IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No. 4690/2008

In the matter between:

INTECH INSTRUMENTS **Plaintiff**

and

TRANSNET LTD t/a
SOUTH AFRICAN PORT OPERATIONS **Defendant**

ORDER

The following order is made:

1. The plaintiff's claims are dismissed with costs, such costs to include the costs of two counsel where so employed.
2. Judgment is granted in favour of the defendant against the plaintiff for:
    (a) Payment of the sum of 56 982 600.
    (b) Interest on the sum of R56 982 600 at the rate of 9% per annum a tempore morae from date of service of the Defendant's Notice of Amendment dated 26 August 2014, to date of payment;
    (c) Costs of suit, such costs to include the costs of two counsel where so employed, and the qualifying expenses and travel and accommodation expenses of the following expert witnesses:
        (i) Dr Willem Du Toit;
        (ii) Peter Goodwin;
        (iii) Pieter Pretorius;
        (iv) Ralph Granig;
        (v) Denys Rothero;
        (vi) Pieter Van Zyl; and,
        (vii) Adrian Young.

3. No order as to costs is made in respect of the application for absolution.

4. The plaintiff is directed to pay all other and further costs which were reserved from time-to-time, such costs to include the costs of two counsel where so employed.

JUDGMENT

KOEN J

INTRODUCTION

[1] The defendant owns and operates two bulk handling facilities, namely an iron ore terminal at the Saldanha Bay port, and a manganese terminal at the Port Elizabeth port. Early in 2006 the plaintiff, a sole proprietorship owned by Mr Rajan Pillay, in terms of two contracts concluded between it, as contractor, and the defendant, as employer, undertook to do certain work in respect of these two facilities. Various claims and counterclaims have arisen from the plaintiff undertaking this work. At the commencement of the trial the various disputes arising out of the contract relating to the manganese plant at the Port Elizabeth project were separated[1] by agreement for determination before all other issues. This judgment only deals with disputes arising in respect of that contract.[2]

THE PLEADINGS

[2] The pleadings are extensive. Any reader of this judgment is referred thereto insofar as any specific details or interpretation thereof are required. In brief, the plaintiff alleges that in terms of a written contract concluded between it and the defendant during January 2006, it undertook to refurbish and upgrade the capacity of the defendant's manganese terminal at the port of Port Elizabeth. *Ex facie* the

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[1] All disputes relating to the Saldanha project thus stand over for subsequent determination.

[2] It is common cause that the contract was cancelled during August 2007, at which time the work was only partially completed. There is however a dispute between the parties as to whether the purported cancellation by the plaintiff or that by the defendant has legal effect.

pleadings, this contract was a 'lump sum' contract without bills of quantities. The contract price in respect of the refurbishment component was R26 352 730 and the contract price in respect of the upgrade component was R17 631 726. The contract period was 10 months.[3]

[3] Based on this pleaded background, the plaintiff advanced five claims:

(a) A claim for payment of retention moneys;

(b) A claim in respect of unpaid invoices;

(c) A claim in respect of interest on two invoices which are alleged to have been paid late;

(d) A claim for standing time costs (which has subsequently been abandoned and remains relevant only in regard to the issue of costs); and

(e) A claim for damages in respect of an alleged loss of profits on the balance of the contract.

[4] The defendant in turn advanced the following counterclaims:

(a) A claim based on a final certificate.

(b) In the alternative to the claim based on the final certificate:

  (i) a claim for damages; and

  (ii) repayment of certain amounts alleged to have been paid in error.

(c) A claim for penalties for late completion of the works.

All the claims in convention (excluding the one abandoned) and counterclaims remain in contention.

FACTUAL BACKGROUND TO THE CLAIMS AND COUNTERCLAIMS:

[5] The material facts emerging from the documentation and uncontested evidence relevant to the claims and counterclaims, in chronological sequence, is set out hereunder.

[6] During September 2005 the defendant invited tender options for:

(a) the refurbishment; alternatively;

[3] All of this is common cause on the pleadings.

(b) the refurbishment and upgrade of its manganese terminal at Port Elizabeth. Prospective tenderers were required to quote fixed lump sum prices on a 'design and build' basis. Although the tender documents contained a description of the scope of work in respect of each option, as well as extensive specifications, they did not contain a quantification of the scope of work in the nature of a bill of quantities. Instead the tender documents stipulated a number of deliverables.

[7] The principal deliverable in respect of the refurbishment only option was to:

'…maintain the current handling rate of 1 500 tons per hour, and alignment of the complete system so that at least the mandatory requirements pertaining to safety of personnel and equipment engaged in the terminal are met. The objective is to complete the project within 12 months but not exceeding 18 months.'

[8] The principal deliverable in respect of the refurbish and upgrade option was to:

'…refurbish and upgrade the Manganese Bulk plant to 2 500 tons per hour, and alignment of the complete system so that at least the mandatory requirements pertaining to safety of personnel and equipment engaged in the terminal are met. The objective is to complete the project within 12 months but not exceeding 18 months.'

[9] Both the aforesaid options specified certain specific deliverables in respect of various items of plant which make up the terminal. The tender documents also incorporated several specifications and codes relating to specific aspects of the proposed work, ranging from occupational health and safety requirements to corrosion protection. Also included were topics such as structural steel work, electrical motors, gearboxes, etc. The detailed specifications contained various references to the need to ensure the structural and mechanical integrity of the machines, including the requirement that the integrity of specific machines be analysed. In respect of both options the tender documents stipulated that 'the specification constitutes (SAPO's[4]) minimum requirements and that it in no way absolves the contractor from sound engineering practices.'

[4] South African Port Operations, which is a division of the defendant.

[10] The tender documentation also included the defendant's general conditions of contract ('GCC') and special conditions of contract, and required aspiring contractors to 'provide a detailed scope of works and costing envisaged to meet the requirements of this specification.'

[11] On 3 October 2005 a site inspection was held. This enabled aspiring tenderers to inspect and acquaint themselves with the facility. Mr Pillay attended that inspection on behalf of the plaintiff. At that stage, the plaintiff was a small instrumentation business with no prior experience in the kind of work which the project required. Mr Pillay wished to secure a subcontract in respect of certain electrical work and instrumentation components of the project. During the site inspection he however met other potential subcontractors, including Lorbrand, a company which specialises in the supply of conveyor components, to which he was introduced by Mr Dan Reddy, one of SAPO's employees. As a result of these introductions Mr Pillay decided to tender for the entire project. Not having had any experience in such projects, nor being possessed of the necessary resources to complete it personally, his intention was to sub-contract most of the work out. His role would thus predominantly be one of general co-ordination and project management.

[12] Following the site inspection, the plaintiff on 17 November 2005 submitted a tender in respect of both the refurbishment and the optional upgrade. The amount quoted for the refurbishment component was R26 352 730 and the amount for the upgrade was R17 631 726, giving a total of R43 984 456, excluding Vat.

[13] The proposed scope of work was described by the plaintiff as follows:

'**REFURBISHMENT**

As specified we offer professionally managed project-with full compliance of all safety, legal, engineering and SAPO specifications and standards-to refurbish the Ore terminal such that it will remain fully operational for 5 to 7 years at a throughput rate of 1,500 Te/hr at acceptable operation and maintain levels past handover.

Price: R26 352,730 excluding VAT.

Warranty: A twelve months Warranty is offered on all complete & inspected work.

Scope of Work: a detailed schedule of work to be completed is contained in this file

Summary of Scope of Work: Refurbishment

- Detailed cleaning of the entire facility
- Full inspection of all operating components
- Cleaning, greasing, re-sealing and re-compaction of all shafts, bearings, gears and pivots
- Installation of new lights to OHS ACT standards
- Installation of Cable Reelers on Stackers, Reclaimers & Shiploaders
- Sandblasting, inspection & painting of structures &steelworks
- Replacement of sectional degenerated steelwork to ensure safe operation for up to 7 years
- Hot steam welds on conveyors belts Replacement of 750mtrs of damaged belting
- Electronic scales on Import and Export lines
- Basic full refurbishment of the CCR substation and MCC
- Make good the existing operations of the tipplers, stackers, reclaimers and shiploaders
- Full refurbishment of the charger units
- Technical specifications contained in this file

UPGRADE

An additional cost of R17 631 726 is included in the schedule of prices.*'*

[14] The tender covering letter also referred to ten additional items which were offered as options, and was accompanied by a file of schedules and other documentation pertaining to proposed subcontractors.

[15] The tender form stipulated that unless the employer (described as SAPO) advised otherwise in writing, the tender and its covering letter and any subsequent exchange of correspondence together with SAPO's acceptance would constitute a binding contract pending the execution of a formal contract document.

[16] The tender further included a provision to the effect that any conditions had to be stipulated in an accompanying letter and that the tenderer was not to make any alterations or additions to the actual document. In addition, the tender included a provision that any omissions or sub-standard requirements of the specification must be brought to the attention of the defendant at tender stage and optional prices for addressing such omissions had to be provided. The tenderer was also required to give where called for, confirmation as to whether the tender complies, and if not how

it differs from the specification. The tender also included a form of contract which was signed by Mr Pillay. According to that document the contract period was 8 months. If the work commenced on 1 February 2006, it was to be completed by 30 September 2006.

[17] A tender clarification meeting was thereafter held at the offices of Lorbrand, the plaintiff's proposed main sub-contractor, on 7 December 2005. The purpose thereof was to clarify certain aspects of the tender and 'to obtain comfort of the plaintiff's ability to deliver.' Mr Pillay and his proposed project manager, Dr Glass attended for the plaintiff. Various technical aspects were clarified at that meeting and the plaintiff explained in broad terms how it proposed to execute the project. It also explained that the options which had been offered were not required to achieve the contract deliverables with one exception, namely a new slew ring, which was a requirement in terms of the scope as set out in the tender documentation. It was accordingly agreed that the value of the tender should be increased accordingly to provide for the slew ring.

[18] On 12 January 2006 the plaintiff was advised of the acceptance of its tender. The notice of acceptance recorded that the prices for the refurbishment and upgrade components were R27 656 350 and R17 631 726 respectively, that the contract period was 10 months (2 months longer than initially offered[5]), that the commencement date would be 16 January 2006, and that the plaintiff was required to contact Mr Gouws, who was described as the 'Project Manager'.[6] A written contract accordingly came into existence. The documents which comprise this contract are in bundle volumes 6 and 7 read together with the minutes of the tender clarification meeting. While the documents contain two sets of general conditions namely the 1980 and 1997 versions, it is common cause on the pleadings that the contract was governed by the latter, that is GCC 97, also referred to as 'the E5 contract document'. It does not seem that the contract was ever signed on behalf of

[5] Although not specifically canvassed in evidence the additional time would have had to have been added as the tender documents expressly stipulated that the work would have to be synchronised with SAPO's operations whereas the tender had been compiled based on 100% availability, thus not in accordance with the terms of the enquiry.
[6] The notice also referred to the need for certain bonds to be delivered.

Transnet. The contract is however admitted on the pleadings, so nothing appears to turn on that failure.

[19] The nature of the work to be undertaken and the layout of the plant were such that the plant had to be completely shut down while work was carried out on certain key sections, notably transfer points identified as 'T8' and 'T9'. The dates of the shutdown had to be planned and determined months in advance and the 'shut-down work' completed during that window period, to avoid losses being incurred by the defendant's customers and the defendant.

[20] The plaintiff commenced work on the site on 18 January 2007, two days later than provided for in the contract.[7] Nothing turns on that either.

[21] A 'kick-off meeting' was held on the same day. The purpose of the meeting was to commence with the project and prepare the necessary documents for the contract. The minutes of that meeting, summarized, record the following:

'The contractor is to carry out the full scope of work in accordance with the contractual requirements and applicable specifications;

SAPO – Procurement Personnel are responsible for the control of contractual items and contract documentation.

The SAPO – Project manager is responsible for Project Management, Design approvals, Planning & Progress control, Cost Control, Quality Control, issue of Variation Orders and Invoice Approval;

Andries (Dries) Gouws is SAPO's communication link person and Don Glass is the plaintiff's communication link person;

Correspondence of items involving costs changes and Variation orders and of a contractual nature are to be submitted by way of 1 x hard copy transmitted by post-delivery directly to SAPO's procurement department and 1x paper or electronic copy transmitted to Dries Gouws.

The maintenance warranty is 12 months from date of completion as noted on the Handover certificate after each conveyor;

A project plan / programme is required as soon as possible showing all activities

[7] The reason for the discrepancy was not canvassed in evidence and appears irrelevant.

