



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 773/2024

In the matter between:

**MAKASELA CONSULTING AND
PROJECTS (PTY) LTD**

APPLICANT

and

MOPANI DISTRICT MUNICIPALITY

RESPONDENT

Neutral Citation: *Makasela Consulting and Projects (Pty) Ltd v Mopani District Municipality* (773/2024) [2026] ZASCA 131 (30 September 2026)

Coram: MOLEFE and KOEN JJA and ZILWA AJA

Heard: 26 May 2026

Delivered: 30 September 2026

Summary: Professional Engineering Services – Reconsideration of application for special leave to appeal – risk-based appointment of applicant providing for inclusive professional fee calculated at 17.5% of construction costs – municipality subsequently contending that 8% upper limit applicable – later instruction and invoice not extinguishing contractual entitlement nor constituting compromise – quantum proved – special leave granted. Practice – absence of replication not an admission of allegations in plea.

ORDER

On application for reconsideration: referred to the Court by the President in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013:

- 1 The application for reconsideration is granted.
- 2 The order of this Court refusing special leave to appeal is set aside and replaced with the following order:
 - 2.1 Special leave to appeal is granted with costs.
 - 2.2 The order of the full court is set aside and replaced with an order in the following terms:
 - ‘1 The appeal is upheld, with costs on scale C.
 - 2 The order of the court of first instance is set aside and replaced with an order in the following terms:
 - (a) The defendant is ordered to pay the plaintiff an amount of R5 219 665.55;
 - (b) The defendant is ordered to pay interest on the amount of R5 219 665.55 at the rate of 8.75% per annum a *tempore morae* from 27 May 2020 to date of payment;
 - (c) The defendant is ordered to pay the plaintiff’s costs on scale C.’

JUDGMENT

Zilwa AJA (Molefe and Koen JJA concurring):

Introduction

[1] This is an application referred to the Court by the President in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the SC Act) for the reconsideration, and, if warranted, variation of the decision of two judges of this Court in terms of which they, on petition, refused special leave to appeal against the judgment of the Limpopo Division of the High Court, Polokwane (the full court).

[2] The essential controversy is whether the appointment of the applicant, Makasela Consulting & Projects (Pty) Ltd (Makasela), to a risk-based feasibility study (the risk-based appointment) entitled it to remuneration calculated at 17.5% of construction costs, apportioned according to the stages of work. The respondent, the Mopani District Municipality (the Municipality), maintains that Makasela's remuneration was confined to an 8% upper limit of the costs. This limitation, it contends, applies in accordance with an earlier appointment of Makasela to a pool of approved suppliers. That appointment was subject to the 'Guideline for Services and Processes for Estimating Fees for Persons registered in terms of the Engineering Profession Act 2000 (Act No 46 of 2000)' ¹ of the Engineering Council of South Africa (the Guidelines). The Municipality also contends that a later instruction, following the risk-based appointment, reduced the contractual basis for remuneration to an 8% upper limit.

¹ Published in Government Gazette No 39480 dated 4 December 2015.

[3] The litigation commenced in the Limpopo Division of the High Court, Polokwane, before Makweya AJ (the court of first instance) and thereafter was heard by the full court of that division on appeal. The applicant, having been unsuccessful in both the court of first instance and the full court, and its application for special leave to appeal having been refused on petition, the litigation now reaches this Court by way of an application for reconsideration as to whether special leave to appeal should be granted and if so, whether the appeal should succeed.

[4] Deciding whether the remuneration should be at 17.5% or 8% of the contract value requires the successive contractual documents to be construed as a whole, while keeping separate three questions that became conflated in the courts below, namely: what remuneration was to apply to the risk-based appointment; whether the later instruction altered or extinguished that entitlement; and whether payment pursuant to the later invoice constituted a compromise and was in full and final settlement.

Background

[5] Makasela was initially appointed by the Municipality to a pool of approved contractors who would qualify for the rendering of professional engineering services, for the period 2017/18 to 2019/20. The pool appointment established a general framework under which, inter alia, professional fees for such services, if and when engineers are appointed, would not exceed rates approved and determined by the Municipality with reference to the Guidelines. The Municipality contends that the Guidelines impose a cap of 8% on all fees. Importantly, the appointment to the pool did not of itself result in Makasela being appointed to the Lulekani Water Scheme or any other project. Project work required a further project-specific written appointment.

