IN THE HIGH COURT OF ESWATINI

JUDGMENT
(21 SEPTEMBER 2020)

HELD AT MBABANE

CASE NO. 485/2020

In the matter between

HORUS PROPERTIES (PTY) LTD Applicant

And

MAR AND DAR SWAZI GRC (PTY) LTD 1st Respondent
THE ROYAL ESWATINI POLICE 2nd Respondent
THE ATTORNEY GENERAL 3rd Respondent

Neutral Citation : Horus Properties (Pty) Ltd v Mar and Dar Swazi GRC (Pty) Ltd and 2 Others (485/2020) [2020] SZHC 187 (21 September 2020)

Coram : MAMBA J.

[1] *Civil Law – Law of Contract – complete turnkey (construction) contract – completion of project – time is of the essence.*

[2] *Civil Law – Law of Contract – total turnkey contract – contractor unilaterally stopping work following part of his claim being disallowed by the Project Manager. Contractor not attending to defects identified by the Project Manager and not going for adjudication on*

disallowed or uncertified claim – project delay beyond revised and agreed date for completion. Contractor in breach of contract. Employer entitled to terminate or cancel contract and apply for ejectment of contractor.

[3] Civil Law and Procedure – application proceedings – alleged disputes of fact, Rule 6 (17) of the Rules of Court. Dispute of fact must be on material and relevant issue, necessary for the just determination of the case.

[1] The applicant in Horus Properties (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Kingdom of Eswatini. It is the owner of the immovable or fixed property situate or known as Plot 37, Jorrisen & Tenbergen Street, in the City of Manzini. It also has its principal place of business thereon.

[2] The first respondent is Mar and Dar Swazi GRC (Pty) Ltd, a company also registered and incorporated in terms of the company laws of Eswatini. It has its principal place of business in Matsapha. The 1st respondent is described herein as a construction or building company.

[3] The second and third respondents are the Royal Eswatini Police and the Attorney General of the Kingdom of Eswatini respectively, and there is no relief sought against either of them and therefore there is, I think, no further reference to be made regarding them in this Judgment, save of

course just a passing reference to the prayers sought herein by the applicant.

[4] On or about the 5th day of April 2018, the applicant and the 1st respondent entered into a written agreement or contract in terms of which the 1st respondent undertook *inter alia*, to design, construct and build what is referred to in the contract as a 'commercial building at Plot 37, Jorissen and Tenbergen Street, Manzini for and on behalf of the applicant. This was a complete or total turnkey construction contract.

> 'The term "turnkey" was possibly first used to denote a project in which the contractor undertook full responsibility to design, construct and commission the works to the point where the employer turned the key to open the door of a fully operating building. This is still the basis of a total turnkey contract. In this form of contract the employer signs a contract with one contractor (which may be one company or a consortium of companies) and that contractor undertakes (within the specifications, conceptual designs, testing requirements, guarantee undertakings and other stipulations set out in the contract) to be responsible to complete the task. The project may include detailed design and engineering; detailing of equipment specifications; supply of machinery and equipment; construction of the civil works; erection of the

machinery and equipment; commissioning and start-up; and training of the employer's labour force. If the contract is a complete turnkey project in hand the contractor takes on additional responsibility for technical management of the project after its completion and during actual operation (manufacturing, processing and other functions) of the works. The prime or general contractor meets its obligations under the complete turnkey contract either by performing the work itself or engaging sub-contractors to do portions of the work. In some cases, the contractor may secure a contract and then sell it on to another contractor which carries out the project under the guise of the first contractor.'

(George P. Macdonald, ***International Trade.. Law and Practice, 1983 Euromoney Publications at 64***).

[5] In concluding the contract, the applicant was duly represented by Lefki Efrem, one of its directors whilst the first respondent was duly represented by one Mohammed Al Raies, one of its directors.

[6] It is common cause that the first respondent had, amongst other things to design and construct the said building and 'bear the full responsibility for

the architectural and structural design, [and] thereafter carry out the construction to the completion of the works and then hand over a completed functional building to the employer [applicant].'