Data packs are to contain Commissioning reports, Equipment technical data/ drawings, operation/licence manual, drawings 'as built', Inspection reports and certificates. One data pack, + 2 CD, Auto cad 14 are required prior to Handover of each conveyor;

In relation to quality assurance and control, SAPO's standard specifications are applicable;

Quality Control plans are required to be compiled and submitted for approval prior to commencement of work;

Handover certificates are required to be signed by SAPO on completion and acceptance. Handover certificates are to be issued per conveyor;

Payments are to be governed by the stated cash flow projection. The plaintiff is to compile and submit a preliminary cash flow projection based on the preliminary programme schedule;

Payment will be based on actual value of materials / equipment delivered and work completed. This will be verified on a SAPO Progress/payment certificate. All invoicing needs to be accompanied by a progress/payment certificate. Payments will only be made on priced items as per the Bill of Quantities or approved Variation Orders;

All Variation Orders are to be issued and approved by SAPO project manager officially in writing to the plaintiff Intech and copied to procurement for inclusion in the contract file. NO NEW WORK IS TO BE DONE WITHOUT AN OFFICIAL VARIATION ORDER. Where similar items are on the Bill of Quantities variation orders will be issued based on these pricings. Where new items are required the Contractor is to submit a market related quote for SAPO's written acceptance and approval before carrying out the work;

Sub- contractors are subject to the same safety requirements as the contractor and the contractor is responsible to ensure they comply therewith SAPO requires details of all sub-contractors who will work on site prior to them commencing work. All sub-contractors will be quality evaluated before commencement of work.

Security and retention is 10% and the contractor is to furnish a 10% bank bond to cover the retention. No payments of invoices will be effected unless an approved 10% security bond has been issued to SAPO. The 10% security bond is to be held by SAPO to the end of the delivery period and after 5% retention bond is received. The plaintiff offered a 5% retention and was to forward a 5% Bank Bond to cover the retention before the last 5% of the work is completed and invoiced;

The plaintiff was to arrange public liability and professional indemnity during manufacture, shipping and transport;

The base date price is fixed;

Penalties are applicable as noted in the General Conditions of Contract.'

[22] In relation to Health & Safety Training and Legal compliance, the plaintiff was to attend induction at SAPO working on site, and was to ensure that the then current construction regulation requirements were satisfied. Special attention was to be placed on health matters, with testing required before and after. The plaintiff was to ensure that all staff were experienced and that they had the necessary safety training to carry out their tasks. The plaintiff would be responsible for the safety of all staff whilst on site.

[23] In relation to construction regulations the plaintiff was to register the project with the Department of Manpower, appoint safety representatives prior to site work, and provide proof that it complies with the requirements of the COID Act,[8] or any amendments thereto, and the OHS Act[9] in terms of clause 11.1 of EM5 (1980) General Conditions of contract.

[24] Risk assessments for the work to be carried out were to be compiled and submitted for SAPO's approval prior to any work commencing. Work could only commence once the risk assessment has been approved. The risk assessment needed to be reviewed on a daily basis.

[25] As appears from paragraph 5.04 of that minute, the intention at that time was that the plaintiff would work on one item or section of the plant, sometimes referred to as a 'project', at a time and that the defendant would then take over that item and pay for that work upon completion and acceptance of that component. The warranty would then begin to run in respect of that item and the defendant would become liable to maintain it.

[26] That methodology however proved to be very onerous for the plaintiff, as it lacked the necessary resources to sustain it financially whilst work was ongoing on various components. Consequently it was informally[10] agreed that it would be paid monthly, according to estimates of the percentage of work done on various items. To facilitate this, the plaintiff produced an activity schedule based on its 'envisaged scope'. Progress was estimated against the line items provided therein, for the

[8] Compensation for Occupational Disease and Injuries Act 130 of 1993.
[9] Occupational Health and Safety Act 85 of 1993.
[10] 'Informally', in the sense that no formal agreement was reduced to writing.

purpose of interim payments. This informal methodology became necessary because the contract did not contain any objective measure for payment, such as a bill of quantities. It however enabled the plaintiff to work on various parts of the facility simultaneously without committing additional resources, and the payments which came to be made to it benefitted its cash flow. However, it also meant that the separate projects would not necessarily be undertaken sequentially and that discrete portions would not be signed off and taken over upon completion of the work on that component (e.g. a tippler) as had been intended originally. Instead partially refurbished components of the plant would be in use for potentially lengthy periods without having been formally accepted or taken over, while the plaintiff was still at risk.

[27] Similarly motivated, shortly after the commencement of the contract, the parties also agreed that the lump-sum which the plaintiff had included in its tender in respect of preliminary and general items and project management charges, would be paid to it in equal instalments spread over the contract period of ten months, that is approximately R455 000.00 per month.

[28] Issues of delay arose and were discussed at a meeting held on 7 September 2006. It was recorded that the anticipated new completion date would be March 2007 and that the defendant would consider the option of applying penalties for delays. It was also recorded as a matter of concern, that the project had been running for seven months and that no items or sections of the plant had by then yet been fully completed or taken over.

[29] The status of the project was discussed further at a subsequent meeting which was held on 5 October 2006. It appears from the minute of that meeting that:

(a) Mr Pillay expressed his unhappiness regarding a visit from a team of auditors and stated that he was not prepared to provide the defendant/SAPO with documents, or to attend meetings whilst being the subject of a forensic audit.

(b) Mr Pillay indicated that the plaintiff would not be able to meet the planned shutdown dates of 27 October 2006 to 13 November 2006.

(c) Significant differences of opinion had arisen regarding the scope of the plaintiff’s obligations. The plaintiff’s attitude was that it was only required to do

specific items of work. The defendant's attitude was that the plaintiff was required to do whatever was required to achieve the outcomes stipulated in the contract documents. The plaintiff undertook to furnish a document setting out its understanding of the scope. It maintained that if it was required to do work which it considered to fall outside of the contracted scope then it would bill the defendant for that work. The defendant's representatives indicated that the plaintiff needed to address the scope of work issue as a matter of urgency as the defendant would need to source additional funds if there was any out of scope work to be done.

[30] The plaintiff experienced some difficulties with 'Lorbrand' from a very early stage. Their relationship eventually broke down to the extent that it became apparent that it would not be possible for the plaintiff to achieve the planned 'shut-down'.[11] As a result of the plaintiff's inability to meet the shutdown deadline, agreement was reached to excise all the structural and mechanical work pertaining to the transfer points 'T8' and 'T9' from the scope of the contract, and to award that work to Lorbrand to execute in terms of a direct contract between it and the defendant. This was done with the plaintiff's agreement or acquiescence - rather than by means of the exercise of any contractual power.[12]

[31] Shortly before the scheduled shut-down the defendant employed one of its operating divisions, Transnet Capital Projects ('TCP'),[13] which had entered into a service agreement with a Joint Venture of professional engineering firms ('HMGJV', hereinafter referred to as the 'JV') to oversee and manage the shut-down work. The 'point man' at TCP was Mr Dan Reddy, referred to earlier in this judgment, who was designated as 'Project Director'.[14] The JV appointed one of its engineers, Mr Pretorius as acting project manager to oversee the execution of the T8/T9 project.[15] He, together with supporting staff, determined what was required for the upgrade of

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[11] The real cause for the breakdown is irrelevant. However, the evidence of Mr Granig and Mr Pillay's own evidence as a matter of probability suggests that the reason was that the terms of the Lorbrand sub-contract did not match those of the main contract, and that the plaintiff had failed to cater for certain expenses which were not covered by the Lorbrand quote, and also failed to comply with its payment obligations towards Lorbrand.

[12] The defendant had the power to excise portions of the work without the plaintiff's consent.

[13] This was during approximately October 2006.TCP is a specialized contract management division of the defendant. At a legal level the introduction of Transnet Projects did not change anything as 'Projects' was simply one of the Transnet's operating divisions, not a separate legal entity.

[14] That was simply a title – he was not a director of the defendant or any of its subsidiaries.

[15] Mr Pretorius was also involved in the decision to excise the T8/T9 project; however, nothing turns on that.

that component of the facility and drew up a scope of works. This scope of work entailed demolishing most of the existing T8/T9 conveyor structure, and replacing it with a new one built according to a different design, to accommodate the stipulated throughput. Some of the existing equipment such as motors and gearboxes were salvaged and re-used. These works had not become part of Lorbrand's scope but remained part of the plaintiff's scope.

[32] The shut-down work was completed on time on 13 November 2007. After attending to some outstanding punch list items Lorbrand effectively left the project. The defendant paid R8 604 228, 45 to Lorbrand in respect of this shut-down work it had contracted for separately.

[33] Following the shutdown, the mandates of TCP and the JV were extended to include all work remaining to be done on the PE facility. At a practical level, they became interposed between the plaintiff and defendant and were charged with the management of the project. This further work entailed broadly a review of the existing refurbishment project, a study to establish the work required to comply with then current safety regulations, refurbishing and upgrading the terminal to obtain a useful 5 to 7 year lifespan on all assets and equipment to achieve a sustained export throughput of 4,2 Mtpa, as well as developing and submitting maintenance and safe working procedures. The JV's first task was to carry out an assessment of the state of the items of the plant which together comprise the facility with a view to determining a scope of work.

[34] According to the evidence of Mr Pretorius and others who were present during that period Lorbrand and possibly also Alstom were attending to certain punch list items but there was little or no other work being done on the site.[16] The defendant describes the project as being 'in limbo'.

[35] On 15 December 2006 Mr Reddy instructed the plaintiff to suspend most of the work on the project. The reason for this was that there was a concern that the work which remained to be carried out in terms of the plaintiff's contract might not

[16] Mr Pretorius was now also gradually withdrawing and eventually came to be replaced by Mr Rothero with effect from 1 March 2007 and by Mr Andrew Young to oversee the JV contract.

coincide with the true requirements and that carrying out such work might entail a risk of wasteful expenditure. That instruction was confirmed in letters dated 18 and 20 December 2006 respectively.[17] That was not, in my view, a legitimate reason to suspend the contract. It would have given rise to specific remedies which might have been available to the plaintiff. No such remedies were however invoked. Instead the project remained in limbo as Mr Reddy for the defendant commenced negotiations with the plaintiff with a view to potentially 'closing out', that is terminating the contract. As part of those negotiations Mr Pillay was asked how much money the plaintiff would require for the contract to be terminated by agreement. On 1 February 2007 the plaintiff reverted with a figure of approximately R14 million. That figure was close to the balance which remained available in terms of the contract.

[36] Mr Reddy however considered that amount to be too high, as it would have amounted to fruitless expenditure, and he decided to instruct the plaintiff to complete the remaining scope. That decision was communicated to the plaintiff on 21 February 2007. Mr Reddy explained in evidence that the work to be done could be aligned with what was in fact required by way of instructions, consistent with the terms of the contract.

[37] In the meanwhile, it had come to the JV's attention that certain unsafe work practices were taking place on the site. These prompted the JV to carry out a so-called 'desk-top' audit on the plaintiff and its sub-contractor Langa Sandblasting & Painting ('Langa') which was working on site on 14 February 2007. The OHS Act deviations were noted and a 'stop-works order' was issued to the plaintiff detailing the non-compliances and requiring that it be remedied. The practical effect of this instruction was to stop the work of Langa, which essentially was confined to grit blasting and painting of certain structures.[18]

[38] A project meeting was held on 21 February 2007. The purpose of that meeting was to get the contract work restarted. Several issues material to the

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[17]The precise impact thereof is not clear given that it is not evident what exactly the plaintiff was doing or planning to do on the site at that time. These events also took place shortly before the annual 'builder's holiday' was due to commence.

[18] How Langa came to be doing this work in circumstances where the project had been placed on hold was not explained.

continuation of the contract were addressed. The minutes of that meeting record that the defendant was awaiting the submission of technical and design documentation which would include completion certificates, independent engineer's certificates and signed-off technical drawings, in relation to completed work. In that context:

(a) The plaintiff was requested to furnish all relevant documentation in respect of work which had been executed;

(b) The plaintiff's attention was drawn to certain shortfalls in the work;

(c) The plaintiff was advised of the need to comply with the OHS Act and Regulations, including the requirement to have a complete and up to date OHS file on site;

(d) It was recorded that the plaintiff had previously submitted a pack of variation requests in respect of pre-shut-down work and that all those requests had been rejected;

(e) The plaintiff was requested to provide a schedule detailing the outstanding scope of work; and

(f) The plaintiff was advised that it would need to submit formal motivations in respect of claims for additional time and/or remuneration if it considered itself to be entitled thereto.

[39] On the same day, the plaintiff issued a 'site transmittal' in which it undertook to remedy the respects in which it was not OHS Act compliant. Although there was no direct evidence of the stop works order of 14 February 2007 having been lifted it appears that work was allowed to resume on the strength of these undertakings.

[40] During the last few days in February 2007 some of Langa's workers were observed working 'at height' without life-line attachments.

[41] Mr Rothero, also an engineer, was thereafter appointed on behalf of the JV to take over the management of the project with effect from 1 March 2007. He understood his function to be to oversee the implementation of 'phase 2'. He did not regard himself as being in charge of the Intech contract. The defendant maintains that although this was not strictly correct, it is understandable as he testified that he did not see any of the 'plaintiff's people' on site save for an isolated interaction with one of the plaintiff's employees, Mr Naidoo over OHS issues. At that stage the

plaintiff's contract remained incomplete.[19] On 2 March 2007, it however came to the JV's attention that an employee of one of the plaintiff's sub-contractors, Alstom had, some weeks previously, suffered an injury which required him to be booked off work for a period (a so called 'lost time injury'), which had not been reported by the plaintiff. This event prompted further investigations by the JV into the extent of the plaintiff's OHS Act non-compliances.

