THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1165/18

In the matter between:

INTECH INSTRUMENTS **APPELLANT**

and

TRANSNET LIMITED t/a SOUTH AFRICAN PORT OPERATIONS **RESPONDENT**

Neutral citation: *Intech Instruments v Transnet Limited t/a South African Port Operations* (1165/18) [2019] ZASCA 79 (31 May 2019)

Coram Majiedt, Dambuza, Mathopo and Makgoka JJA and Plasket AJA

Heard: 13 May 2019

Delivered: 31 May 2019

Summary: Contract – repudiation manifested by conduct – motive irrelevant – status of interim certificates where construction contract lawfully cancelled by employer – cease to be of force and effect – not self-standing claims separate from remainder of contract.

ORDER

On appeal from: Kwazulu-Natal Division of the High Court, Durban (Koen J sitting as court of first instance):

1 The appellant's late filing of the record is condoned. The appellant is ordered to pay the costs of the application for condonation, including the costs of two counsel where so employed.
2 The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Majiedt JA (Dambuza, Mathopo and Makgoka JJA and Plasket AJA concurring):

Introduction

[1] The respondent, Transnet Limited (Transnet), through one of its internal divisions, South African Port Operations (SAPO), is responsible for the operation and management of South Africa's seven ports. There are 13 terminals in these seven ports. Saldanha Bay and Port Elizabeth ports have bulk handling terminals. Iron ore is exported from Saldanha Bay and manganese ore from Port Elizabeth.

[2] During early 2006 the appellant, Intech Instruments (Intech), a sole proprietorship, was awarded a tender for the refurbishment and upgrade of these two terminals. Disputes in respect of the execution of the tender arose between the parties, culminating in litigation in the Kwazulu-Natal Division of the High Court in Durban (the high court). By agreement between the parties, the trial in the high court before Koen J was confined to the Port Elizabeth project and an order was made to that effect.

[3] Intech alleged repudiation of the contract by Transnet, cancelled same and sued Transnet for various amounts. Transnet, in turn, alleged repudiation on the part of Intech, cancelled the contract and counterclaimed for various amounts. After a protracted trial, Koen J dismissed Intech's claim with costs and upheld Transnet's counterclaim, together with interest and costs. This appeal is with the leave of the high court.

Condonation

[4] Intech's attorneys filed the record out of time. Condonation was sought at the hearing, but was opposed by Transnet. Its main ground of opposition was that the application was based entirely on inadmissible hearsay. There is considerable merit in this submission. And it is true that, as was contended on behalf of Transnet, the application contains inadequate averments in the founding affidavit and the replying affidavit was filed late without an accompanying condonation application. We nonetheless granted condonation in the interests of justice. This matter originates from events in 2006 and involves millions of Rands. Moreover, as stated, the dispute between the parties relating to the Saldanha Bay works is standing over, presumably until finality is reached in the present dispute. It is in our view in the interest of all concerned that this appeal should be finalised on the merits.

The factual matrix

[5] The background facts are largely common cause or not seriously disputed and are as follows. A global increase in demand for bulk commodities, particularly for iron and manganese, during the mid-2000's prompted Transnet, in consultation with mining houses, to re-assess its export capacity. The demand for iron and manganese was largely fuelled by a demand for steel by China's rapidly expanding economy.[1] Transnet consequently decided to effect significant expansion to its export capacity in respect of, amongst others, iron ore and manganese ore. This entailed the expansion of both its rail network (operated by its division, Spoornet, in respect of bulk commodities) and its export terminals at the ports. There is a dedicated iron ore rail network on Transnet's Sishen-Saldanha line and manganese ore is transported by rail from the Northern Cape mines to the Port Elizabeth port.

[1] Steel is manufactured mostly from iron ore. Manganese forms roughly 10% of its composition.

Given the circumscribed dispute in the high court, I will restrict the further discussion to the latter.