[6] Section 34 of the Engineering Profession Act provides, as regards professional fees, that the Engineering Council of South Africa must annually, after consultation, determine guideline professional fees and publish those in the Government Gazette. The relevant Guidelines were published as Board Notice 138 of 2015 in Government Gazette No 39480 of 4 December 2015. The preamble to the Guidelines records that it provides an approach for determining fees to be paid for engineering services, but that the approach serves merely as a guideline. Any other basis most appropriate to the situation at hand should be used by the client and service provider to arrive at an agreed professional fee for the specific service to be provided. It remains the prerogative of the client and the consulting engineer to negotiate a fee for the service to be provided, utilising the Guidelines as a basis for their negotiations.

[7] The Guideline makes it clear that the range of fees reflected therein is not a prescribed maximum fee, but rather a guideline that serves as a basis for negotiation between the parties. The appointment of Makasela to the pool of engineers did not state that fees may not be charged in excess of the Guidelines, but simply that fees would not exceed the rates as approved and determined by the Municipality in terms of the Guidelines.

[8] On 28 May 2018, the Municipality appointed Makasela in terms of the risk-based appointment to perform a feasibility study in respect of the Lulekani Water Scheme. Paragraph 3.1 of the Guidelines dealing with Planning, Studies, Investigations and Assessments refers specifically to ‘initial feasibility studies’ and provides that these will normally be remunerated on a time and cost basis. There is no 8% guideline or limitation specified for feasibility studies.

[9] The risk-based appointment is distinct from a project-specific written appointment following appointment to the pool of engineers. The risk-based appointment letter stipulated that Makasela was to develop a technical report and seek the necessary approval to guide the implementation of the proposed project. Payment would follow approval of the technical report and project business plan based on the applications made to the funder. The inclusive fee offered by the Municipality would be 17.5% of the construction costs, and the total professional fees (inception, design, supervision and contingencies etc. included) payable for the project should not exceed 17.5% of the total construction costs. If the feasibility study was not approved, Makasela would not be entitled to claim payment of any fee. It was only entitled to claim a fee if the feasibility study (technical report) was approved.

[10] The risk-based appointment expressly provided that Makasela's inclusive professional fees would be calculated at 17.5% of construction costs. It apportioned that fee across six stages: inception 5%; concept and viability 25%; design and development 25%; documentation and procurement 15%; contract administration, supervision and inspection 25%; and project close-out 5%.

[11] It is common cause that Makasela duly performed the work required by the risk-based appointment and obtained approval of the technical report on 13 May 2019, which culminated in a municipal infrastructure grant in favour of the Municipality. Makasela maintains that it accordingly became entitled to payment of the sum of R9 615 174.14. The Municipality pleaded that it was entitled, by way of 'amplification', to limit and calculate Makasela's fee contrary to what was agreed upon. It relied on a request it subsequently made to Makasela to submit an invoice at 8% of the total contract price. Makasela submitted an account dated 12 July 2019,

reflecting R4 395 508.59, and the Municipality paid that amount on 28 August 2019. Makasela maintains that it did so to facilitate payment to it.

[12] In the action instituted by Makasela for the balance of its remuneration calculated as R5 219 665.55 (R9 615 174.14 less R4 395 508.59), the court of first instance found that the parties were bound by the upper limit of 8% and that Makasela was not entitled to the balance to make up the fee of 17.5%. The appeal to the full court was dismissed, the full court finding that Makasela had acquiesced in the fee of 8%, notwithstanding this not having been pleaded, because Makasela's failure to reply to 'the positive averments' in the plea of the Municipality had the automatic effect that Makasela accepted the allegations in the plea.

Discussion

[13] The approach to contractual interpretation is well settled. Interpretation is a unitary exercise in which text, context and purpose are considered together. The language chosen by the parties remains the point of departure, but it is read in the light of the document as a whole and the circumstances known to the parties when the agreement was concluded.²

[14] Those principles do not permit a court to prefer an interpretation merely because, with hindsight, it appears commercially more convenient for one party. Nor may context be used to make a contract for the parties that they did not make for themselves. The enquiry remains directed at the objective meaning of the language employed, considered in its contractual setting.

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); 2012 (4) SA 593 (SCA) para 18. See also *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) paras 65-66.

[15] The earlier pool appointment and the later project-specific risk appointment were separate and distinct contracts. They served different functions and purposes. The pool appointments established the general relationship and contemplated later specific project appointments, but not feasibility studies. The risk-based appointment was the instrument through which Makasela was engaged to perform the feasibility in respect of the Lulekani Water Scheme and which identified the work, risk allocation, stages, and fee.