[42] On 5 March 2007 the JV, on behalf of Transnet issued a stop-works order based on non-compliance with provisions of the OHS Act. That instruction was repeated in a further transmittal on 8 March 2007. The two instructions differ only to the extent that the later one was signed by the project manager, Mr Rothero and referred only to the OHS requirements which had been incorporated into the contract. The first instruction had also referred to JV requirements, which were more onerous than those incorporated into the contract. Mr Pillay testified that he was aware of the non-conformances. He eventually also conceded that the stop works orders were justified given the circumstances. This concession was contrary to what had been pleaded. At a meeting on 13 March 2007 the plaintiff recorded that it would be appointing an assessor to assist it in becoming OHS Act compliant.

[43] On 14 March 2007, the JV informed the plaintiff that a safety audit would be conducted on 20 March 2007. The plaintiff confirmed its availability for such a meeting.

[44] On 19 March 2007, a Mr Shorne Darlow of LexisNexis conducted a desktop evaluation. In a subsequent report furnished by him he confirmed the existence of several shortfalls. During evidence he testified that there was not even a semblance of compliance with the OHS Act or the applicable regulations and that the shortfalls were such that work ought not to have been allowed to start in the first place.

[45] The scheduled audit took place on the following day, 20 March 2007. Only the plaintiff and Langa were audited. The remaining sub-contractor working on the site,

[19] Mr Rothero did not impede the completion of the contract in any way. If he did then the plaintiff would have remedies available to it.

Alstom, was not available to be audited. The scoring reflected a lack of compliance with the provisions of the OHS Act and the applicable regulations – in particular the general regulations and construction regulations. Although the plaintiff took some steps during the period which followed to get its house in order relative to OHS issues, it did not, at any time, indicate that it was ready for another audit. Nor did it ask for the 'stop works' order to be lifted. It also did not submit a Health and Safety plan for consideration. Mr Darlow's evidence was that his brief from the plaintiff was not extended to assist in the preparation of a Health and Safety plan.

[46] The plaintiff further failed to furnish a document setting out its understanding of the scope, which it had been requested to do at the meeting of 21 February 2006. Mr Pillay explained that his focus was on getting the OHS issues in order.

[47] Whatever the reasons were, the project did not go forward. A meeting was then arranged for 19 March 2006 for the purpose of getting the work re-started. The plaintiff decided not to attend that meeting. The scope of the remaining or outstanding work accordingly remained unresolved and the contract deadlocked.

[48] On 10 May 2007 the defendant forwarded a schedule to the plaintiff setting out what was described as 'the client defined remaining scope'. That schedule also listed numerous shortcomings in the plaintiff's performance. The plaintiff was requested to review the document and to revert to the defendant with comments. Mr Dan Reddy testified that the purpose of the exercise was to reach agreement on what exactly remained to be done and to plan the execution of that work, which was important *inter alia* as certain activities could not be performed while other sections of the plant were operating.

[49] Mr Pillay rejected the request and threatened legal action. He had in the interim submitted certain invoices, one of which contained a claim for 'standing time' from January to April 2007.

[50] On 18 May 2007 SAPO's General Manager, Mr Nxumalo wrote a letter to Mr Pillay in which he requested him to complete the remaining work and to co-operate to achieve consensus regarding the remaining work to be executed. Mr Nxumalo

also advised that a formal extension of time application duly vouched would need to be submitted in respect of the plaintiff's invoice for alleged standing time costs.

[51] The plaintiff's attorneys replied on 21 May 2007 demanding immediate payment of the sum of R5 910, 607, 62 and advising that the plaintiff would not 'take the project further' until the issue of its outstanding invoices was resolved. Mr Pillay confirmed in his evidence that this was indeed his attitude. On 28 May 2007 Mr Pillay addressed an email to various of the defendant's representatives recording that 'unless payment is made of all our outstanding invoices we will not respond to any requests and incur further costs until these payments have been effected to ourselves'. The plaintiff was not prepared to engage with the defendant about the completion of the outstanding work unless and until its claims were paid. In the result, the project came to a complete standstill. No further work, apart from certain emergency work which the defendant caused to be done after direct communications and contracts with certain of the plaintiff's sub-contractors, was done.

[52] On 31 May 2007 the defendant addressed a letter to the plaintiff regarding defects in the SCADA system and the need for urgent action to rectify same. Mr Pillay's response was that the defendant should communicate with his attorneys.

[53] The plaintiff finally left the site at or about the end of May 2007. There were no P&G and project management charges after that date.

[54] On 4 June 2007 the plaintiff's attorneys addressed a letter to the defendant in which they demanded payment of the disputed invoices and reserved their client's right to cancel the agreement on account of the defendant's alleged repudiation. It ended with a threat of litigation if the demand for payment was not met within 2 days.

[55] On 7 June 2007 Mr Nxumalo addressed a letter to the plaintiff's attorneys in which he, inter alia:

(a) Recorded the history of what had transpired relative to the OHS issues;

(b) Noted that the plaintiff had not yet reverted regarding those issues or indicated that they were ready for a further audit;

(c) Recorded that the plaintiff had failed to respond in respect of the matters

which it had been required to be actioned, as recorded in the minutes of the meeting of 21 February 2007;

(d) Again, requested the plaintiff to revert regarding the execution of the remaining contract works;

(e) Assured the plaintiff that it would be paid all amounts due to it in respect of work duly completed in accordance with the contract; and

(g) Drew the plaintiff's attention to the existence of contractual 'procedures and processes' for the resolution of disputes – being a reference to clause 40 of the E5 contract.

[56] On 22 June 2007 the plaintiff's attorneys addressed a further letter to the defendant in which they maintained that the plaintiff's non-compliance in relation to OHS issues had not been so serious as to justify the stop-works order. That letter also recorded that the plaintiff was willing to perform in terms of the scope of works contained in the tender submission. That tender of performance was however conditional upon receipt of payment of the sum of R5 910, 607,62, being the amount which the plaintiff alleged was then due to it. The letter also alleged that the plaintiff had been 'pulled off the site' on account of 'ulterior motives'.

[57] On 18 July 2007 the defendant's attorneys sent a 'holding letter' to the plaintiff's attorneys advising that they were in receipt of the previous communications and required time to take instructions.

[58] On 13 August 2007 the plaintiff via its former attorneys cancelled the contract on the grounds of the defendant's alleged repudiation. On the same day, the defendant's attorneys addressed a letter to the plaintiff's attorneys in terms of which the defendant cancelled the agreement alleging numerous breaches, including an abandonment of the works. It also notified the plaintiff of the defendant's intention to invoke various contractual rights and remedies including imposing penalties.

[59] In the interim the JV had caused various investigations to be undertaken with a view to establishing the state of the structures and items of plant which comprise the terminal, to determine a scope of works to refurbish the facility and bring it within the then current statutory requirements relating to health and safety and upgrade the

export capacity to 1250T/hr per line, i.e. a combined capacity of 2500T/hr. These investigations had commenced in approximately December 2006 and continued until approximately mid-2007 and inter alia revealed that the main ship loader gantry structure was at risk of collapsing because of extensive corrosion damage and that very extensive work would be required to properly refurbish and upgrade the facility to achieve the required outcomes. Once a preliminary scope had been determined certain works which were described as 'emergency safety critical' were put in hand. These included building additional trestles to prevent the ship loader gantry from collapsing and thereafter reinforcing the gantry structure according to designs and specifications which were prepared by experts in their fields of expertise. Thereafter each of the items of plant was refurbished and items of plant and conveyor systems were upgraded and modified to achieve the revised stipulated outcomes. The entire process of determining what work was required, drawing up the necessary scopes of work, inviting tenders, letting the various contracts and overseeing the execution of the work was overseen by the JV, the lead person being Mr Young, designated as the 'senior project manager'. This project took several years to complete and was eventually completed at considerable cost.[20]

[60] The plaintiff instituted action against the defendant during April 2008.

[61] During August 2014 Mr Young prepared a final certificate in respect of the plaintiff's contract determining that the plaintiff was indebted to the defendant in an amount of R179 112 062.23 (excluding Vat). The methodology which he employed and manner in which he arrived at that figure appear from his evidence and the documents contained in volumes 23 and 24 of the bundle.

THE PARTIES' VERSIONS:

[62] The plaintiff places a different construction on some of the aforesaid facts, primarily insofar as it concerns the scope of the work, and what precisely the plaintiff

[20] Approximately R400 million.

had to do to receive incremental payments.[21] The plaintiff's case is that its obligations were confined to doing only certain items of work.

[63] The defendant's case on the other hand, is that the contract was one based on a performance specification and that the plaintiff's obligations accordingly extended to whatever work was required to achieve the stipulated outcomes.

KEY ISSUES FOR DETERMINATION:

[64] Based on the aforesaid brief statement of the respective contentions of the parties a number of key issues arise for determination:

(a) The meaning of the contract, in particular the scope of the plaintiff's obligations in terms of it. If the defendant's contentions are accepted then the effect would be to disqualify all of the plaintiff's claims with the exception of its claim for interest on alleged late payments;

(b) The lawfulness of the competing cancellations. The defendant's case is that the plaintiff repudiated the contract and that its response in cancelling was lawful. If this argument is upheld then the effect is to non-suit the plaintiff in respect of its claim for damages and to render it liable for additional costs incurred by the defendant as a consequence of having had to employ others to complete the works. If this argument is not upheld then the defendant asserts that the plaintiff's pleadings in any event do not, for the most part, make out a proper case on any reading of the contract and that the plaintiff has failed to prove its alleged entitlements.

(c) The defendant asserts that it is entitled to payment of the amount certified in the final certificate, but that it is not necessary to investigate the quantum in depth as the defendant is content to confine the capital of the main element of its counterclaim, namely the additional costs incurred as a result of having to employ others to complete the contract works and render them free of defects, to R50 Million. The defendant maintains that the result is to reduce the quantum of the main counterclaim and the alternative claim for damages to approximately 25% of what is actually due to it in terms of its claim based on the final certificate and alternate claim for damages flowing from the remedial work, thus in effect leaving a 75% margin of

[21] The plaintiff's counsel has described the scope dispute as the elephant in the room lying at the root of the dispute.

error in favour of Intech. The defendant's claim for repayment of amounts in respect of P&G and project management charges is effectively incorporated in the final certificate. Its separate claim based on the *condictio* is only pursued in the alternative to the main claim, more specifically, in the alternative to the corresponding relief sought in terms of the main claim. The defendant also asserts that it is entitled to penalties, but that it is content to give the plaintiff the benefit of the period during which the work was suspended (approximately two months) and hence to confine the capital of that claim to an amount of R 6 982 600.00.

[65] In what follows, I shall deal with the scope of work, the lawfulness of the respective cancellations, the plaintiff's individual claims, and finally, the defendant's counterclaim.

THE SCOPE OF THE WORK:

[66] What exactly the plaintiff was required to do in return for the agreed contract price does not appear clearly and succinctly from the plaintiff's pleadings. The plaintiff's case, as discerned not only from the pleadings but also the evidence and arguments adduced, is that its obligations were confined to doing the items of work listed on the activity schedule which was produced after the conclusion of the contract, which in turn seems to flow from the premise that its obligations were confined to doing the work listed in the 'envisaged scope' which accompanied the plaintiff's tender. The defendant's case is the opposite, namely that the plaintiff was required to achieve the contract deliverables as set out in the scope of works documents which formed part of the tender enquiry and which, in due course, came to form part of the contract documents.

[67] Which contention must prevail depends on the terms of the written contract including the defendant's general conditions of contract GCC 97 (E5), as pleaded by the plaintiff. These are common cause on the pleadings. Determining the scope of work accordingly entails an interpretation of the terms of the contract with reference to its language, applying the normal rules of grammar, and with due regard to the immediate context in which the words appear (that is the remainder of the contract) and the broader context (that is the facts which gave rise to the contract and the

setting in which it was concluded). This Court needs to place itself as near as possible to being in the shoes of the parties at the time of they contracted.[22]

[68] The correct approach to interpretation generally has recently been restated in *Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk*[23] as follows:[24]

'**Interpretation**

10. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* the current state of our law in regard to the interpretation of documents was summarised as follows:

> "Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. 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",

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[22] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[23] 2014 (2) SA 494 (SCA) at para 10 to 12.
[24] The citation of authorities are omitted.

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

11. That statement reflected developments in regard to contractual interpretation in *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another*; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*; and *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund*. I return to it and to those cases only because we had cited to us the well-known and much-cited summary of the earlier approach to the interpretation of contracts by Joubert JA in Coopers & Lybrand and Others v Bryant, that:

"The correct approach to the application of the golden rule of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract . . . .

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. . . .

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions."

12. That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise". Accordingly it is no longer helpful to refer to the earlier approach.'[25]

[25] See also *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA), *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) 24 – 25.

[69] In *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*[26] it was said that:

'A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.'

[70] The starting point regarding context is the invitation to tender. The notice to tenderers invited tenders for 'Refurbishment or an option to upgrade the manganese bulk plant, Port of Port Elizabeth.' The tender documents included several other documents but specifically two entitled 'Scope of work and Specification' - one in respect of the refurbish only option, and the other in respect of the optional upgrade.