[6] After initial studies, Transnet decided to invite tenders to refurbish its plant at the Port Elizabeth manganese ore terminal (the plant). An option to tender, in addition, for the upgrade of the plant was included in the invitation. Transnet's invitation to tender; Intech's response thereto by way of its letter of tender; and Transnet's acceptance of the tender (collectively, the tender documents), are crucial to the determination off the dispute. Before I deal with them, however, it is necessary to explain in broad outline how the plant at the terminal operated.

The Port Elizabeth terminal plant

[7] The plant has two lines, referred to as 'A' and 'B'. On the import side, the manganese ore would arrive by train at tipplers A and B. The tipplers would tilt (or tip) the ore onto conveyors which would transport the ore to the stackers. Along the lines one conveyor would discharge the ore into another conveyor at transfer points which are located at 90 degree angles on the lines. These transfer posts are referred to as T1, T2 and so forth until T9. The ore is poured onto stockpiles by the two stackers, A and B, through conveyors.

[8] The export side commences when ore is reclaimed from the stockpiles by the reclaimers. The ore is reclaimed from a specific stockpile as is required by the ship to be loaded. Once reclaimed from the stockpile, the ore runs along the two lines on conveyors past the transfer points in the direction of shiploaders A and B. Transfer points T8 and T9 are the closest to the shiploaders. The shiploaders have bogies which run on wheels and a gantry-like structure on top. Conveyors would transport the ore within the gantry towards the loading boom from where it drops into the hold of the ship.

[9] Three important features of the operation of the plant bear mention. First, the stackers, reclaimers and the shiploaders are huge structures (in evidence the shiploaders were referred to as 'superstructures'). They consist of complex machinery, operated individually from control rooms located on the various structures. Central monitoring and control is effected from a central control room

from which the entire import and export operation can be monitored. Second, the entire operation ran on an expansive conveyor system past the various transfer points, first to the stockpiles and then to the ships. And third, due to the large machinery and conveyors with moving parts, the manganese dust and the need to work at height, safety was paramount at the plant.

The tender and its execution

[10] Transnet issued the tender during September 2005. As stated, it called for the refurbishment, alternatively the refurbishment and upgrade of the plant. In respect of the refurbishment, Transnet's main requirement 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'. In respect of the refurbishment and upgrade option Transnet's invitation to tender stipulated, as main requirement, 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'. The tender notice informed prospective tenders of a compulsory site inspection at the terminal on 3 October 2005. It also stipulated that '[t]enderers shall give a clause-by-clause comment where called for, as to whether or not their tender complies, if not, how it differs from the specification. Failure to do so may preclude a tender from consideration'. The invitation set out the scope, general requirements and conditions (including occupational health and safety requirements), codes and standards and specific requirements in respect of individual items such as the chargers, tipplers, stackers, conveyors, reclaimers and shiploaders.

[11] Intech's sole proprietor, Mr Inderan (Rajen) Pillay, accompanied by Mr Dean Richards, Intech's operations manager, and Dr Don Glass, Intech's projects manager at Saldanha Bay[2], attended the site inspection. At that time Intech was a small electrical and instrumentation firm which had no experience at all in the

[2] The Saldanha Bay project commenced before the Port Elizabeth project.

execution of projects of the size and scope of the proposed tender. According to Mr Pillay, he had no intention of submitting a bid for the entire project. His intention was to submit a tender for the electrical and instrumentation part only. He testified that: 'My intention was never to do the refurbishment nor the upgrade *because I was not qualified to do either. I know almost nothing about stackers and reclaimers*, I knew – you know, whatever little I knew about it was what I saw at Saldanha, but I did not work with them, so I thought that I would go in there and meet other contractors that were going to be there and I would give them a price as a sub-contractor because one of the criteria was that you needed to have a BEE contingent. . . .' (Own emphasis).

[12] Mr Pillay met other contractors at the site inspection. They persuaded him to submit a tender as the main contractor. The idea was to subcontract out the other specialized work to firms which had the requisite specialist skills and experience. One of these subcontractors was Langa Sandblasting & Painting (Langa), which specialized in painting and sandblasting. Another one was Alstom, a large French multinational, which was interested in the instrumentation and software part of the project. Mr Pillay stated that it came as somewhat of a shock to him that a huge multinational enterprise such as Alstom was not interested in tendering for the entire project. And a third was Lorbrand, a Gauteng based company which specialized in the manufacture of conveyor components. There were other subcontractors as well, but these three featured prominently in the case.