[7] It is also common cause between the applicant and the first respondent (the parties) that some of the main or material terms of the contract were as follows:

'9.1.1 Within a period of 9 months from the date of hand over of the site to the 1st Respondent;

9.1.2 At a total cost of **E10 750 000.00 (Ten Million and Seven Hundred and Fifty Thousand Emalangeni)** being paid;

9.1.3 An advance payment in an amount of **E3 000 000.00 (Three Million Emalangeni;**

9.1.4 A value added Tax (VAT) payable monthly and in advance.

…

9.2 Inter alia the following provisions appear in the **General Conditions of Contract:**

9.2.1 Clause 1.1 (bb): A "Variation" is an instruction given by the Project Manager which varies the works;

9.2.2 Clause 1.1 (f): The Project Manager is responsible for supervising the execution of the Works and administering the Contract and Messrs Ngwenya Wonfor and Associates were duly delegated and appointed as such by the Applicant.

9.2.3 Clause 5.1: Communications referred to in the Conditions shall be in writing;

9.2.4 Clause 12 (1): The Contractor shall provide all risk insurance cover from the start date to the end of the Defects Liability Period (which in terms of item of the Special Conditions Item GCC 1.1 IS 12 months from the completion date) as well as [12 (1) (e) a valid Advance Payment Bond;

9.2.5 Clause 16: The works have to be completed by the Completion date;

9.2.6 Clause 18.1: The Contractor shall be responsible for the safety of all activities on the site;

9.2.7 Clause 21.1: The Contractor shall allow the Project Manager and any person authorised by the Project Manager access to the site;

9.2.8 Clause 22.1: The Contractor shall obey all lawful instructions of the Project Manager;

9.2.9 Clauses 23 and 24: If the Contractor disputes a decision by the Project Manager, the dispute shall within 14 days be referred to an Adjudicator whose decision, unless either party refers said decision it to arbitration shall be final;

9.2.10 Clause 26.4: A revised program by the Contractor shall show the effects of Variations and Compensation Events;

9.2.11 Clause 27: deals with extension of the Completion date;

9.2.12 Clause 38.1: All variations shall be included in the Contractors' updated programs and be approved by Employer;

9.2.13 Clause 39: In the event of any variations agreed upon by the parties, the payment plan shall be submitted by the Contractor and approved by the Employer prior to the start of variation works;

9.2.14 Clause 41.3: The Project Manager shall certify the amounts payable to the Contractor, by way of payment certificates;

9.2.15 Clause 45 (1): deals with liquidated damages payable by the Contractor to the Employer. [Special Conditions item GCC45.1: 0.05% of final contract price per day];

9.2.16 Clause 47: The Contractor shall provide a Performance Security [Performance Guarantee/Bond] valid for one year from date of Completion Certificate in the case of a Performance Bond;

9.2.17 Clause 54: Either party may terminate the Contract if the other party causes a fundamental breach of the Contract in which event, in terms of Clause 55, the Project Manager shall issue a certificate for the value of the work done and material ordered less advance payments and the Special Conditions of Contract percentage to the value of the work not completed;

9.2.18 Clause 56.1: All materials on the Site, plant, equipment, temporary works and works shall be deemed to be the property of the Employer if the Contract is terminated because of the Contractor's default.'

[8] It is also a term of the contract that other documents such as the Letter of appointment of the 1st respondent by the applicant, the General conditions of Contract and special conditions of the contract, all attached to the contract, are to be read, deemed, and construed as part of the contract, (per clause 2).

The relevant letter of appointment is dated the 05 day of April 2018 and is annexed as HP3 to the applicant's Founding Affidavit.

[9] The Project Manager was appointed by the applicant, whilst the first respondent states that:

> "8.1.8 the Project Manager should be agreed upon by both parties, the present Project Manager was not agreed upon but was forced to the 1st respondent and he was appointed after the signing of the contract and the receiving of the down payment." The first respondent does not, however argue that the appointment of the Project Manager was invalid and therefore that the applicant cannot rely on whatever duties were performed or executed by the Project Manager in this case. Finally, I think, it is fair to conclude that the first respondent acquiesced to the appointment of Ngwenya Wonfor & Associates, as the Project Manager. Indeed, there is no objection to such appointment in these proceedings. How or who appointed the Project Manager is therefore irrelevant in this case. It is a non-issue. In any event, the 1st respondent is in error in this statement inasmuch as the special conditions of contract specifically states that 'the Project Manager is the Applicant or otherwise [someone] delegated by [the Applicant] (see HP2 at 91

of the Book of Pleadings). The Project Manager in this case was, in reality one delegated or appointed by the applicant in compliance with the said clause or provision.