[71] The scope in respect of the upgrade and refurbishment was described in general as follows:

'1. SCOPE:

1.1 This specification covers the designs, manufacture, and commissioning and all other work necessary for the refurbishment and upgrade of Manganese Bulk Plant to 2500 tons per hour, and alignment of the complete system so that at least the mandatory requirements pertaining to safety of personnel and equipment engaged in the terminal are met. The objective is to complete the project within 12 months but not exceeding 18 months.

1.2 All existing belt conveyors will be upgraded to convey Sinter and Manganese Ore continuously at 1 250 tons per hour per conveying stream, peaking at 1 500 tons per hour, from rail tipper to the stockyard and from the stockyard to the ship-loaders.

1.3 All the mechanical equipment including, belting, splices, rollers, belt cleaners, pulleys (nip guards) and take-up units should all be checked, upgraded, repaired, replaced and refurbished as required to support the operational requirement.

1.4 The integrity of the truck tipplers, truck positioner, stackers, loaders and reclaimer machines, should be analysed in line with new required handling rate, mandatory requirements to safety of personnel and equipment, reliability and availability specifications and upgraded to meet these requirements. The machines shall be adequately protected against corrosion where applicable as per specification HE9/2/B, to ensure that the structure life is maintained until 2011.

1.5 All transfer points and shutes must be completely re—engineered and modernized to eliminate the spillage and resulting damage to the equipment.'

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[26] 2016 (1) SA 518 (SCA) in Novartis at para 28.

[72] The 'expected outputs' in respect of the upgrade option only were described as follows:

'5. EXPECTED OUTPUTS:

5.1 The end result of the project must ensure that all systems and structures is upgraded to ensure a further plant life at design capacity of at least 7 years assuming 4000 machine working hours per annum. The quality of the upgrade must ensure that a 98% plant availability is maintained for the projected lifespan of 28 000 machine hours.

Calculated as follows: $\frac{\text{Total Running Hours – Plant/Stoppages}}{\text{Total Running Hours}} \times 100\%$

5.2 A complete maintenance plan, to maintain the required outputs for the specified period, shall be provided for the equipment by the successful tenderer. This plan shall include all scheduled, unscheduled and predictive maintenance tasks with their respective triggers.

5.3 The continued handling rate should be 1250 ton per hour per belt allowing for 20% surges in the handing rate due to the nature of the feeding system.

5.4 The plant will be operational during the upgrade process and planning must be such that a plant availability of 85% is maintained during this period. The successful contractor would be required to establish his side work such that it does not interfere with the terminal's operations.'

[73] These general specifications were followed by more detailed specifications in respect of the various items of plant and machinery which make up the facility, as well as a commissioning/testing regime, an overview of the operation, and several technical codes.

[74] The site inspection held on 3 October 2005 afforded aspirant tenderers with the opportunity to inspect the facility and acquaint themselves with it. The abridged notes of that meeting record that the scope was '*as per project specification*' and that Mr Gouws explained the difference between the 'refurbish only' and 'refurbish and upgrade' options. It is common cause that aspiring tenderers were not given any more information or told what exactly (or even approximately) would be required to comply with the project specification. That was left for them to determine, if they chose to tender. The plaintiff submitted its tender against that background. The tender covered both the refurbishment and the optional upgrade, for amounts of R26 352 730.00 and R17 631 726.00 respectively. The tender covering letter was

accompanied by a file containing several schedules, other documents as well as certain mandatory documents including a signed form of contract and a declaration confirming that the tenderer had acquainted himself with all the tender documents.[27] Objectively, the plaintiff's tender appeared to comply with the requirements of the invitation to tender and was dealt with on that basis.

[75] Following receipt of the plaintiff's tender a clarification meeting was held at Lorbrand's offices on 7 December 2005 to clarify aspects of the tender.[28] It was communicated to the defendant that the plaintiff's tender covered all the requirements of the tender enquiry, save that the additional slew gear, which was an express requirement, had been offered as an option. That was then added and the price was adjusted accordingly.[29] No further clarity was sought.

[76] It is against that background that the tender was then awarded to the plaintiff.

[77] The plaintiff is very critical of the maze of background documents. In its heads it complains that:

'The defendant has elected its battleground in the voluminous and contract documents capable of competing interpretations. It contends that although Intech populated the tender document with data, descriptions of work activities and crisis in particular, the tender and its provisions remained the product of the defendant, by its own boast the largest transport company in the world with specialised skilled lawyers, internal legal advisers and highly proficient engineers at its beck and call. They had ample time to draft the contract, were well aware that unless it was clearly defined the works that the bidder undertook to do could result in disputed interpretations as to the scope and that clarity of expression was vital. With that background it put together a contract which *per se* sets up "tension between an

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[27] The plaintiff signed a declaration confirming that it had acquainted itself with all the documents listed in the schedule of tender documents. Mr Pillay conceded that he had never read or applied his mind to the contents of the contract documents at any time during the life of the contract, even though he had been referred to certain provisions of the GCC it by clause number. If Mr Pillay had not included that declaration in his tender then the tender would have been non-compliant with the result that it could not have been accepted. That declaration was the root cause of many problems the plaintiff subsequently encountered.

[28] The other purpose and the reason for the meeting being held at Lorbrand's premises was that SAPO officials could satisfy themselves that Lorbrand, as the plaintiff's main subcontractor had the necessary capacity (Record 191 lines 15-23).

[29] The plaintiff has referred to this addition to the contract as indicative of the vague nature of the scope of work. Whatever the position might have been prior to that meeting, the addition of the slew ring and the increase in the price which was accepted rather suggests that greater unanimity was achieved as to the scope of works.

impossible and fundamentally unrealistic outcome at the one end and detailed scopes and options at the other."'

[78] It is also critical of the fact that the defendant does not have a signed copy of the contract.[30] It contends that the scope remained unclear, and that this is confirmed by the defendant having sued Mr Dan Reddy, the nominal head at the time of it inviting tenderers, after the fallout between the parties, on the basis of breach of his employment contract because he had produced a contract vague in scope. Mr Andrew Young also stated that the scope of works was very vague. The plaintiff accordingly views itself as the victim of all this uncertainty.

[79] The absence of an agreement signed by the defendant, is a surprising fact, but it is not fatal and assumes little, if any, significance where the contract documents are admitted on the pleadings. That the contract could have been formulated with greater clarity is also no doubt so. But very few complex commercial transactions are without complications. This court must, in accordance with the relevant principles applicable to interpretation, endeavour to establish the respective rights and obligations of the parties as best it can.

[80] Viewed against the general background outlined above I conclude that the provisions of the contract listing specific deliverables in respect of both the refurbish only option and the optional upgrade, and the tender enquiry (which became part of the contract), all point to the scope of work entailing that the contractor had to achieve stipulated outcomes. That, with the benefit of hindsight, the contract possibly introduced 'tension between an outcome (which might have been difficult to achieve) … at the one end and detailed scopes and options at the other', is of little significance. I have been puzzled why a contract of such magnitude was awarded to essentially a sole proprietor of an instrument company with no established track record of refurbishment and upgrade of major plants of this nature, in what is obviously a vital if not essential part of the operations of a major mining aspect of the South African economy, namely the export of mined manganese. I can speculate on that issue, but such speculation will be largely irrelevant to the present enquiry. In

[30] Mr Pillay was given large volumes of documents which he was asked to sign and initial some time on a visit to Mr Nxumalo's office, which he did he said without considering the 700 pages.

particular, having regard to what was envisaged at the time, and having regard to the capacity and experience of the plaintiff, the limited anticipated duration of the contract and the contract price, it seems unlikely that the defendant could realistically have expected, to put it in the vernacular, a Rolls Royce which phase 2, performed under the auspices of the JV after extensive examination and reports subsequently produced between 2007 and 2014. To resort to the vernacular again, although the stipulated outcomes might be the same (indeed some more onerous) than that subsequently required in phase 2, what could reasonably be expected was rather a Volkswagen, which although it can cover the same distance and perhaps reach the same speed as a Rolls Royce, would probably do so with less comfort, reliability, acceleration and performance, although the quantitative 'outcomes' of the journey undertaken by both vehicles as to distance and average speed might be the same. The plaintiff could not in my view have been in any doubt that it had to achieve the outcomes stipulated. If it was difficult, even to the extent of being nigh '… impossible and fundamentally unrealistic'[31] then the plaintiff assumed the risk of tendering at a too low price, and/or being unable to deliver at the price tendered. But in line with the defendant's expectations of the future of the plant, it could also not have expected a plant with the level of operative detail and longevity which eventually was produced after the contract with the plaintiff was cancelled. This has been a vexed issue arising in this case.

[81] The requirement that the plaintiff was to submit a proposed scope of work '*envisaged to meet the requirements of this specification…'* as part of its tender, did not detract from its overriding obligation to achieve the stipulated outcomes. Prospective contractors are sometimes required to furnish information (like a proposed 'method statement') at the time of tendering, the purpose of which is to enable the employer to see what the tenderer has in mind to do to meet the requirements of the contract. Such information can be of value to an employer in evaluating competing bids, but the information contained in the method statement or, as in this case the 'envisaged scope', does not serve to qualify the contractor's obligation to achieve the stipulated outcomes/ deliverables, particularly where the contract is a '*lump sum, design and build*' contract. In *casu,* the scope was described

[31] No argument was advanced that the contract was impossible of performance, perhaps not surprisingly.

with reference to so called 'performance criteria'. How the plaintiff was to achieve those outcomes was up to it. Whether it had correctly assessed what achieving those outcomes would involve,[32] was at its risk.

[82] The plaintiff confirmed the above interpretation by informing the defendant prior to the award of the contract that its tender covered all of the requirements of the invitation to tender save for the additional slew ring, which was then added. Apart from constituting a highly relevant background fact, such representations[33] have historically been dealt with on the basis that they constitute a term of the contract.[34]

[83] To read the contract in the way the plaintiff wishes to construe it, would require disregarding large parts of the contract documents specifically those sections defining the deliverable outcomes, the applicable codes and standards, and the stipulated commissioning and testing regime, contrary to well established rules of construction. On the plaintiff's version, none of the stipulated standards were applicable, which would then seemingly mean that the work could be done to whatever standard the plaintiff thought to be appropriate, a conclusion which simply cannot be so.

[84] This is also not a case in which subsequent conduct shows that the parties held a common view as to what the contract required. On the contrary, Mr Pillay testified that there were disputes[35] about what exactly the plaintiff was required to do, virtually from day one. He testified that Mr Gouws informed him that he would not approve requests for Variation orders ('VO's) as it was up to him (Mr Pillay) to do whatever had to be done to meet the project specification for the contract sum. If anything, this would lend support to the defendant's construction of the contract.[36]

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[32] Whether the employer may also have thought that the 'envisaged scope' would be sufficient is equally irrelevant.
[33] Really in the nature of *dicta promissava.*
[34] *Hall v Milner* 1959 (2) SA 304 (O) at 311 to 313, in particular *dicta* at 313
[35] The real cause of these disputes appear to have been that neither Mr Pillay nor any of his employees had actually read the tender documents and consequently did not know what they were committing themselves to do at the time of submitting the tender.
[36] The words which were used were that the plaintiff had in mind a Volkswagen whereas Mr Gouws expected a Rolls Royce. On other occasions Mr Pillay stated that Mr Gouws expected to receive a new plant (Record 207 lines 8-9).

[85] The invitation to tenderers expressly stipulated that '*Any additional conditions*[37] *must be embodied in an accompanying letter.* The purpose of that requirement was that if contained in an accompanying letter it would be clear to anyone assessing the tender that it was qualified, contained additional conditions, and did not correspond to the terms of the invitation to tender. If the plaintiff wished to limit its obligations from that in the invitation to tender then it should have recorded in its tender covering letter that what was offered was not what had been invited, but something different. Had it prior to the award of the contract indicated that its tender was not to be construed as an offer to do what had been asked for, then it might not have been awarded the contract.

[86] I conclude therefore that the scope of work was as contended for by the defendant with reference to the stipulated outcomes. I shall return to this aspect again briefly when I deal with the defendant's counterclaim.

THE LAWFULNESS OF THE COMPETING CANCELLATIONS:

[87] In considering the lawfulness of the respective purported cancellations of the contract by the plaintiff and defendant, it is convenient first to summarize very briefly some of the relevant legal principles applicable to construction contracts, particularly in regard to their cancellation, before considering the relevant facts.

[88] A contract to perform building or engineering work[38] is an 'entire' contract. The contractor's obligation to complete the work is an indivisible one. The contractor's right to payment only arises upon completion of the whole of the works. Completion of only a part of the work does not entitle a contractor to payment.[39] Recognizing that this could hold cash flow and possible other disadvantages for a contractor on a

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[37] The word 'conditions' is not here used in its legal technical meaning, but would include any deviations from the terms of the enquiry including limitations.