[13] On this basis, Intech submitted on 17 November 2005 a comprehensive tender for the refurbishment and upgrade of the plant at a consideration of R27 656 350 and R17 631 726 respectively. Intech's tender proposal consisted of a covering letter, Transnet's pro forma tender document, duly completed and signed, a scope of works, details of options, technical data and brochures. A tender clarification meeting was held on 7 December 2005, attended by Mr Pillay and Dr Glass on behalf of Intech and various Transnet representatives. Numerous technical aspects were clarified and Intech's representatives set out in broad terms how they proposed executing the tender. On 12 January 2006 Transnet advised Intech that the tender had been awarded to it. In awarding the tender, Transnet accepted Intech's proposed scope of works and specifications. It accepted only one of the numerous

additional options proposed by Intech, namely the addition of a slew ring at extra cost. The tender price was adjusted to make provisions for the addition of the slew ring.

[14] The tender period was stipulated as 10 months, commencing from 16 January 2006 and Transnet designated its Mr Andries Gouws as project manager. It is common cause that an agreement came into existence upon Transnet's acceptance of Intech's proposed tender on 12 January 2006. The tender form provided that, pending the execution of a formal contract document, Intech's tender together with the covering letter, subsequent correspondence and SAPO's acceptance would constitute a binding contract. A comprehensive written contract was later signed by Mr Pillay for Intech. That document, which runs into hundreds of pages, contained Transnet's standard general conditions of contract (more particularly, for present purposes, its 1997 General Conditions of Contract, the GCC 97) and special conditions of contract. Transnet was unable to produce a copy of the contract bearing a signature on its behalf, but the contract and its terms were common cause on the pleadings.

[15] Problems arose at an early stage of the execution of the tender. Their genesis is to be found in the parties' differing interpretations of the contract. These problems became progressively worse over time. The difficulties were exacerbated by the serious disagreement which arose early on between Intech and its main subcontractor, Lorbrand. Transfer points T8 and T9 were key sections on the export side of the operation. The work entailed that the entire plant had to be shut down when work was done at T8 and T9. The proposed shutdown dates had to be carefully planned and determined long in advance. The shutdown work had to be completed within the designated period, so as to avoid ships charging demurrage against Transnet for delays in loading the ore.

[16] The relationship between Transnet and Lorbrand eventually broke down, to the extent that it became clear that Intech would not be in a position to achieve the planned shutdown. Given the importance of the shutdown deadline, Transnet exercised its contractual right of excising the structural and mechanical work on T8 and T9 from the scope of the contract. It awarded that part of the work to Lorbrand to

execute in terms of a direct contract between it and Lorbrand. At that time Transnet Capital Projects (TCP), a division of Transnet, took over the supervision and management of the shutdown work. TCP performed this duty in conjunction with a joint venture of three professional engineering and project management firms, Hatch Africa, Mott McDonald and Goba, referred to at the trial as 'HMG' (collectively, TCP and HMG will be referred to as the 'JV'). At the helm of this work was Mr Dan Reddy for TCP and Mr Piet Pretorius for HMG. After the successful completion of the shutdown work, the mandate of the JV was extended to include the remaining work on the terminal. The JV thus effectively became interposed between the parties in respect of the management of the project.

[17] On 15 December 2006 Mr Reddy instructed Intech to hold all further work on the plant. This was to give Transnet an opportunity to re-assess the future of the terminal. There appears to have been a preliminary view by Transnet at that stage that the terminal's export capacity might require expansion substantially beyond the 2 500 tons per hour envisaged in the scope of the Intech tender. Mr Reddy's concern was that any further work done by Intech would then, in the circumstances, amount to wasteful expenditure. He requested in writing that Intech should indicate the cost of 'closing out' (ie terminating) the contract at that stage. Intech reverted with an amount of R14 million, which Mr Reddy considered as too high, being in effect fruitless expenditure. He consequently instructed Intech to complete the remaining scope.