[10] Again, it is common cause that despite it being provided in the tender document (HP1) that the Applicant would be required to make a down payment of '50% of the total contract as advanced payment upon contracting' the applicant was unable to pay half of the contract price (E10,750,000.00) upon contracting. A sum of E3,000,000.00 was instead paid on 11 May 2018 (See clause 41.4 of the contract). This is common cause and both parties agreed to this adjustment or variation of the written terms of the tender documents and the construction of the building started after the site was handed over to 1st respondent at the beginning of August that year. This inevitably also shifted the completion date to May 2019. The applicant states that there was an additional period of 60 days to cater for any further unplanned delays and contingencies.

[11] Just a month after handing over the site to 1st respondent, the Project Manager complained to the 1st respondent that "work has progressed at a snail pace" and this was a cause for concern to both the Applicant and its financiers. The Project Manager pointed out to the 1st respondent that the

Advance payment made was "in excess of 40% of the Project value." (See HP6 at Page 95). In response, the 1st respondent stated that delays had been caused by or due to inclement weather, rain to be specific, and Public Holidays during the month of August and September. In all, four weeks had been lost. It also pointed out that there had been a delay of about 120 days by the Applicant since the signing of the contract. The 1st respondent further stated that

> 'GRC structures projects are of a nature where more than 80% of the work is done in the factory (i.e off site) and only installation and assembly process takes place on site.
>
> We have completed the production of 80% of the ground floor --- and 13% of the suspended ceiling slab while preparing the site for the foundation slab.' He invited the applicant, its financiers and the Project Manager to do an inspection at its factory in Matsapha to view what had been actually done in this respect. (See HP7.1 and 7.2). The 1st respondent disputed that more than 40 % of the Project Price had been paid. It said only 35.5% had been paid instead.

[12] By letter dated 10 December 2018, the 1st respondent filed a claim for payment of just over E3 million for work allegedly completed. This is

valuation claim 3. This was rejected by the Project Manager on the ground that 'Your cash flow proposal [is] in our opinion heavily front loaded and is not reflective of actual progress on site.' (See Page 106 – 107 of the Book of Pleadings).

[13] By Letter dated 16 January 2019, the Project Manager wrote a letter to the 1st respondent demanding a report or 'programme showing actual progress scheduled on each activity' and the effect thereof 'on the timing of the remaining work.' Additionally, the 1st respondent was instructed to provide a clear construction method statement' to allow employer to understand how you will undertake the works to finality ….' This was apparently a follow on a resolution between the parties made on 11 January 2019.

[14] Again, on 21 January 2019 the Project Manager wrote a letter to the 1st respondent noting that the latter had 'stopped all operations on site without a written notification to ourselves or to the employer.' The 1st respondent was challenged to refer the matter for adjudication for settlement and it was suggested that 1st respondent should submit two names of its proposed adjudicators by the 23rd day of January 2019. In reply the 1st respondent insisted on being paid a sum of E1620,914.39

which was allegedly outstanding at the time. It further informed the Applicant that it had the sole prerogative to invoke the adjudication process and it would do so at its own choosing. The 1st respondent blamed the delays on the Applicant. (See Pages 114 to 117). The Applicant's response to this Letter is dated 26 January 2019. In that Letter the Applicant denied being liable for the amount claimed and stated that such amount had not been certified by the Project Manager. Applicant further noted that the 1st respondent had withdrawn its 'personnel and resources from the site' and that this was in contravention of the terms or provisions of the Construction Contract.

[15] In response to a letter from the 1st respondent dated 01 February 2019, the applicant reiterated that it was not obliged to pay the sum of E1620 914.39 because it had not been certified and the 1st respondent had not referred such dispute to be adjudicated upon. The Applicant further noted that 'Your performance bond a performance guarantee are not in the amounts stated at the meeting on 01 February 2019 and both lapsed on 08 January 2019' and that this was a breach of the terms of the contract. (This letter by the Project Manager is erroneously dated 11 February 2018 instead of 2019. Nothing turns on this error though).

[16] The last mentioned stoppage (Para 14 above), forced the applicant to accede to the 1st respondent's demands in paying the disputed amount. Such payment was made on or about 01 March 2019. In this regard, the applicant explains that

> '21.1 This was without acknowledging or conceding that the 1st respondent was entitled to such disputed payment.
>
> 21.2 The applicant felt that it did not have a choice and in hindsight, the applicant played into the unscrupulous hands of the 1st respondent who circumvented the dispute resolution procedure in the contract and knowing the pressing need on the part of the applicant for the project to be completed, held the applicant ransom to its demands.'