[38] *Locatio conductio operis faciendi.*

[39] N Duncan *Wallace Hudson's Building and Engineering Contracts* 472-480; *Smith v Mouton* 1977 (3) SA 9 (W); *Mouton v Smith* 1977 (3) All SA 238 (A) at 5C- D; *Rocade Developments (Pty) Ltd v Van Vuuren & Trathen (Pty) Ltd* 1997 (3) SA 494 at 502I-503E & G-I, 504I-505C; *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N); *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 563G; *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd; Shelfaerie Property Holdings CC v Midrand Shopping Centre (Pty) Ltd* 1995 (3) SA 187 (A) at 193A-C and H-194 B; *Martin Harris & Seuns v Kwa Kwa Regeringsdiens* 2000 (3) SA 339 at 354J- 355D & H-356A.

large extensive project, construction contracts often provide for periodical interim payments to the contractor, usually against some kind of certificate, prior to completion of the entire works. These progress payments made from time to time as the work progresses, represent payments on account in expectation of the entire work being completed. They are not payments for discreet completed parts of the work, even although they invariably may be calculated with reference to the value of work done during any given period. They also do not constitute acceptance of the work to which they relate. They are subject to on-going revision by means of further certificates, whether interim or final. Accordingly, interim certificates are not evidence of the satisfactory completion of any part of the works or of a contractor's entitlement to payment in respect of individual items of work.[40]

[89] If a contract is cancelled by an employer because of a contractor's breach, the interim payment certificates issued prior to such cancellation cease to have any force as there is no longer any expectation of completion of the work by the contractor.[41]

[90] Where a contract is cancelled by a contractor because of an employer's breach, then an interim payment certificate issued in terms of the contract prior to its cancellation remains capable of supporting a claim, but the right to payment is of a provisional nature given that such certificates remain subject to revision in later certificates and, in particular, in a final certificate.[42] Once a final payment certificate is issued previous interim payment certificates cease to have any force as they are effectively 'overtaken' by the final certificate.

[91] Generally claims for payment of amounts which are alleged to be due in terms of construction work fall into two categories, namely:

(a) Claims founded on specific provisions of the contract, which entails identifying the specific provision of the contract sought to be relied upon and establishing the facts to bring the claim within the ambit of that applicable provisions; and

(b) Claims at common law, generally for a breach of a contract, for example a claim for damages, which requires that all the necessary elements for such a claim

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[40] Ibid.
[41] *Thomas v Grafton, supra*.
[42] *Shelegatha supra. Martin Harris supra.*

must be pleaded and, subsequently proved,[43] (assuming also that such a claim is not precluded by the provisions of the contract. Where a contract regulates the consequences of conduct which at common law might have amounted to a breach, then no claim for damages will lie as there is no breach.)[44]
The party advancing the claim bears the onus both in regard to pleading and subsequently proving the requirements of the contract to sustain the claim. That position is not affected by a failure to make the relevant averments.[45]

[92] A party charged with the responsibility of issuing payment certificates must act fairly. Hence a claim for payment for work done can be prosecuted sans a certificate if it can be shown that a certificate ought properly to have been issued and that the failure to issue one was unfair. The applicable standards are those of good faith and reasonableness. Such claims are ordinarily framed on the basis of a breach, and are thus, strictly speaking, claims for damages rather than for payment *ex contractu.*[46]

[93] Where a contract incorporates restrictions regarding amendments to for example the work to be completed, usually in the form of a provision requiring such amendments to be made in writing and to be signed, then no purported amendment will be of any force unless it is alleged and shown that the terms relating thereto have been satisfied to allow such amendment.[47] Where a contract provides for the exercise of administrative functions by an agent (who may or may not be an employee of the employer) the agent's power, in accordance with the principles relating to agency, is limited to administering the contract according to its terms and does not extend to any greater power of varying the contract or acting outside the terms thereof.

[94] A contractor's only remedy in circumstances where the work has not been completed[48] is to claim a *'quantum meruit'*[49] for work partially complete. Where the

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[43] *Imprefed (Pty) Ltd v National Transport Commission* 1993 (2) All SA 179 (A) at 186; 197.
[44] *Group 5 Building Ltd V Minister of Community Development* 1993 (3) SA 629 (A).
[45] *Edward L Bateman Ltd v C.A Brand Projects (Pty) Ltd* 1995 (4) SA 128 (T).
[46] This distinction is of little practical relevance in the context of a claim against the employer.
[47] *S.A. Sentrale Ko-op Graanmaatskappy BPK v Shifren* 1964 (4) SA 760 (A).
[48] This is not to be confused with the situation where interim payment has been certified but the certificate not yet paid.
[49] Amount of enrichment.

contract has not been cancelled the claim is a contractual one for a reduced contract price. Where the contract has been cancelled the claim is one based on the principles of enrichment.[50] Although the essential elements of a claim in contract differ from those of a claim based on alleged unjustified enrichment, the distinction is of little if any practical effect in this context as the contract rates and prices are generally taken to be representative of the extent of the employer's enrichment.[51] On either basis however, the contractor's claim is limited to the value of work done, valued at contract rates.[52] Any notional claim in respect of retention moneys (if applicable) is subsumed within this claim. The contractor bears the onus of proving the extent of the shortfall in performance and the extent of the deduction to be made on account thereof. Sometimes a contractor may not be entitled to any remuneration at all depending on the reasons for its failure to complete, whether the contract has been cancelled and if so, by whom, and whether the employer has accepted the partial performance and taken the partially completed works into use.[53]

[50] *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) 392 (A) at 424C.
[51] Ibid at 422 F-G.
[52] *Jacoba v Maree & Sons* 1965 (3) SA 73 (T); *BK Tooling v Scope Precision Engineering (Edms) Bpk supra;* Hudson's *supra* at 475-480, paras 4-006-4-013 and 1070 and 8-172; A May *Keating on Building Contracts* 5 ed at 76 and ("impossibility of performance") 207.
[53] *BK Tooling v Scope Precision Engineering supra* at 425A- 426G.

[95] The plaintiff's case on the pleadings is that it became entitled to cancel the contract because the defendant unlawfully stopped it from working on the site on account of alleged Occupational Health and Safety ('OHS') infringements, and thereafter failed to inform it of the nature of the infringements, or of what it was required to do to rectify the alleged shortcomings, thereby rendering it impossible for the plaintiff to perform.[54] Mr Pilllay however accepted in cross examination that this was not so, that he knew where the plaintiff had fallen short and that he also knew what was required in order to rectify the shortcomings. He also conceded that the defendant had been justified in stopping the work given the circumstances. Mr Pillay also conceded that the plaintiff failed to get its house in order relative to the OHS issues and that the project fizzled out not because of Health and Safety issues, but rather because he refused to engage the defendant regarding the continuation of the work, because certain invoices according to him remained outstanding, he had insisted that these first be paid.

[96] While the pleadings have not been amended, the plaintiff's case as it emerged from propositions put to various witnesses became that while the defendant might have been entitled to bring the work to a stop on account of the plaintiff's non-compliance, the defendant's conduct in doing so was opportunistic and overly heavy handed and was motivated by an improper and/or ulterior motive to bring the contract to an end, to implement phase 2.

[97] This argument is problematic insofar as it connotes that the relevant statutory provisions relating to OHS are to be construed as being discretionary rather than peremptory. The terms of the OHS Act are peremptory. Section 8 thereof requires an employer to provide a working environment which is, as far as practicably possible, safe and without risk to the health of his employees. To that end it requires an employer to do a number of specific things e.g. risk assessments. Construction Regulation 4(1)(e) requires an employer in the position of the defendant (referred to as the 'Client') to '*stop any contractor from executing construction work which is not in accordance with the principal contractor's health and safety plan*' (my emphasis).

[54] The suggestion is that the defendant frustrated the plaintiff's efforts to perform.

[98] On the plaintiff's argument these provisions must be construed as conferring a discretionary power.[55] I am unable to agree with that argument. The words employed are clear. The requirements are peremptory. Such an interpretation also accords with how the provisions were viewed and are applied in practice. Mr Pillay conceded that the stop works orders were justified. Mr Shorne Darlow, who was called as an expert by the plaintiff, conceded that the plaintiff had not complied with the OHS Act and its regulations. He was driven to concede that the defendant was obliged to stop the work given the circumstances. At best for the plaintiff he suggested, but somewhat faintly, that the defendant should have confined the stop works order to hazardous work. However he had to concede that the construction regulations as they then stood did not support that contention. He further also could not point to any specific construction activities which would not have entailed hazards.

[99] Dr du Toit, Mr Pretorius, Mr Rothero and Mr Young all experienced in construction matters, rejected the plaintiff's aforesaid contentions out of hand. Attention was drawn to the inherent extremely hazardous nature of the manganese site and the dangers associated with carrying out the work. They all stressed that safety is a vital consideration in the construction industry. Mr Young explained that they subscribe to a policy of 'zero harm'. Dr du Toit rejected Mr Darlow's thesis that the stop works orders were excessive and testified that the defendant was not only entitled to stop the work, but was obliged to do so. I agree with their construction of the obligations in terms of the OSH Act.

[100] All the defendant's witnesses denied being motivated by any improper ulterior motive. According to them it did not matter who did the work, provided it was done properly and with due regard to the applicable OHS regulations.[56]

[101] It might be said, possibly even with some justification, that the stop works order was welcomed by the defendant as it allowed an opportunity[57] to implement its

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[55] Further examples of such peremptory language are to be found in Construction Regulations 5(1); 5(2); 5(3); 5(4); 5(6)(1); 5(7); (6)(1); 7(1); 7(2); 7(9); 8(1) and 8(4).
[56] Their contentions were not pressed in cross examination.
[57] The consequences of the stop works orders were not significant in regard to what work was actually being performed on site at the time. This would be largely irrelevant unless the stop works order was unlawful and one would for example be considering a claim for delay or some form of damages. Nevertheless the reality is that very little work was being done during March 2007, more due to the

more extensive and professional upgrade of the manganese facility. But ultimately motive is irrelevant. Even if the defendant's motive to stop the work was mala fide, but through its agents the issue of the stop works order was justified as a matter of law, then the stop works order cannot be unlawful. Conversely, if the motives of the defendant and its agents were entirely bona fide, but the stops works order was not legally justified and hence unlawful, amounting to a breach or repudiation of the contract, then adverse legal consequences would flow from such conduct no matter how well intended the stop works order might have been in the safety of workers.

[102] In my view the stop works orders were clearly issued lawfully. It was within the defendant's power to demand that the plaintiff rectify the shortcomings which existed.

[103] The plaintiff's purported cancellation, based on the stop works orders amounting to unlawful conduct and a repudiation by the defendant of its obligations in terms of the contract, was therefore itself unlawful. The defendant was entitled to treat the plaintiff's unlawful attempt at cancellation as a repudiation of the agreement, pursuant to which it elected lawfully, as it was entitled to do, to cancel the agreement. The contract was therefore lawfully cancelled at the instance of the defendant.

[104] My aforesaid conclusion regarding the validity of the defendant's cancellation of the agreement disposes of the plaintiff's claims other than its claim for interest on alleged late payments and its claim for damages. Many of these claims however also fall to be dismissed on other grounds. Although not strictly necessary I deal with some of these briefly below, should my conclusion that the plaintiff's cancellation was invalid and the defendant's cancellation valid, be found to be incorrect. My discussion of these other grounds shall however be very brief.

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fact that the plaintiff had failed to respond to a request made at the meeting of 21 February 2007 for a document setting out its understanding of what exactly its remaining scope comprised. Essentially the contract had become or was close to becoming deadlocked. Either way, work could not recommence until there was agreement as to what precisely the plaintiff was going to do and to what standard the work would be done. If and when the outstanding work was agreed, it would also have to be programmed. That never happened. The contract had largely become bogged down for reasons unrelated or not solely related to the stop works order.

PLAINTIFF'S CLAIMS:

Claim 1: Retention of moneys

[105] R3 877 884.10 was retained by the defendant as retention moneys.[58] The plaintiff claims this money on the basis that its entitlement to payment thereof arises *simpliciter* upon cancellation, without the legal basis for that conclusion in paragraphs 11(a) to (c) of its particulars of claim being pleaded and without the lawfulness or otherwise of its purported cancellation featuring as an element of its cause of action.[59] *Cambrian Collieries v Jenkins and Sons*[60] is at times invoked as authority for the proposition that a contractor could become entitled to payment of retention moneys upon cancellation of the contract. That decision must, with respect, be treated with circumspection. It *inter alia* does not take account any of the considerations referred to below, which detract from that general proposition. But even if correct, such a claim would even then only follow after the contractor has lawfully cancelled the contract following a repudiation thereof by the employer, and not where the contract is lawfully cancelled at the instance of the employer, as I have found. The unlawfulness of the cancellation precludes this claim by the plaintiff.

[106] However, even if I was wrong in that conclusion, retention is a form of security given to an employer for the due and proper completion by a contractor of all its obligations under the contract. The extent to which monies are to be retained (if at all) and when and to what extent the contractor will become entitled to payment of retention moneys, are matters which fall to be determined by the terms of the contract. Ordinarily, it will only be payable upon completion of the work free of defects,[61] although a portion may, in certain instances, become payable on the

[58] The defendant denied that the plaintiff is entitled to be paid the retention moneys alternatively it alleges that the claim has been extinguished by set off, in terms of the provisions of GCC 34(i).
[59] I shall for the purposes of this judgment assume in favour of the plaintiff, that the lawfulness of the cancellation is to be implied in its particulars of claim.
[60] (1902) 23 NLR 431, 444-446.
[61] *In casu* the GCC clause 37.3 (v) required the project manager to produce a final certificate following completion of the work by others. Such certificate would, by its nature, take account of moneys held in retention and would preclude a separate claim for payment of retention moneys. This would mean that where the contract has been cancelled as a consequence of the contractor's default, the contractor could claim payment in terms of a final account in which all prior assessments would effectively have been reviewed. That did not happen.

attainment of so-called 'practical completion'.[62] In this instance, GCC clause 29 regulates the position as follows:

'29.1 Security in the amount equal to either ten or five percent of the contract price, as elected by the Contractor, shall be provided by the Contractor for the due and faithful performance by him of all the duties and obligations resting upon and assumed by him in terms of the contract.' (my underlining); and

'29.2 Either five or ten percent of the value of the work competed, as reflected by the net monthly amounts certified for payment, will be retained by Transnet for the due and proper fulfilment of the Contract, until such retention money is sufficient, in the opinion of the Project Manager, for the protection of Transnet. Transnet is entitled to withhold all or portion of the retention money until the completion of the contract and the expiry of the maintenance period.' (my underlining).