[18] In the early part of 2007, safety issues arose on the plant. It came to the JV's attention that one of Intech's subcontractors, Langa, was engaged in unsafe working practices on the site. Following investigations, a 'stop works' order was issued on 14 February 2007 to Intech (as main contractor), setting out the instances of non-compliance and the required remedies. After Intech gave certain undertakings in this regard, which the JV accepted, the 'stop works' order was lifted and work resumed.

[19] On 2 March 2007, the JV became aware that one of Alstom's employees had suffered a 'lost time injury' on site which necessitated the employee to be booked off from work. The injury had not been reported by Intech as it was statutorily obliged to do as the main contractor. This precipitated a further investigation by the JV into

safety aspects relating to Intech's work. As a consequence, the JV, on behalf of Transnet, on 5 March 2007 issued a 'stop-works' order based on general non-compliance with the Occupational Health and Safety Act 85 of 1993 (the OHS Act). Another 'stop works' instruction was issued on 8 March 2007. It differed from the previous one only in respect of its limited reference to OHS Act requirements which had been incorporated into the contract and was thus less onerous than the previous one. At this time very little work was being done by Intech – there was mostly sandblasting and painting being done by Langa and Alstom was performing critical work on the computer software in the control room.

[20] In the meantime, disputes regarding payments were raised by Intech. A standoff ensued as Transnet disputed Intech's demands for payments on various grounds. The impasse was never resolved and Intech finally left the site at the end of May 2007. Correspondence was thereafter exchanged between Intech's attorneys and Mr Hamilton Nxumalo, SAPO's general manager, concerning the disputed payments. After further correspondence, Intech, via its attorneys, cancelled the contract on 13 August 2007, based on Transnet's alleged repudiation in the form of the issuing of the 'stop works' orders. In response, on 14 August 2007 Transnet's attorneys wrote to Intech's attorneys, alleging a number of breaches on the part of Intech and cancelling the contract.

[21] The project was eventually completed by the JV several years later at a much higher cost (some R600 million). Intech sued Transnet for: (a) payment of retention monies; (b) unpaid invoices; (c) interest on the late payment of two invoices; (d) standing time costs (subsequently abandoned); and (e) damages for the alleged loss of profits on the balance of the contract. For its part, Transnet counterclaimed for: (a) a claim based on a final certificate, alternatively a claim for damages and for repayment of certain amounts allegedly paid in error; and (b) penalties for late completion of the works.

[22] The counterclaim on a final certificate emanated from a certificate compiled by Mr Adrian Young, HMG's senior project manager, on 25 August 2014. The final certificate derived from clause 37(3)(v) in GCC 97 which stipulated that the project manager shall issue a final certificate upon Transnet's instructions. In terms thereof,

Intech was liable to Transnet in respect of work done by other contractors (supervised and managed by the JV) to complete the work which Intech had undertaken to perform (including the rectification of Intech's defective work) in the sum of R204 187 750 (VAT included). At the trial Transnet abandoned a large part of this claim and confined its claim to R50 million.

The issues

[23] The main issues which require determination are:

(a) The precise nature of the contract, with particular reference to what exactly Intech's scope of obligations was. Intech contended that it only had to do certain items of work, whereas Transnet's case was that this was a 'lump sum' contract, based on a performance specification. According to Transnet's interpretation, the contract required Intech to perform all the work that was required to achieve the outcomes stipulated in the invitation to tender.

(b) The lawfulness of the respective cancellations by the parties.

(c) The consequent effect of a valid cancellation by Transnet on Intech's claims as pleaded.

(d) The counterclaim.

What was the exact nature of the contract?

[24] The correct approach to the interpretation of contracts is well established. We must give meaning to the words used in the contract applying the normal rules of grammar and syntax, viewed within the attendant factual context, in order to determine what the contracting parties intended.[3] In addition, contracts must be interpreted in a manner that makes commercial sense.[4]

[25] It is striking that this contract did not contain a bill of quantities quantifying the works in detail. Instead, the scope of work set out in Transnet's invitation to tender as far as refurbishment and upgrade was concerned, read as follows:-

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[3] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) para 24; *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 28.