[16] Where a general framework, such as the pool appointment, is followed by a specific risk appointment that expressly regulates the very subject in dispute, the specific terms of the latter cannot be deprived of their content by seeking to revert to the general framework for work on projects that are yet to be implemented. Any Guidelines provision remains relevant context but cannot detract from the fee expressly agreed to by the parties in the risk-based appointment.

[17] The pre-existing contractual relationship giving rise to the appointment of Makasela to the pool of engineers did not provide for feasibility studies in regard to a specific project. A feasibility study may find that a particular project is not feasible, in which event it will then not be proceeded with. Even where it is found that the project should succeed, it might be awarded to another successful tenderer in the pool initially established to the exclusion of the engineer appointed to conduct the feasibility. The appointment of Makasela was accordingly on risk.

[18] Makasela had to be remunerated in accordance with the terms of that appointment. The Guidelines do not prescribe the fees for such an appointment; they are left to the parties to negotiate. In casu, the Municipality fixed a fee at 17.5%, which

Makasela accepted. The Guidelines are simply a guide and did not limit the negotiated fee determined by the Municipality.

The part payment

[19] The Municipality relied heavily on the written instruction which it, subsequent to the appointment on 1 June 2019, issued to Makasela regarding payment. This instruction stipulated an 8% upper limit for the calculation of the professional fees, the resulting consideration being R4 395 508.59 inclusive of VAT. Makasela later, as requested by the Municipality, submitted an account dated 12 July 2019 reflecting R4 395 508.59, and the Municipality paid that amount on 28 August 2019.

[20] These documents are relevant, but the question is what legal consequence they bear. The courts below treated the sequence as effectively dispositive. That approach paid insufficient attention to the separate risk-based appointment and to the Municipality's burden of establishing the defence on which it relied. It also ignored the evidence of Makasela that it applied for the payment simply to obtain a part payment of the contract amount, which was already due to it.

[21] The document was simply an instruction dealing with payment, issued by the Municipality in the course of the existing contractual relationship governed by the risk-based appointment. It was not a new agreement, nor intended to be a variation of the risk-based appointment, nor a novation thereof, nor a waiver of rights. That was never pleaded. The Municipality's case has been described in the language of amplification, variation, and full and final settlement. Those concepts should not be collapsed.

[22] A variation changes contractual rights and obligations by agreement. Waiver involves the abandonment of a right with knowledge of it. A compromise is an agreement to settle a disputed or uncertain obligation. Each depends centrally upon objectively established consensus.

[23] The fact that Makasela accepted the instruction and thereafter invoiced the Municipality for the amount the Municipality was prepared to process does not by itself establish that the parties intended to cancel, novate, or compromise the remuneration formula already contained in the project-specific appointment. The invoice and receipt of payment establish that R4 395 508.59 was claimed and paid. They do not, without more, establish that Makasela abandoned any further entitlement arising from the fee formula in the project-specific appointment.

[24] *Pacta sunt servanda* (agreements must be kept) remains foundational. Agreements freely and properly concluded should be enforced, subject to the Constitution and public policy.³ The later documents did not establish consensus that the 17.5% project fee formula was extinguished and replaced, for all purposes, by an 8% fee, or that payment of R4 395 508.59 was tendered and accepted in full and final settlement of Makasela's contractual claim.

[25] Receipt of a lesser amount than contractually due does not, merely by receipt, amount to a compromise. A compromise requires consensus directed at the settlement of a disputed obligation. The evidential sequence in this matter is insufficient to justify the conclusion that Makasela surrendered the balance it contended remained payable under the risk-based appointment. An intention to extinguish an existing right is not

³ *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) paras 79-87.

lightly inferred. The invoice and receipt of payment of R4 395 508.59 did not establish that Makasela abandoned the right to the balance of its agreed remuneration.

The absence of a replication

[26] Makasela contended that the courts below attached impermissible significance to its failure to deliver a replication. That submission is sound. Under the Uniform Rules of Court, where no replication is delivered, the issue is joined on the plea. Positive factual allegations constituting a special defence are not thereby automatically admitted. On the contrary, they are taken to be denied.

[27] The Municipality accordingly bore the burden of proving the factual and legal foundation of its defence. It had to establish that the later instruction and associated conduct altered or extinguished the contractual debt asserted by Makasela. The absence of a replication could not relieve it of that burden, nor could it transform equivocal conduct into unequivocal consensus. The Municipality failed to prove a variation, waiver, or compromise sufficiently to defeat the claim for the reasons given above. Once it is accepted, as it must be on the evidence, that the later instruction did not extinguish the pre-existing contractual basis of remuneration, the fee stipulated in the risk-based appointment remains. It expressly stated that inclusive professional fees would be calculated at 17.5% of the construction costs. The dispute over quantum was capable of determination by applying the contractual fee mechanism to the relevant construction-cost base and crediting the amount already paid by the Municipality.