The stage of completion contemplated in clause 29, was never achieved. No alternative basis, for example that the contract included an implied or tacit term entitling it to payment of retention moneys before completion, or on cancellation, was pleaded.[63] Accordingly, as a matter of interpretation of the terms of the contract alone, absent consideration of the invalidity of the cancellation, the plaintiff failed to prove an entitlement to payment of the retention moneys in terms thereof.

[107] Even regardless of the terms of the contract, the claim for retention moneys is

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[62] Keating *supra* 72; IN Duncan Wallace *Hudson's Building & Engineering Contracts* 11 ed at 1008 (para 8-078).

[63] Such a term could not be implied as it would be in conflict with the express terms of clause 29. To the extent that the case sought to be advanced by the plaintiff, although not pleaded might be that retention moneys constitute amounts which are deducted from moneys which are due to the contractor but retained by the employer and that ownership of the retention moneys vests in the contractor, that contention is unsound in law and has been rejected by our courts holding that a contractor's entitlement is limited to the net amounts certified for payment (i.e. after deduction of the retention moneys) and that no claim for payment of retention monies arises otherwise than in accordance with the relevant terms of the contract – see Loots *Construction Law and Related Issues* at 483; *Martin Harris v Qwa Qwa* supra at 355H-I; *Rabbich v Somerset East Municipality* (1898-1899) 13 EDC 107; *Graham NO V Williams Hunt (Pty) Ltd* 1995 (1) SA 371 (A) at 374C-E; I-J; 375I-J; 376B-C; *Cambrian Colliers v Jenkins and Sons* supra at 444-446. A further unexpressed premise might be that the contractor is as of right entitled to payment in respect of parts of the (incomplete) work – i.e. that the contract is divisible. The work in this instance was however indivisible.

Any suggestion that the contractor's failure to complete the work is to be regarded as irrelevant on the basis that completion constituted a condition which must, in the circumstances, be taken or deemed to have been fulfilled is also unsound. It overlooks the distinction between a term of a contract and a contractual condition in the strict sense. In this regard, it is well settled that the doctrine of fictional fulfilment applies only to conditions – usually of suspensive nature. It has no application to contractual terms. But has in any event also not been proved. Conversely an obligation arising from a term can be enforced, but no action will lie to compel the performance of a condition. RH Christie *The Law of Contract in South Africa* 6 ed (2011) at 137 to 141 and authorities cited, in particular *R v Katz* 1959 (3) SA 408 (C) at 417.

also unsustainable at the level of general principle. Interim payments are advances on account, made in the expectation that the contractor will complete the works. Once that premise falls away then any right to interim payments falls away,[64] and a final accounting is required in respect of amounts retained in respect of interim payments and as well as claims made in respect of partially completed works (i.e. unpaid invoices not certified for payment).[65] A contractor may in those circumstances at best claim for the value of work properly done. Any notional claim for retention moneys will then be subsumed within that claim.

[108] Interim payments are furthermore based on estimates. A contractor's entitlement is subject to on-going revision in subsequent interim certificates, and ultimately in the final certificate.[66] A vested right to payment cannot arise in respect of parts of amounts arrived at by means of estimates which are, in terms of the contract and as a matter of law subject to later revision,[67] independent of the terms of the contract as would occur following cancellation of the contract.

[109] The plaintiff's claim for retention moneys accordingly falls to be dismissed.[68]

Claim 2: The unpaid invoices

[110] This claim relates to amounts alleged to be due to the plaintiff in respect of invoices numbered 1364, 1367, 1417 and 1424, annexures 'H', 'I', 'J' and 'K' respectively to the particulars of claim. The amounts in these invoices were never

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[64] *Thomas v Grafton supra*.

[65] Different considerations may apply in respect of claims based on interim certificates in the proper sense; however, such considerations do not arise in this instance.

[66] In this instance, the position is regulated by the provisions of GCC clauses 36.1, 36.3 and 36.5.

[67] The minute of the meeting of 21 February 2007 recorded that remedial work was still required in respect of some items. Also no data packs had been provided in respect of line items which had been paid for as to 100%. This suggests that the plaintiff had possibly been overpaid in respect of those items and that the corresponding values might have been revised, possibly downwards, to provide for shortfalls.

[68] In the alternative the defendant further submitted that the claim has been extinguished, either as a result of the reduction of rates which was effected in terms of Transnet's letter of cancellation or, failing that, by operation of set-off having regard to Transnet's counterclaims. GCC Clause 34(i) reads as follows

'34 (i) All money, whether a liquidated amount or not, that may become payable to Transnet by the Contractor in terms of any clause or condition incorporated in the contract may be recovered from the Contractor by deduction or recovery

3.30..1 From money, including retention money, due to or to become due to the Contractor under this or any other contract he may have with Transnet, or...'

3.30..2 In the light of the conclusion to which I have come it is not necessary to consider that argument and I accordingly refrain from doing so.

certified for payment, and are pursued on the basis that the defendant acted unreasonably and therefore in breach of its obligations in failing to certify payment of these invoices, that is as damages claims.

[111] The claims are respectively for:

(a) Work alleged to have formed part of the agreed scope (so called 'in scope work'), reflected on invoice 1364, items 96,101,102,105,106; 113, 128, 152,157 and invoice 1424, items 129 and 140; and

(b) A claim for work which is alleged to have fallen outside the agreed scope (so called "out of scope work"), reflected on invoice 1367; and

(c) A claim for additional preliminary and general costs and project management charges, reflected on invoice 1364, item 189 and Invoice 1417.[69]

[112] These claims are bad in law. The system of interim payments is a contractual device aimed at maintaining a contractor's cash flow during the interim stages of the project. They are in the nature of advances made on account and in contemplation of the contractor, in due course, completing the entire works which would then entitle it to the full contract price. This however only applies while the contract is *in esse*. Once the contract ceases to exist, particularly as a result of a breach by the contractor at the option of the employer, as I have found earlier, the underlying basis for the interim payments falls away and that system comes to an end. Thus a claim

[69] The defences pleaded, mostly in the alternative to these claims are firstly that the claims as pleaded do not disclose a valid cause of action; secondly that any entitlement to payment in respect of the invoices in question has been extinguished by virtue of the issue of the final certificate; thirdly that the amounts claimed in respect of alleged 'out of scope work' relate to alleged variations of the contract in respect of which the provisions of the contract regarding to claims for variations had to be complied with, and were not complied with; fourthly that the claims are time-barred (this also relates to the claims in respect of the alleged 'out of scope' work); fifthly that the plaintiff was not entitled to certification of these invoices as it was itself in breach of the provisions of the agreement and refusing to perform (i.e. a defence based on considerations of reciprocity); sixthly that any indebtedness that may be found to have been in existence has been extinguished by the operation of clause 34(i) of the GCC, alternatively by operation of set-off; seventhly that the work was both incomplete and defective and that the defendant incurred expenses in remedying the defects and in having the work completed by others; eighthly a general denial of liability; and ninthly that the plaintiff failed to comply with the dispute resolution proceedings provided for in the contract. In response, with regard to the claim in respect of alleged variations, the plaintiff replicated that the defendant 'waived' compliance with the provisions of the contract in respect of extras. That 'waiver' is alleged to be founded on the defendant's conduct and that it allegedly '*continued to give instructions for additional work, accepted such work and made payment for a period of nine months. Further, that the plaintiff relied upon this representation and continued to execute such work*' (which is not really a case of waiver but more correctly a form of estoppel). In the light of the conclusion to which I have come it is not necessary to consider all these defences, and I shall accordingly not due so but only deal briefly with those which are in my view dispositive of the claims.

based on an interim certificate, and *a fortiori* a claim for damages based on an interim payment allegedly due and which had not been certified under a contract which has been cancelled, is not competent in law, regardless also of the circumstances by which the contract came to be cancelled. The contractor's only remedy following cancellation is to sue for the value of work actually properly done less any amounts previously paid on account. The instances where a claim based on an interim certificate might survive the cancellation of a contract are confined to instances in which the contractor is the innocent party,[70] but do not extend to where an employer lawfully cancelled following a breach by the contractor.[71] In those instances, any interim payment certificates issued prior to cancellation, or claims for damages on the basis that such payments should have been certified, cease to have any force. A contractor's rights in respect of an unpaid claim which was not certified for payment cannot be greater than those in respect of an interim payment certificate. The contractor's rights in respect of payment post cancellation are regulated by the provisions of GCC clause 37.3(v), which is exhaustive in confining a contractor's rights to suing for a final payment pursuant to a final accounting, once all outstanding work has been completed. A separate claim for amounts which the contractor contends ought to have been paid during the contract, is not contemplated.[72]

[113] Specifically with regard to the facts of this matter, the plaintiff's claims are premised on the underlying assumption that its obligations were confined to those listed in its activity schedule, and divisible, that is that each line item represents an actual contractual entitlement. That was however not the case as the activity

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[70] *Shelagatha* supra.

[71] The fate of the claims therefore also turn on the lawfulness of the competing cancellations.

[72] The defendant also advanced a further legal consideration which appears to me to be decisive of this issue, which I mention but will not consider further as it is unnecessary to do so in the light of the earlier conclusions to which I have come. It is said to have arisen because of a development which occurred during the litigation, the development being the issue of a final certificate many years after the litigation had commenced. This has however been criticized by the plaintiffs as opportunistic if not unlawful, arguments which I do not consider further. Interim certificates and payments pursuant thereto are, as stated earlier, provisional in nature and subject to revision in subsequent certificates and ultimately in a final certificate. Accordingly even if they don't lose effect following cancellation, they cease to be of effect upon the issue of a final certificate. When the final certificate was issued any rights which the plaintiff may have enjoyed in respect of claims which had been certified on an interim basis would have fallen away upon the issue of that certificate. *A fortiori* therefore any notional claim in respect of an uncertified claim (assuming that such a claim can exist) would also have been extinguished on the issue of the final certificate.

schedule had no contractual standing, but was simply part of an informal arrangement devised at site level sometime after the conclusion of the contract, in the apparent shared belief that the work listed in the schedule would be sufficient to achieve the contract deliverables. It cannot sustain a claim as advanced in accordance with the terms of the contract.

[114] The result is therefore that the claim must also fail.

Claim 3: Interest on alleged late payments[73]

[115] Interest of R35 360 is claimed in respect of invoice 1290 and R19 342 is claimed in respect of invoice 1321. In both instances payment was made on 23 March 2007 and in both instances the plaintiff alleges that these payments were made late. The defendant denies that the amounts were paid late.

[116] Liability for interest is regulated by GCC Clauses 36.3 and 36.4, which provide:

'36.3. The Contractor shall be entitled to receive payment of the amount authorised in the said certificate, subject to deduction of retention monies in terms of clauses 29.2 and 29.3 hereof, within 30 days after the day of progress measurement or estimate by the Technical Officer or receipt of a VAT-invoice from the Contractor whichever is the later.

36.4. In the event of failure by Transnet to make payment within the stipulated time in clause 36.3, he shall pay to the Contractor interest at prime overdraft rate as certified by the Contractor's bankers upon all overdue payments of such certified amounts, from the date upon which such payments should have been made.'

To succeed with a claim for interest the plaintiff was required to establish that the invoices were delivered together with whatever supporting documents were required by the date alleged, namely 8 January 2007 in respect of invoice 1290 and 22 January 2007 in respect of invoice 1321.

[117] In his evidence-in-chief Mr Naidoo was initially unable to say when invoice 1290 was sent. Later he testified that it was submitted on 11 January 2007.[74] He was

[73] This claim is dealt with in paragraphs 4(c) and (f) read together with paragraph 13 of the particulars of claim. They are not set out herein and the reader of the judgment is referred to the pleadings.
[74] How he suddenly could remember these facts was not explained.

however unable to say what, if any documentation had accompanied the invoices. He could not recall exactly when invoice 1321 dated 22 January 2007 was submitted to SAPO but stated it would most likely have been on the same day. He contended further in chief that the payment certificate would always have been attached to the invoice. However, under cross examination he was driven to concede that this had not always been the case and that he could not say what (if any) documents had accompanied these invoices.

[118] Mr Richards at one stage testified that a certificate had accompanied the invoice. However, he also said that Mr Pretorius had not in fact signed off the 'certificate'. It is therefore not clear what he was attempting to assert – seemingly that an activity schedule had accompanied the invoice. The quality of Mr Richardson's evidence is however not satisfactory and the reliability thereof in doubt. It is moreover clear for reasons which we have already canvassed that no reliance can be placed on Mr Richard's evidence).