[17] After the above payment, (Claim 4) the 1st respondent resumed work on the building site. This was on or about 25 March 2019. The applicant states that the project was then projected to be completed by the end of September 2019, but this did not happen. Instead the 1st respondent by letter dated 30 October 2019 promised to have the project completed by '30 November, with the possibility to be extended to 15 December 2019 with the expected weather related delays.

This is strictly conditional to receiving due payments when claimed with no delays to allow smooth supply of materials and services to site.' (See Page 121 of Book of Pleadings).

[18] Claim 11 for the payment of E136,138.63 was submitted by the 1st respondent on 04 December 2019. This claim was rejected by the Project Manager as being in excess of the contract price. This rejection again caused the 1st respondent to abandon the work on or about 25 January 2020. Three (3) days thereafter, the Project Manager entered the site, inspected the building and compiled what is referred to as a snag list – being a list of the things that had to be corrected or properly done by the 1st respondent. The Project Manager further requested the 1st respondent to indicate when these would be carried out and the expected completion date. There was apparently no compliance with the Project Manager's instruction or request by 10 February 2020, the project had not been completed. (See Page 131 of the Book – being a letter to 1st respondent by the Project Manager). From the tone of this letter (Para 7.2), it would appear to me that an undertaking had been made by the 1st respondent 'to completing the work within 20 days.'

[19] In the letter of the 10th February 2020, the Project Manager complained of the following breaches of contract by the 1st respondent namely:

> '31.1.1Failing to deliver the project within the agreed time and within the agreed budget;
>
> 31.1.3 Stopping work on site for no apparent reason allowable in terms of the contract; and
>
> 31.1.4The insurances required to be kept in place having lapsed and having not been reinstated.'

[20] The Project Manager was able to enter and inspect the building again on 21 February and he compiled another report on the state of the building in question. Because of the above cited breaches of contract, the applicant decided to terminate the contract and this was communicated first by the Project Manager, then the Applicant's Attorney and later by the applicant by letter dated 26 February 2020.

[21] Following the cancellation or termination of the said contract, the applicant has filed this urgent application on an *ex parte* basis and prays *inter alia* for the following order:

‘3. That pending finalization of this matter a Rule Nisi do hereby issue calling upon the Respondents to show cause on a date and time to be determined by the above Honourable Court why the Court should not make the following orders final:

3.1 Ejecting the First Respondent, and all those holding possession under or through the First Respondents of the property described at **PLOT 37, JORRISEN AND TENBERGEN STREET, MANZINI**, from such premises.

3.2 Authorising and directing the Second Respondent to assist in the execution of Paragraph 3.1.

3.3 Declaring the Building Contract entering into between the Applicant and the Third Respondent on the 5th day of April 2018, to have been duly and lawfully cancelled by the Applicant.

3.4 Directing and ordering the First Respondent to forthwith grant access to the Applicant and the agents of the Applicant and any other person/s designated by the Applicant, to **PLOT 37, JORRISEN AND TENBERGEN STREET, MANZINI** and to any and all buildings or structures thereon.

3.5 Interdicting and restraining the First Respondent and those acting under the First Respondent's auspices or authority from removing, disposing of or alienating, or permitting to be removed, disposed or alienated, or from supplying or releasing to any party any movables situated on the said premises.

4. That Prayers 3.1, 3.2, 3.4 and 3.5 are to operate with immediate effect as interim relief pending the return date herein and the Respondents are called upon to show cause on the return date as to why a final order should not be granted in terms of said Prayers 3.1 to 3.5 of the Notice of Motion.

5. That the Respondents may anticipate the return date herein upon delivery of not less than twenty four hours notice.

6. That a copy of this Notice of Motion, the Founding Affidavit and its Annexures as well as the Rule Nisi be served on the Respondents.

7. Costs including the costs of Counsel as certified in accordance with High Court Rule 68(2) as against any Respondent/s opposing this application.'

The matter was set down for hearing (ex parte) on 18 March 2020 and the application was granted as prayed. The rule nisi was ordered returnable on 03 April 2020. The rule lapsed on that date and was revived on 06 April 2020 and made returnable on 21 April 2020.