[4] *Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

'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, stacker, 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.'

[26] The expected outputs for the upgrade option stipulated 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 1 250 ton per hour per belt allowing for 20% surges in the handling 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.'

[27] Intech's tender covering letter is instructive. It reads as follows:

'Attached please find ONE FILE containing our Tender proposal for the specified work at the Manganese Ore Terminal in Port Elizabeth.

1. File Containing – Published Tender document. Signed and completed as required, Scope of Works, details of Options, technical data and brochures.

REFURBISHMENT.

As specified, we offer a 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 1,500Te/hr at acceptable operation and maintain levels post handover.

Price: R 26,352,730 excluding VAT

Warranty: A twelve month Warranty is offered on all completed & inspected work.

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

Summary 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 lighting to OSHACT 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 Seam welds on Conveyor belts
- Replacement of 750mtrs of damaged belting
- Electronic scales on Import & Export lines
- Basic SCADA and conveyor PLC system
- 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 Specificaitons: Contained in this file

UPGRADE

An additional cost of R 17,631,726 is included in schedule of prices.

TIMESCALES

A basic time schedule is included in this file. Intech will provide a detailed planning schedule as specified within two weeks of being awarded the contract.

CONTRACTORS

Intech has experience as a Project Management & co-ordination group. Intech also has specific experience with Electrical, Instrumentation, SCADA, PLC, Mechanical and Structural construction work.

To support Intech in this project, a relationship has been structured to include:

- Intech Instruments – Prime Contractor – Electrical 7 Instrument Design & installation – Professional (GCC) Engineers, Project Management and SCADA / PLC
- Lorbrand – Conveyor System Manufacturers and Installers
- Scorpio Martin Engineering – Transfer, Chute & Liner specialists: Dust suppression designers
- Dave Brown Engineering – Gearbox & Slew gear manufacture and refurbishing
- Langa Sandblasting – Corrosion & structural Engineering
- Alstom Controls – Control (PLC & SCADA)
- Bellco – Network, radio communication

OPTIONS

Various Options are offered to SAPO by Intech – Enclosed are ten detailed optional items.'

[28] Detailed specifications were outlined in respect of the items of plant and machinery in the terminal and an overview of the operation and technical codes were also included. The site inspection of 3 October 2005 had as its objective an opportunity for prospective tenderers to examine the plant closely with a view to determining precisely what work was required in respect of the various items on the

plant to achieve the outcomes required by Transnet. Prospective tenderers themselves had to calculate the cost of the work in this regard. It is against this background that Intech successfully tendered. It was the only compliant tender – two other tenderers submitted tenders only in respect of investigative studies to determine the precise scope of work required. Included in the tender submitted by Intech was a signed declaration that the tenderer had acquainted himself with all the tender documents. Intech's tender thus complied with all the requirements of the invitation to tender.

[29] In its particulars of claim Intech appears to accept, at least impliedly, that the contract required of it to achieve the deliverables stipulated in the invitation to tender. Thus, it pleaded that:

'(a) The contract was concluded pursuant to [Intech's] submission of a tender dated 17 November 2005 and [Transnet's] confirmation of the award of the tender to [Intech] by way of a telefax dated 12 January 2006.

(b) In terms of the contract [Intech] undertook to refurbish the manganese bulk plant at Port Elizabeth for the sum of R27 656 350, excluding VAT and undertook to upgrade the said manganese bulk plant for an additional cost of R17 631 726.'

Importantly, Intech also pleaded that it had 'agreed to comply inter alia with the [OSH Act]'. These averments were admitted in the plea.

[30] Furthermore, Mr Pillay, the driving force behind Intech, appeared to accept that Intech was required to achieve the stipulated outcomes. He testified as follows:

'So the – what you're saying is that work is listed in the options which is not in fact required in order to achieve the stipulated items? – No, it was not. And we've been over this and you accept that he spoke of contract which – there was no [scope] required but the output which was required were, well as you stipulated in refurbishment, it's 1 500 tons per hour which is 750 x 2 belts and then the upgrade is to the 1 250 tons per hour? – That is correct'.