[119] In the circumstances this claim was not proved on a balance of probabilities and falls to be dismissed.

Claim 4: Damages (loss of profit)

[120] This claim is for loss of profit in the sum of R4 748 378.16 which the plaintiff claims it was prevented from earning by virtue of the cancellation of the contract pursuant to a repudiation by the defendant. It has two elements, namely liability for such damages in principle, and if established, the quantum of such damages.

[121] In view of my finding that the plaintiff's purported cancellation was unlawful and hence ineffective, and amounted to a repudiation which entitled the defendant to cancel the contract, the claim cannot be sustained and fails for that reason alone in principle.

[122] But even if I was wrong on that issue, the plaintiff in any event failed to prove what, if any, profit it would have made on the remaining work. It was required to prove what properly remained to be done in terms of the contract, what income it

would have derived from that work, and what its costs would have been. No such evidence was led. On the contrary, the only evidence which was led in relation to quantum was that the plaintiff had, in compiling its tender, added a mark-up of 15 percent to its sub-contractor's rates and prices. While that may have been so it does not follow that the plaintiff would necessarily have made a 15% profit on the remaining work, or necessarily any profit at all, because:

(a) One cannot simply assume that the plaintiff's rates and prices were fully covered by sub-contractor rates and prices.[75]

(b) One also cannot simply assume that all sub-contracts were on a 'back to back' basis, or that sub-contractors would have continued performing at the rates and prices originally quoted notwithstanding that the project had run into a second year. Prices invariably rise with time.

(c) The plaintiff had fallen out with its main contractor, Lorbrand and would have to secure a replacement main sub-contractor to complete the outstanding conveyor work. That contractor might not have come at Lorbrand's rates, yet the plaintiff would not have been entitled to pass on any increase in rates and prices to the defendant.

(d) Given the delays which had taken place it would in all likelihood not have been profitable for the plaintiff to have done any more work without a substantial upward adjustment of rates and prices.

[123] This claim accordingly falls to be dismissed for lack of proof. If I am wrong in that regard, then the claim would in any event be extinguished by the defendant's counterclaim.

THE DEFENDANT'S CLAIMS-IN-RECONVENTION:

[124] The defendant has advanced five broad counterclaims, namely:

(a) A claim based on a final certificate;

(b) A claim for damages;

(c) A claim for the repayment of amounts which are alleged to have been overpaid in terms of the contract;

[75] Mr Pillay conceded that he might have 'left things out' and the facts pertaining to the plaintiffs subcontract with Lorbrand proved that to be so. At the very least, the plaintiff failed to obtain a rate for transporting the goods to site.

(d) A claim for the repayment of certain P&G payments which are alleged to have been made in error; and,

(e) A claim for penalties for failure to complete timeously.

[125] Apart from the last claim for penalties, claims (b) and (c) are in the alternative to claim (a) which is based on the final certificate, in the sense that they are also incorporated in that claim. Some of the claims are also advanced in the alternative to others.

THE MAIN COUNTERCLAIM: FINAL CERTIFICATE, ALTERNATIVELY DAMAGES:

[126] The defendant's primary claim is based on a final certificate prepared and signed by Mr Young, which was issued long after the litigation had commenced. *Ex facie* that certificate the plaintiff is indebted to the defendant in the amount of R204 187 750.00, including Vat.[76] The plaintiff has admitted the authenticity of the certificate but otherwise placed everything in dispute.[77] In the alternative it claims damages[78] in an amount of R204 176 349 under several separate heads.[79] The alternative claim for damages is disputed in its entirety. I deal first with the claim based on the final certificate.

[127] The issuing of a final certificate following lawful cancellation by the employer, and the consequences thereof, are regulated by clause clause 37(3)(v) of GCC97. The relevant portion reads as follows:

'37(3)(v) … after the said work has been completed by such other person and such other person has been paid therefor, the Project Manager shall issue the Final Certificate

[76] In defence the plaintiff raised a special plea of prescription in respect of the certificate claim. It however subsequently indicated that it does not intend to pursue that defence. It need therefore not be considered further in this judgment. Bundle Vol 2 at 231 paras 19-31. It is not in dispute that the defendant is entitled to credit in respect of the work which was excised. What was in issue was whether the defendant was entitled to recover the over spend, which it asserted it is in principle entitled to recover. The defendant conceded that this claim could not succeed on the evidence, accordingly did not persist with it, and conceded that the amount certified in its favour in the final certificate falls to be adjusted by adding back the amount of R5 193 520 (excluding Vat).

[77] Including the validity of the final certificate, the defendant's entitlement to rely on it and the basis upon which the certificate was prepared.

[78] Which is a claim which would be available following on the cancellation of the contract by the defendant, which cancellation I have found to be lawful.

[79] Inasmuch as the claim for damages substantially overlaps with the claim based on the final certificate the underlying evidence as to quantum is common to both claims.

when so authorised by the Executive Officer. Should any money be shown to be due by the Contractor to Transnet, the Contractor and/or his guarantor shall forthwith pay such money to Transnet, failing which Transnet may recover the said amount from the contractor.'

[128] Mr Goodwin, Mr Van Zyl and Mr Young all explained that the JV's mandate was to refurbish and upgrade the facility so that it could safely and reliably operate at a throughput of 4.2 MTpa for a period of approximately seven years. In pursuit of that mandate they conducted a superficial assessment of the major items of plant to establish their condition with a view to developing a broad scope of work. This was followed by inspections of other elements, for example electrical, and in due course more detailed inspections and assessments. The JV's collective assessment was that the facility was in a very poor state of repair and that extensive work would be required in order to meet the project deliverables. A very early finding included that the main ship loader gantry was at risk of collapse, and required urgent remedial work to render it safe. Another finding was that the structures of the reclaimers could not safely accommodate the proposed increase in loading which the uprated export capacity required and that they would have to be modified. In carrying out these assessments no distinction was drawn between those portions of the facility which the plaintiff had worked on and those on which it had not done any work.

[129] The design solution which the JV arrived at to meet the project deliverables entailed increasing the export capacity of the plant to 1 250T/hr per line – i.e. a combined rate of 2 500T/hr. The capacity of the import side from the rails to the stacking areas would be left unchanged. The results of the investigations were applied to the design solution and utilised to develop so called 'work packages' comprising drawings, specifications and the like. Input was also obtained from other specialist consultants. This work was done by 9 Dot. The work was then put to tender and carried out by contractors under the oversight of the JV.

[130] The initial work, confined to work described as 'safety critical', commenced at about the end of August 2007, shortly after the plaintiff's contract was cancelled. The cost of that work came to approximately R11 million. Thereafter other work was done to virtually all the components of the facility over several years to meet the project deliverables, at a total cost in respect of 'phase 2' of approximately R400 million.

[131] It was only during 2014 and after completion some 7 years later, that Mr Young was instructed to prepare a final certificate in respect of the plaintiff's contract. His starting point was to ascertain what the project deliverables in terms of the plaintiff's contract had been. On his reading of the contract documents, what was required was that the facility should be refurbished and upgraded to conform with the then current safety regulations and to be able to safely convey 1 250T/hr per line (i.e. a total capacity of 2 500T/hr) for a period of 5 to 7 years[80] assuming 4 000 operation hours per annum. It also had to have a 98% plant availability, which he described as very high. Certain items of plant had to incorporate certain specified features, most of which were related to safety and all work had to be done in accordance with certain specified codes.

[132] In Mr Young's opinion, these deliverables correlated with the JV's deliverables in respect of 'phase 2', and if anything, were more onerous as the JV's solution did not entail increasing the capacity of the import side to the stackers to match that of the export side to the ship loaders, and required only an approximately 94% plant availability as opposed to the 98% specified in the plaintiff's contract. He considered the deliverables in the two scenarios to be sufficiently closely matched to be essentially the same.[81] I have no reason to doubt his expert opinion on that aspect. He thus took the JV's deliverables as a starting point.

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[80] All the technical experts rejected the thesis that a facility of this kind could be refurbished or upgraded so that it could safely be used for 'just five to seven years'. They explained that there is no design code or measure by which that could be achieved. Instead structures would need to be assessed for their integrity and ability to carry the specified loads. That exercise requires certain industry codes to be applied. Where modifications or remedial works are required, they would have to be done in accordance with the applicable codes. All of them expressed the view that to 'refurbish' a facility like the manganese facility would, for these reasons, effectively mean 'to make as new'. In the result a properly refurbished structure would most likely last for many more years– possibly as long as 40 or 50 years with routine maintenance. They were accordingly all of the view that the fact that the JV's deliverables referred to a period of eight years as opposed to the 'five to seven years' was completely irrelevant. According to the technical experts similar considerations would apply in respect of the electrical and mechanical components, which could either be left as is or be refurbished and upgraded to conform to the applicable standards. It was impossible that they could be made good to conform to the relevant standards and achieve the specified deliverables to last for 'just five to seven years.' None of this evidence was challenged in cross-examination and no evidence of technical witnesses was adduced to rebut this evidence. This evidence accordingly falls to be accepted.

[81] The defendant submits that this entailed erring somewhat in favour of the plaintiff.

[133] Having determined this starting premise Mr Young then prepared the final certificate. He used the plaintiff's contract value as his starting point then subtracted approximately R2.3 million to take account of the T8/T9 excision, then added approximately R6 million, being the value of approved Variation Orders, which resulted in an adjusted contract value just short of R49 million. This part of the certificate is uncontroversial, although the defendant contends that the deduction in respect of the T8/T9 project appears to be understated as the value used is that which Mr Richards derived at but which he stated represented what the plaintiff would have paid Lorbrand, not what the plaintiff would have charged the defendant, whereas the defendant should be entitled to a credit of what it would have been required to pay to the plaintiff for the work which was excised.

[134] Next he deducted the amounts paid to the plaintiff in terms of its contract. The balance represented the remaining contract value following the aforementioned adjustments. This leg of the calculation is also largely uncontroversial, save that it takes account of amounts which the defendant alleges were paid in error, being the subject of the defendant's third claim, to which I shall return briefly below.

[135] Mr Young then deducted certain contra charges. The first was an amount of just short of R5.2 million in respect of amounts paid to Lorbrand for the T8/T9 work. This is short of the approximately R8.6 million which the defendant paid to Lorbrand. The reason for the difference was not canvassed in evidence. However even if the higher figure is assumed to have included the approximately R500 000.00 which the defendant was forced to pay Lorbrand in respect of work done under the Lorbrand/Intech contract, the result errs in Intech's favour to the extent of approximately R2 million.[82]

[136] The second contra charge amounted to R192 171 916.41 being the costs incurred by the defendant in having the works completed and made free of defects by third parties following the cancellation of the Intech contract. This item is contentious. Mr Young explained that this figure is reflected as the 'Grand Total' on annexure AY2, being the costs incurred by the defendant in connection with 'phase

[82] This deduction equates to the defendant's first head of damages in terms of it alternative clam, Clam AA.

2', which he considered were attributable to the Intech contract. He explained that there were elements of 'phase 2' which comprised work which had not formed part of the plaintiff's contract, such as certain earthworks and the provision of a new bucket wheel reclaimer, and that there were also instances where work done to certain items exceeded what was strictly necessary to achieve the project deliverables. In those instances, in which the work fell wholly outside the plaintiff's scope he did not apportion any amount to that contract, and in the other instances, he assessed the work done under each contract which was strictly necessary to achieve the Intech contract deliverables, as he understood them. This he did on a 'qualitative' basis rather than by attempting to identify specific items thereby arriving at a percentage (by value). Where his assessment was 100% then he carried that across to the right-hand column (i.e. for the plaintiff's account). Wherever his assessment resulted in an estimated range, for example 40 to 50%, he always used the lowest percentage and carried that value across. The defendant accordingly maintains that the figure of R192 million was arrived at on a conservative basis.

[137] Mr Young was not challenged on any of these figures during cross-examination. Nor was any evidence led to controvert the accuracy of his assessments. This evidence accordingly stands unchallenged, save for the challenge that Mr Young proceeded on a wrong premise in thinking that the deliverables in terms of the plaintiff's contract were what he thought them to have been. This proposition was put, but not amplified. The defendant rightly submits that such criticism is misplaced, as it was the plaintiff's obligation to achieve the stipulated contract deliverables, and not simply do the work listed in its activity schedule, as I have found earlier.

[138] The above notwithstanding, the defendant has limited its counterclaim (and the corresponding element of its alternative claim in damages) to an amount of R50 million, that is almost one quarter of the amount reflected in the final certificate. In my view the defendant has proved its entitlement to this amount.

DEFENDANT'S COUNTERCLAIM FOR REPAYMENT OF P&G PAYMENTS MADE IN ERROR (Claim C)[83]

[139] The defendant counterclaimed, based on a *condictio indebiti,* for amounts paid to the plaintiff for P&G's and project management charges for December 2006, January 2007 and February 2007 in the amount of R1 370 143, 70 including Vat alleging that the amounts were paid in error in the mistaken belief that they were due when they were not.