[22] In opposing the application, the 1st respondent has raised four (4) points in limine, namely:

(a) The matter is not urgent inasmuch as the issues complained of arose in 2018 'yet the application was moved on 18 March 2020;

(b) There are disputes of fact in the matter which cannot be resolved on application namely: 'It is disputed that the 1st respondent has done a poor workmanship or shoddy job ---'

(c) The applicant has failed to satisfy the requirements of an interdict and;

(d) The applicant has come to Court with dirty hands in that 'it has already resorted to self-help' by deploying its security guards on the building site.

I shall deal with these points before going into the merits of the defence herein.

[23] From the onset I must note that the issue of want or urgency is totally misplaced or misconstrued by the 1st respondent. Whilst it is true that the erection of the building in question started in August 2018 and that the application was filed in March 2020, the issues complained of or giving rise to the cancellation or termination of the contract occurred or took place in December 2019 and culminated in the cancellation of the contract by the Applicant in February 2020. These ground are set out in Paragraph 79 of the Applicant's Founding Affidavit and do not relate to issues that occurred in 2018 but rather to issues obtaining at the time of filing the application. This point is therefore without merit and is accordingly rejected.

[24] On the issue of the doctrine of unclean hands; the applicant has stated in its affidavit that it has posted or deployed security guards on the outside of the property in order to secure and protect both immovable and movable property on the site due to the 1st respondent stopping work and abandoning the site. The property in question belongs to and is owned by the applicant. The applicant has a right, if not a duty to protect the said property in the circumstances. The applicant has also fully explained itself in the founding affidavit why it has resorted to such measures. This action by the applicant cannot be characterised or classified as bad in law

or unlawful or an act of self-help as claimed by the 1st respondent. Consequently this point is also rejected.

[25] The 1st respondent states (at 167 of the Book of Pleadings) that the 'applicant has no *prima facie* right to unlawfully cancel the contract when there is still a binding contract and without affording representation to the 1st respondent.' This submission by the 1st respondent is notionally flawed and illogical. First, a contract must exist to be terminated or cancelled by any of the parties thereto. Secondly, the applicant as the aggrieved party, has no obligation to afford the 1st respondent to make any representation to it why it should not terminate the contract. In terms of the contract under the spotlight in these proceedings, I have not seen or read any provision that obliges the aggrieved party to afford the guilty party an opportunity to repent before terminating the contract.

[26] The applicant has alleged that the 1st respondent is in breach of the contract by *inter alia* stopping work and abandoning the site in question and by failing to deliver the project on the agreed date as per the terms of the agreement. Additionally, the property is owned by the applicant. An owner of property has a *prima facie* right to defend his property against harm or damage of whatever nature or form. To argue that the applicant

must first resort to extra-cural means of resolving the impasse with the 1st respondent, is, in my view to suggest that the applicant has no right to cancel the contract – inspite of its breach by the 1st respondent. The applicant is not barred from lawfully terminating the contract where or in instances where the other party is in breach thereof. It cannot, in my view, be seriously argued that, upon termination of the contract, the owner of the property has no prima facie right to take possession and or occupation of such property to restrain or prevent it from being damaged or destroyed or being unlawfully occupied. This point has no merit and it must accordingly fail and it is dismissed. Based on the allegations in Paragraph 91 – 93 e.g. the removal of material on site, this Court was justified to hear the application *ex parte* and granting the *rule nisi*.

[27] On the issue or question of disputes of fact, the 1st respondent denies that there is no electricity supplied to the building or that it has done a shoddy job or that it was the cause of the delays complained of. This matter is clearly linked with the merits of this application. It is not every dispute of fact though that would render the matter inappropriate to be decided or determined in application proceedings. The dispute of fact must be material and genuine. Its materiality must go to the root of the issue in

dispute or which is central to the just conclusion of the matter. The matter is governed by Rule 6 (17) of the Rules of this Court.

[28] *In Nokuthula N. Dlamini v Goodwill Tsela (11/2012) [2012] 28 SZHC (31 May 2012),* the Court had this to say on the issue of dispute of fact in an application:

'[28] It is for the Court to decide whether such application can properly be decided on the Affidavits. The Rules do not provide guidelines on how to determine this question. There is nothing in the Rules prescribing situations that indicate when application proceedings cannot properly be decided on the Affidavits filed by the parties. The absence of such guidelines in the Rules, leaves the Court with a wide discretion to decide when such a matter cannot properly be decided on the Affidavits.