Quantum

[28] Makasela's particulars of claim calculated the remuneration payable under the 17.5% project formula, allowed credit for the R4 395 508.59 already paid, and claimed the resulting balance of R5 219 665.55 inclusive of VAT. The Municipality's principal

answer was not that the subtraction was arithmetically wrong, but that the 17.5% formula ceased to be operative because of the later reliance on a fee of 8%.

[29] The fee agreed was 17.5%. The foundation on which the applicant's quantum was resisted falls away. The amount of R5 219 665.55 is the pleaded balance produced by the contractual fee formula after deducting the payment received. The arithmetic was not shown to be erroneous.

[30] The court of first instance therefore erred in rejecting the claim on the basis that Makasela had failed to establish a contractual entitlement to the balance of R5 219 665.55. The full court perpetuated that error by treating the later instruction and the absence of a replication as decisive.

[31] Makasela also sought mora interest on the balance due to it. Interest a *tempore morae* is compensatory and follows where a debtor, whose debt is due and enforceable, is in mora. The appellant seeks interest at the rate of 10% per annum from 27 May 2020, when the action was commenced. The prevailing prescribed mora rate at the time was however 8.75% per annum.⁴ In consequence of the conclusion that the balance of the capital debt remained payable, the associated claim for mora interest must succeed on the terms reflected in the order.

Reconsideration and special leave

[32] The threshold for reconsideration and special leave is exacting. It is trite that the requirements warranting the reconsideration of a refusal of leave to appeal are the existence of a likelihood of a grave failure of justice or of bringing the administration

⁴ See Prescribed Rate of Interest (Section 1 of the Prescribed Rate of Interest Act, 1975), GN R713, GG 43475, 26 June 2020.

of justice into disrepute if no reconsideration occurs. The proposed appeal must present sufficient prospects of success and importance to justify special leave.⁵

[33] Those requirements are met. The matter raises a material question concerning the interaction between a general municipal professional-services framework, a later risk-based appointment, and subsequent instruction. It also raises the procedural question of whether the absence of a replication can bear the weight placed upon it in determining a substantive contractual defence.

[34] Most importantly, reconsideration revealed that the contractual and procedural enquiries were conflated in a manner that affected the result. The amount in dispute is substantial. The interests of justice favour reconsideration and the grant of special leave to appeal.

[35] The risk-based appointment provided the contractual basis for the remuneration claimed. The 17.5% provision was both a stated method of calculation and a ceiling on the aggregate fee. The Municipality did not have the unilateral power to substitute an 8% fee after appointment.

[36] It follows that the order of the full court cannot stand. The appeal to that court should have been upheld and the order of the court of first instance replaced with judgment in favour of Makasela. Costs should follow the result at each stage.

⁵ *FirstRand Limited and Another v National Bank of Abu Dhabi PJSC (Pty) Limited* [2026] ZASCA 98; [2026] 3 All SA 485 (SCA) paras 8 and 10. See also *Moloi v Road Accident Fund* [2026] ZASCA 13 (6 February 2026) para 9.

Order

[37] In the result, the following order is made:

- 1 The application for reconsideration is granted.
- 2 The order of this Court refusing special leave to appeal is set aside and replaced with the following order:
 - 2.1 Special leave to appeal is granted with costs.
 - 2.2 The order of the full court is set aside and replaced with an order in the following terms:
 - ‘1 The appeal is upheld, with costs on scale C.
 - 2 The order of the court of first instance is set aside and replaced with an order in the following terms:
 - (a) The defendant is ordered to pay the plaintiff an amount of R5 219 665.55;
 - (b) The defendant is ordered to pay interest on the amount of R5 219 665.55 at the rate of 8.75% per annum a *tempore morae* from 27 May 2020 to date of payment;
 - (c) The defendant is ordered to pay the plaintiff’s costs on scale C.’

ACTING JUDGE OF APPEAL
P H S ZILWA

Appearances

For the Appellant: A A Basson

Instructed by: Thomas & Swanepoel Inc, Tzaneen
Symington De Kock Attorneys, Bloemfontein

For the Respondents: R Baloyi

Instructed by: Verveen Attorneys, Polokwane
Peyper Attorneys, Bloemfontein.