[140] It is common cause that the amounts in question were indeed paid. It is also common cause that the amounts which were paid to the plaintiff in respect of P&G and project management charges exceeded the amount provided for in the contract and that the plaintiff neither sought nor obtained any extensions of time under the relevant provisions of the contract.[84] The claim is resisted on the basis that the payments were not in fact made in error, but that the defendant elected to pay the claims, the payments having been authorised by Mr Reddy, with full knowledge of the facts. Such an error as to the existence of a debt, is an essential element of the *condictio indebiti,*[85] and if proved would constitute a complete defence.

[141] Mr Reddy, who was called by the plaintiff, testified that he did not authorise the payments in question, but further that he would not have been prepared to pay R450 000.00 per month in circumstances where no work was being carried out and the plaintiff had a minimal presence on site. According to his evidence he simply initiated a process in terms of which so-called 'routing slips' were prepared for transmission to the PE project manager for signing off. He addressed an email to Richard Anderson on 28 March 2007 portion of which read*:*

'Please prepare route slips and process for these PM's to sign. Piet for P.E."…..A decision was made last week in respect of PE project & Saldanha that we must process the payments& it is up to SAPO to stop if they wish & not us provided that WORK was done.'

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[83] This claim overlaps with the claim based on the final certificate.
[84] Clauses 17 and 28 of GCC97 are relevant in this context (see Vol 1 67 & 74 respectively).
[85] *Iscor Pension Fund v Jerling* 1978 (3) SA 858 (T) 861; *Rane Finance (Pty) Ltd v Queenstown Municipality* 1988 (4) SA 193 (E); *Rahim v Minister of Justice* 1964 (4) SA 630 (A); *Wallis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A).

That communication had invoices 1364, 1365, 1366 and 1367 all dated 27 March 2007 attached to it and was copied to several people, including messrs Pretorius, Young and Nxumalo. According to Mr Reddy it was then up to the PE project manager to decide whether to authorise the payment. According to him, the fact that the invoices were paid indicates or suggests that they must have been approved at site level, but whether they were actually approved would be speculation on his part.

[142] Mr Pretorius testified that the plaintiff was not entitled to additional P&G payments given that no extensions of time had been granted and that he did not authorised any such payments.[86] It appears from the minutes of meetings and correspondence which passed between the parties that the plaintiff was repeatedly informed, *inter alia* by Mr Reddy and Mr Nxumalo, that it would have to lodge a formal and properly motivated application for an extension of time if it considered itself to be entitled to any additional time or related remuneration.

[143] Against that background, the defendant argued that it is improbable that anyone in authority would have authorised those payments, and that it is more probable that the payments were made in error, having 'slipped through the cracks' without having been properly authorised. The onus of proving that the payments were made in error was and remains on the defendant. It is a big organisation, with no doubt elaborate procedures and checks when it comes to disbursing payments. That the payments were made, is a given. Why they were made if not due, falls peculiarly within the knowledge of the defendant. The probabilities, arising from Mr Reddy's evidence is that the payments must have been authorised at site level. That was a preliminary step in the administrative 'routing process' of approving payments. There was no suggestion that there was any interruption in this process, or that it was not followed when these payments were approved. The collective knowledge to be attributed to the defendant from its various officials and representatives is that the payments were duly approved with full knowledge of the state of activity on the site. No witness was called to testify what mistaken belief the defendant was under when the payments were made. I am accordingly not persuaded that the defendant has discharged the onus of proof in respect of this claim and the defendant is not entitled

[86] Although not alleged, it seems unlikely that either Mr Gouws or Mr Nxumalo would have authorised the payments.

to be refunded those amounts, whether via the final certificate or as a stand-alone claim.

[144] Based on what is set out above the defendant submits that it is entitled to payment of the amount of R173 018 542 (excluding Vat), that being the amount claimed in respect of the defendant's main claim, alternatively in respect of its counterclaim AA, less R5 193 520 (excluding Vat), being the overpayment to Lorbrand**.** It is however prepared to confine its claim to R50 million.

DEFENDANT'S COUNTERCLAIM FOR PENALTIES[87]

[145] This claim is for payment of penalties for failure to complete timeously in the amount of R10 786 031.00 plus Vat. It is separate from and independent of the claim based on the final certificate or the alternative claim for damages. The amount of the penalty is calculated by multiplying the total contract value by 0.25 per day for each day by which the contract was late. The defendant claims that the contract having commenced on 16 January 2006 with a stipulated completion date of ten months thereafter, was 271 days late as at date of cancellation thereof, namely 14 August 2007. The 0.25% penalty on the total contract value amounts to R34 913 00 per day.[88]

[146] The plaintiff in its consequential plea to the penalty claim pleads:

1. That the defendant waived reliance on the penalty clause by virtue of the conduct specified in sub paragraphs to 33.1;[89]
2. That the defendant is precluded from claiming penalties in circumstances where it has repudiated the contract, the repudiation relied upon being the demand for work beyond the scope of the specific activities tendered for by plaintiff;[90] and,
3. That the defendant is precluded from relying on the penalty clause because it was prevented from performing timeously and that time became at large[91] because:

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[87] This is claim 'B' of the defendant's amended claim-in-reconvention.
[88] This is arrived at using the adjusted contract value (as per final account) initial refurbishment value R27 656 350; plus initial amount for the Upgrade R17 631 726 (excluding Vat), totals R45 288 072.00; plus approved variations R 5 944 221; totals R 51 232 297 less T8 & T9 deduction R2 354 048; totals R48 878 249 (all excluding Vat) (as per Intech calculation at Bundle Vol 11 828).
[89] The waiver defence.
[90] The repudiation defence.

(a) The defendant rescheduled the shutdown so as to make the 10-month period impossible;

(b) The defendant frustrated the timeous completion of the works by inducing Lorbrand to refuse performance of its sub-contract and failing to make timeous payments to the plaintiff for the work done;

(c) The defendant suspended the continuation of the project in December 2006 unlawfully and being aware that it was delaying performance and completion of the contract by such instructions;

(d) The Defendant demanded work to be done outside the scope of work even after 16 November 2006;

(e) The works were not as at 14 August 2007 overdue either as alleged or at all; and,

(f) The parties had from time to time extended the date for completion and agreed at a meeting on 7 September 2006 that the forecasted completion date was March 2007.[92]

4. The plaintiff also pleads that the amount claimed as a penalty is disproportionate to the prejudice suffered by the defendant as a consequence of the delay and that it accordingly falls to be reduced in terms of section 3 of the Conventional Penalties Act 15 of 1962 (the 'Act'). No evidence was led in support of that defence. The plaintiff has indicated that it does not intend to pursue that defence; accordingly it will not be considered further in this judgment. The defendant raised exceptions to some of these defences, in particular those based on the alleged waiver based on prior conduct, and that time had become 'at large' by virtues of several acts of prevention on the part of the defendant. Those exceptions were previously upheld by me, having the effect that those defences were struck out.[93] They are accordingly also not considered further in this judgment.

[147] As regards the alleged rescheduling of the shutdown, there was no evidence of the shutdown having been re-scheduled. But even if that had occurred, that was permitted by the contract and the plaintiff's remedy was to apply for an extension of time.

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[91] The time at large defence.
[92] The extension defence.
[93] Remnants of these defences remain on the pleadings; however, nothing turns on this.

[148] The suggestion that the plaintiff induced Lorbrand to breach its contract with the plaintiff was not established in the evidence. Lorbrand's, Mr Granig's, evidence was that the relationship between his company and the plaintiff had broken down because the plaintiff was seeking to renegotiate the terms of the subcontract and because the plaintiff failed to make payments as and when they fell due. Not only was that evidence not challenged, but it was corroborated by contemporaneous documentation and correspondence.

[149] The defendant did suspend most the work on the contract during December 2006. The plaintiff's remedy, if it felt aggrieved was to apply for an extension of time. That notwithstanding the defendant is willing to give the plaintiff the benefit of the period for which the work was so suspended from 15 December 2006 to 21 February 2007, being a period of 71 days, which will reduce the claim to R 6 982 600.00.

[150] I agree with the submissions by the defendant that there was no evidence to support the contention that the defendant ordered extra work which would have the effect of delaying the plaintiff, and that there was also no evidence of the defendant having ordered any extra work of any nature after 16 November 2006 as alleged. Even if there had been, that would not have amounted to a breach, and the plaintiff's remedy again was to apply for an extension of time.

[151] The works were overdue as at the date of cancellation as the works should have been brought to completion by early December 2006 but were never completed. The acceptance by a contractor of revised programmes and the like does not have the effect of granting an extension of time or adjusting the stipulated completion date. The usual process of discussing and sometimes agreeing to revised completion dates and schedules is simply part of the management of a contract and does not affect penalties.

[152] In the premises the claim for R6 982 600.00 is upheld.

INTEREST

[153] The defendant has claimed interest in its particulars of claim on the amount of its counterclaim 'at the legal rate of 15,5% a tempore morae.' The counterclaim based on the final certificate was however only introduced by way of a Notice of Intention to Amend dated 26 August 2014. The copy of that notice in the court file does not indicate when it was served on the plaintiff's attorneys. I gave consideration to staggering the interest award based on what had been claimed previously (but in a lesser amount) up to 26 August 2014, and then providing for the balance up the amount awarded from the date of service of the notice of intention to amend. It however seems to me that in the light of the Defendant's willingness to compromise its claim and confining it to R50 million and that claim being based on the final certificate, which claim was only introduced by the Notice of Amendment, that the interest award should be dealt with as an award of interest on the capital amount of the counterclaim at the legal rate a tempore morae from the date of service of the aforesaid notice of amendment (which date should be readily available to the parties), to date of payment. The legal rate as at 26 August 2014 was 9% per annum.[94]

COSTS

[154] The claims, the defences thereto and the counterclaims are largely interwoven. The costs relating thereto should follow the result on an overall basis, and not separately in respect of the claims-in-convention and those in-reconvention.

[155] Given the scale of the matter, the amounts involved, the large volume of documents and the complexity of some of the issues, the employment of two counsel was in my view justified.[95] Any costs order should include the costs of two counsel where so employed.

[156] A cost award must also include the qualifying expenses of expert witnesses as well as their travel and accommodation expenses. In the case of the defendant these include:

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[94] Government Notice R554 dated 18 July 2014 provided that the rate was 9% per annum from 1 August 2014.

[95] At the outset the plaintiff was represented by two counsel. Later he continued only with Mr Kemp SC. The defendant was represented throughout by two counsel.

(a) Dr Willem Du Toit;
(b) Peter Goodwin;
(c) Pieter Pretorius;
(d) Ralph Granig;
(e) Denys Rothero;
(f) Pieter Van Zyl; and,
(g) Adrian Young.

[157] The defendant brought an application for absolution at the end of the plaintiff's case. I refused the application in my discretion and directed that the costs be reserved. In the light of the conclusion to which I have come it is unnecessary and will only add to the length of this judgment to give detailed reasons for my having exercised my discretion in favour of refusing absolution at the time . Suffice it to say, that as much as there were trenchant criticisms which could be raised against some of the claims of the plaintiff, there was the reality that the parties somehow implemented the terms of their agreement, at least partially. At the risk of over simplifying the considerations involved, I considered it necessary in my discretion to hear evidence from the defendant as to how it implemented the agreement. The defendant's evidence would still have been required in respect of the defendant's counterclaim and could impact on the merits of the plaintiff's claims. I accordingly was reluctant to any piecemeal disposal of the issues in the trial and exercised my discretion in favour of refusing the application for absolution. Although the application was refused, and the plaintiff was to that extent successful, it ultimately failed in the action. It seems to me fair that I simply make no order as to the costs of the defendant's application for absolution.

[158] As to the further costs which were reserved from time-to-time, the defendant's counsel prepared a chronology of events annexed to their heads of argument relating to costs that were reserved with comments as to the circumstances giving rise thereto. In the interests of brevity I do not attached this schedule to this judgment as an annexure, nor shall I refer thereto in any detail. Various affidavits have at times also been filed in respect of postponements. I find the facts and comments set out in the chronology persuasive when it comes to my discretion on costs. I direct that the defendant is entitled to all costs which have been reserved

from time to time, such costs to include the costs of two counsel where so employed. This paragraph does not affect the costs of the application for absolution referred to in paragraph [157] above.

ORDER:

[159] In the result, I make the following order:

1. The plaintiff's claims are dismissed with costs, such costs to include the costs of two counsel where so employed;
2. Judgment is granted in favour of the defendant against the plaintiff for:
   (a) Payment of the sum of R56 982 600;
   (b) Interest on the sum of R56 982 600 at the rate of 9% per annum a tempore morae from date of service of the Defendant's Notice of Amendment dated 26 August 2014, to date of payment;
   (c) Costs of suit, such costs to include the costs of two counsel where so employed, and the qualifying expenses and travel and accommodation expenses of the following expert witnesses:
      (i) Dr Willem Du Toit;
      (ii) Peter Goodwin;
      (iii) Pieter Pretorius;
      (iv) Ralph Granig;
      (v) Denys Rothero;
      (vi) Pieter Van Zyl; and,
      (vii) Adrian Young.
3. No order as to costs is made in respect of the application for absolution.
4. The plaintiff is directed to pay all other and further costs which were reserved from time-to-time, such costs to include the costs of two counsel where so employed.

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