[29] The established and the trite judicial practice which now determines the approach of the Courts world wide, to be found in a long line of cases across jurisdiction, is that a court cannot decide an application on the basis of opposing Affidavits that are irreconcilably in conflict on material facts. So where the facts material to the issues to be determined are not in dispute, the application can properly be determined on the Affidavits. It will

amount to an improper exercise of discretion and an abdication of judicial responsibility for a Court to rely on any kind of dispute of fact to conclude that an application cannot properly be decided on the Affidavits. The Court has a duty to carefully scrutinise the nature of the dispute with microscopic lense to find out:-

(i) If the fact disputed is relevant or material to the issues for determination in the sense that it is so connected to it in a way, that the determination of such issue is dependent on or influenced by it.

(ii) If the fact being disputed, though material to the issue to be determined, but the dispute is such that by its nature, can be easily resolved or reconciled within the terms of the Affidavits.

(iii) If the dispute of a material fact is of such a nature that even if not resolved does not prevent a determination of the application on the affidavits.

(iv) If the dispute as to a material fact is a genuine or real dispute.

[30] A fact is material or relevant where the determination of a claim is dependent on or influenced fundamentally by it. Not all facts in a

case are material. So it is only those that have a bearing on the primary claim or issue for determination in a way that they influence the result of the determination of the claim one way or the other. It is conflicts or disputes on such facts that are relevant in determining whether an application can be decided on Affidavits. If the conflict or dispute is not a material fact, the application can be decided on the Affidavits. If the dispute or conflict on a material fact but the dispute is of such a nature that it is reconcilable or resolvable on the Affidavits, then the application can be decided on the Affidavits. If the dispute on the material fact is of such a nature that it cannot prevent the proper determination of the application on the Affidavits, then the Court will decide the application on the Affidavits. If the dispute on a material fact is not genuine or real, then the application can be determined on the Affidavit. This can arise where the denial of fact is vague, evasive or barren or made in bad faith to abuse the process of court and vex or oppress the other party. A frivolous denial raised for the purpose of preventing a determination of the application on the Affidavits or to instigate a dismissal of the application or cause a trial by oral or other evidence thereby delaying and protracting the trial as a stratagem to discourage or frustrate the applicant is a gross abuse of process. We cannot close our eyes to the high

incidence of abuse of court processes. Parties often times do not show readiness to admit liability even when it is obvious that they have no defence to an application or a claim. Such a party, if he or she is a defendant or respondent, tries to foist on the plaintiff or applicant through the frivolous denials. The objective of Rule 6 is to avoid a full trial when there is no basis for it and avoid delayed and protracted trials in such cases. It is the duty of a Court to ensure that a law meant to facilitate quicker access to justice through the expeditious and economic disposal of obviously uncontested matters is not defeated by frivolous denials or claims.'

[29] The alleged disputes of fact must, perforce be looked at and or examined in the light of the matters complained of or at least material for a just determination of the matter. In the present matter, these issues which form the grounds of the termination or cancellation of contract by the applicant are stated in paragraph 19 above. These are: lack of insurance, failing to deliver or complete the project on the agreed time and within the agreed budget, failing to attend to defects identified by the Project Manager and for stopping work on the site for no justifiable or excusable reason.

[30] The 1st respondent whilst admitting that there have been numerous delays in the implementation of the project, denies that these delays were caused by it. It blames the applicant for these; in particular the Project Manager. (See Para 23.2 and Para 40.1 of the opposing affidavit). It is important to note, however, that it is not every delay herein that is the subject of the applicant's complaint. There were indeed various or numerous delays, some caused by the applicant, significantly though, the delays complained of are those that occurred after the deadline was set for the 28th day of November 2019. The revised completion date was suggested by the 1st respondent and agreed to by the Project Manager as per Clause 1 (q) of the Contract. The delays prior to that date were condoned by the Applicant and do not form the gist of the complaint herein. It is common cause that when the application was filed in March 2020 the 1st respondent had not completed the project. It is therefore incorrect for the 1st respondent to state that 'the project has been delivered timeously notwithstanding all the delays.' (Vide Para 23.3).

[31] The 1st respondent denies that it would occasionally stop working but states that it 'only slowed down which is fundamental in Construction law if the employer --- unreasonably withholds payment. The 1st respondent in often times was faced with the problem of sub-contractors refusing to

work as a result of non-payment by the applicant to the 1st respondent.' (Vide Para 23.6).

