANCE WITH THE CONTRACT

[56] In terms of clause 49.10 of the GCC the Engineer (Vela VKE – represented by Mr De Fin) shall:

> "49.10 Within 14 days after date of final approval as stated in the Final Approval Certificate, the Contractor shall deliver to the Engineer a final statement claiming final settlement of all moneys due to him (save in respect of matters in dispute, in terms of Clause 58, and not yet resolved). The Engineer shall within 14 days issue to the Employer and the Contractor a Final Payment Certificate, the amount of which shall be paid to the Contractor within 28 days of the date of such certificate, after which no further payments shall be due to the Contractor (save in respect of matters in dispute, in terms of Clause 58, and not yet resolved)."

[57] The final payment certificate refers to clause 49.1 of the GCC. As it purports to be a final payment certificate it is clearly referring to clause 49.10 as 49.1 deals with interim payments. This was not an issue in the trial.

[58] The final payment certificate has been quoted in full above at paragraph [20].

[59] Mr Ndumo testified that the work was executed. Mr De Fin (the Defendant's representative) testified that Vela VKE had inspected the work, that the work had been done properly and that it had been done in accordance with the specifications.

[60] The issues defined at the pre-trial did not include a challenge to the final payment certificate and the defendant should be held to the issues as defined in the pre-trial minute, see *MEC v Kruizenga*, 2010 (4) SA 122 (SCA). During the trial there was an attempt to challenge the documents underpinning the certificate. This attack was launched on documents discovered late and to which Paparich objected. Be that as it may, it did not disturb the conclusion to be reached from the evidence of Mr De Fin and Mr Ndumo being that the work was performed.

[60] The *onus* thus rests on the defendant to show that the work was not performed or show some other lawful basis for refusing to pay in the face of the final payment certificate. Both Mr Nel and Mr Vermeulen testified that they did not inspect

the works nor did they attend site meetings. No evidence was presented on behalf of the defendant to counter the content or effect of the final payment certificate.

PERFORMANCE AFTER TERMINATION OF THE CONTRACT

[62] A feature neither pleaded nor argued, is that some of the work was performed after 30 September 2011 ie after the termination of the contract. The issuing of the final approval certificate by the defendant's representative, Mr De Fin, in respect of work done after 30 September 2011, includes a tacit extension of time for completion as envisaged in terms of the contract in terms of, amongst others, clause 42.

ORDER

[63] I accordingly grant the following order:

The defendant is ordered to pay the plaintiffs:

1. the sum of R7 857 258.69;
2. interest at the rate of 9% per annum a tempora morae;
3. costs of suit, to include the costs of two counsel.

I OPPERMAN
Judge of the High Court
Gauteng Division, Pretoria

Heard: 30 January 2017
Judgment delivered: 25/4/17
Appearances
For Plaintiffs: Adv Van Den Berg and Adv L Badenhorst
Instructed by: Tyron I. Pather Inc
For Respondent: Adv MC Makgato
Instructed by: Prince Mudau & Associates