[32] It is common cause that invariably whenever a claim filed by the 1st respondent was disputed or disallowed by the Project Manager, the 1st respondent would either stop working or as it concedes, slow down operations until payment was made in full. In taking these actions, the 1st respondent did not refer the matter or the dispute to adjudication as provided in the contract. It has to be noted that a sub-contractor carries out the work that is supposed to be carried out by the contractor; in this case, the 1st respondent. The Sub-contractor is employed by the contractor and any responsibility not properly carried out or executed by the Sub-contractor does not absolve the contractor from liability at the instance of the employer (Applicant). (See Clause 6.1 of the Contract).

[33] In terms of Clause 42 of the Contract, the 1st respondent has a right to charge interest on any late payment of monies after three (3) working days after such payment has been certified by the Project manager. The grounds upon which either party to the Contract may terminate it are not only those listed in Clause 54 of the contract. Clause 54.2 makes this abundantly clear by stating that 'fundamental breaches of contract shall include, but shall not be limited to 'those listed therein. Clause 54.2 (c)

permits the Contractor (1st respondent) to terminate the contract 'if a payment certified by the Project Manager is not paid by [the applicant] within 14 days of the date of the Project Manager's certificate.' The 1st respondent did not at any time exercise this right and there is no evidence that such delay ever arose or existed. The Contract was terminated by the Applicant.

[34] The 1st respondent has not denied that which is contained in the snag list and only contends itself by saying that these are minor defects. They are defects nonetheless and the value thereof is certainly not small. Regarding the issue of there being no Performance Bond and Insurance Policy regarding the matter, the 1st respondent states that it has always kept all such in place and that is why the Project Manager was able to certify the various payments. The first respondent adds, however, that 'once the Court grants us the order to continue working and finishing, all the bonds will be in place.' This is a veiled admission that the relevant bonds are currently not in place, in breach of the contract.

[35] From the above brief analysis of the facts and in particular the crucial ones for determination in this application; namely

35.1 failing to complete the project on time and within agreed budget;

35.2 failing to provide or secure the necessary Bond and Insurance Policy;

35.3 failing to attend to defects on the building and;

35.4 stopping work or being on a go-slow on the project;

there are no material disputes of fact in this case. These facts – giving rise to the cancellation of the agreement by the applicant are not in dispute and have been established by the Applicant. That the Applicant has paid over E10 million of the contract price does not detract from the fact that the project has gone over the revised completion period and the costs for attending to the defects or snag list are not small. The 1st respondent has not attended to the snag or defects list since February 2020. The 1st respondent avers that it is entitled as per the rules of the Construction Industry to withhold its labour where its claims for payment are not fully met by the Applicant. For the record, I have not seen a provision to this effect in the contract.

[36] It is a fundamental rule of the law of Contract based on logic and common sense, that where a party to the contract commits a fundamental breach of the contract, the aggrieved or innocent party is at liberty to declare the contract terminated or cancelled – doctrine of election - and to claim whatever relief may be available to it consequent upon such breach

and cancellation. That, I would think, is trite law. Just for the sake of completeness herein, the reference of a dispute to adjudication is not a bar to either cancellation or legal proceedings.

[37] Whilst it is true that a Contractor may be entitled to withhold its labour where the owner of the property unlawfully or even unreasonably fails to honour its obligations in terms of the building contract; e.g. withholding payment, this would depend on whether, for instance the claim has been duly certified or not by the relevant person. If there is a dispute or difference regarding such payment, e.g. where such claim has been disallowed by the appropriate person, I do not think that, in the absence of a clear right in the contract, the contractor would be entitled to unilaterally withhold its labour.

[38] In the instant case, the 1st respondent did withhold its labour after the Project Manager refused to certify part of the claim by the 1st respondent. The 1st respondent did not go for adjudication but unilaterally withdrew its labour. Whether it was a go-slow or total stoppage – this had a significant impact on the delay complained of. No revision or extension of the deadline for completion of the work was sought and none was

granted. Faced with this fact, was the applicant entitled to cancel the contract? I answer this question in the next segment of this Judgment.

[39] The test for repudiation of a contract or agreement is objective. In other words, the test is whether objectively assessed, the conduct of the 1st respondent in this case amounted to a fundamental or so serious a breach of the contract that a reasonable person in the position of the applicant would have been entitled to regard it as a repudiation of the contract and therefore to entitle him to cancel it. See *Street v Dublin 1961 (2) SA 4 (W), OK BAZAARS (1920) Ltd v Grosvenor Buildings (Pty) and Another [1993] ZASCA 56: 1993 (3) SA 471 (A).* Again in *Datacolor International v Intarmarket (Pty) Ltd [2000] ZASCA 82: 2001 (2) 284*, the Court observed that:

> 'Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, "accepting" and thus completing the breach.' AND at 294, the Court elaborated and said:
>
> 'The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is

accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable man placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a proper interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.'

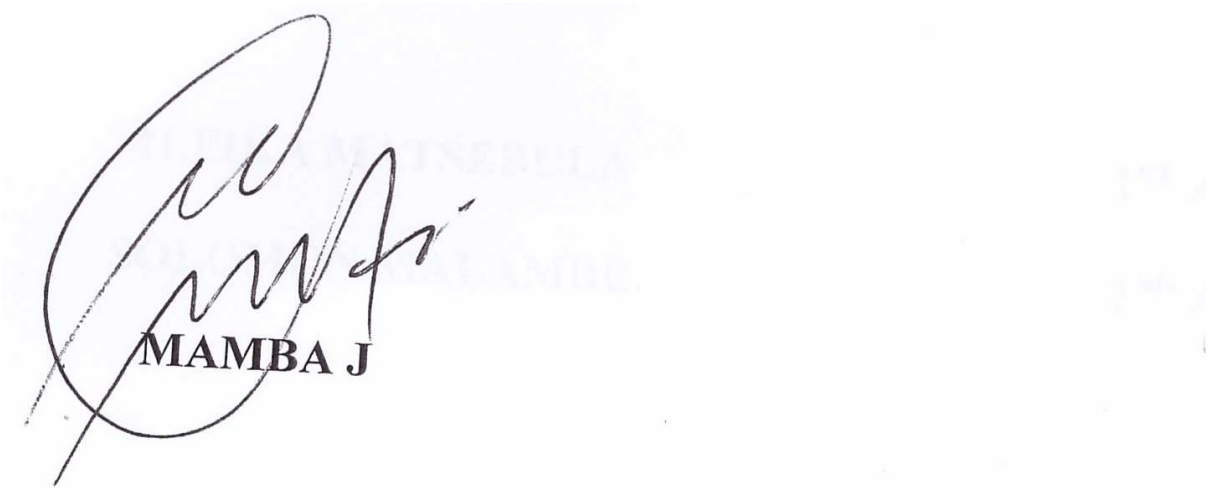
[40] In the circumstances of this case, I have no hesitation in holding that a reasonable person in the position of the applicant, faced with the acts complained of herein – being committed by the 1st respondent – would conclude that the 1st respondent was not willing to abide by the terms of the building Contract and therefore such conduct justified the termination of the said Contract. Consequently, the applicant was justified to cancel the agreement and apply for the prayers herein.

[41] That the 1st respondent has a claim for damages for compensation for delays caused by the applicant is irrelevant in this application and this Court has not been called upon to determine or decide. Similarly, although the 1st respondent stated on several occasions in its opposing affidavit that it would apply for an inspection in loco of the premises in

question, no such application was made before me in this regard. Without making a finding on whether such application would have been successful or not, I think it would have been a strange one in the circumstances.

[42] Relying on the various claims that were certified by the Project Manager and paid by the Applicant, the 1st Respondent has submitted that its workmanship was not shoddy as suggested by the Applicant' and that it has substantially performed its obligations arising from the contract. It is common cause, however, that most of the disputed payments were made under protest or simply because the applicant was eager to have the construction completed. It is trite law that the doctrine or concept of substantial performance in Construction law has no place or application where the obligation is to perform by a specified date as in this case. Clearly, by stipulating the date for completion of the project, the parties regarded that time was of the essence in the Contract. In such an instance the Contractor would be obliged to complete the job on the agreed date, even where the delay was caused by the act of the owner of the building (Applicant). Vide St. John's College (1890) L.R. 6 Q.B. 115. This is one of the consequences of a total turnkey contract.

[43] Accordingly, the rule nisi was confirmed with costs, to include the costs of counsel to be duly certified in terms of the Applicable rule of Court.



(This Judgment has been delayed due to my unavailability since 13 July 2020)

FOR THE APPLICANT : ADV. M. VAN DER WALT

FOR THE 1ST RESPONDENT: MR – B. G. MDLULI