Intech thus appeared to have understood the contract the same as Transnet did.

[31] Over and above the unambiguously stated expected outcomes (which, as stated, Intech via Mr Pillay appeared to accept), the contract also contained detailed specifications which incorporated specified codes and standards. Upholding Intech's

interpretation of the contract would in my view render these detailed performance specifications meaningless. In the context of what Transnet required for the refurbishment and upgrade of the plant, to accept the contention that Intech could simply do whatever work it wanted to, at whatever standard it chose to, would not make commercial sense.

[32] Contracts of this type are often referred to as 'design and build' contracts.[5] They are meant to save costs and time. In effect, they merge a first pre-tender phase of commissioning investigative studies to determine the precise scope of work, with the second phase of the tender for the work itself. In such circumstances, self-evidently there is then a far greater responsibility on prospective tenderers to make a proper assessment of what the tender required and what it would cost to meet those requirements.[6]

[33] The ambit of the invitation to tender and its general envisaged outcome; the specific deliverables stipulated in the contract; and Intech's tender comprising specified items and outcomes, all point to this being a performance specification contract. This conclusion is fortified by the fact that it appears to be common cause on the pleadings and by Mr Pillay's apparent acceptance during oral evidence of this interpretation. En passant, I must agree with the submission by Transnet's counsel that the fact that neither Mr Pillay nor any one of Intech's senior representatives had ever read the documents or the contract, renders the debate about the nature and the scope of the contract somewhat artificial. Astoundingly, Mr Pillay conceded that, even at the time of the cancellation of the contract by his attorneys on 13 August 2007, he had still not read the contract, despite his attention on more than one occasion having been drawn to important provisions in GCC 97. His attorneys, too, had not read the contract when they cancelled. Be that as it may, Koen J cannot be faulted in coming to the conclusion that this is, as Transnet contended, a performance specification contract with stipulated outcomes.

At whose instance was the contract lawfully cancelled?

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[5] See Stephen Furst and Vivian Ramsey *Keating on Construction Contracts* 9 ed, (2011) at 11 para 10-27.

[6] Many of the problems encountered by Intech can be traced back to this onerous requirement in circumstances where Intech had never executed a contract of this nature.

[34] Central to this issue is the question regarding safety on the site in general and Intech's alleged non-compliance with the OHS Act in particular. This is so because Intech pleaded that it lawfully cancelled the contract solely on the basis of Transnet's alleged unlawful conduct in issuing the two 'stop works' orders in March 2007 and thereafter failing to furnish reasons to enable Intech to remedy its shortcomings. Moreover, its purported cancellation through its attorneys on 13 August 2007 was only based on Transnet's alleged repudiation through the alleged unlawful 'stop works' orders. Thus the only issue before the high court in this regard was the lawfulness of the 'stop works' orders. It was submitted on behalf of Intech that regard must also be had to the averments on this aspect in its replication and in its plea to the claim in reconvention. The submission is ill-conceived – it is trite that a party is obliged to make out its case in the papers founding its claims, here, the particulars of claim. It cannot seek to do so in its replication. And, equally well-established, is the principle that a party cannot plead one particular issue and then attempt to raise others at the trial.[7] That principle applies even more so on appeal.

[35] It will be recalled that there had been a 'stop works' order issued on 14 February 2007 on account of Langa's non-compliance with safety prescripts in the OHS Act. Intech furnished undertakings to remedy the non-compliance. On this basis, the 'stop works' order was lifted and work resumed. Thus, the non-compliance in March 2007, relating to the failure to report the lost time injury sustained by an Alstom employee, was a second serious transgression within a matter of weeks. Intech correctly accepted that, as main contractor, it bore full responsibility for the failures regarding safety aspects (in particular non-compliance of the OHS Act) of its subcontractors. Intech specifically agreed in its contract with Transnet to comply with its duties and obligations set out in the OHS Act. It also accepted in terms of the General Conditions of Contract and the OHS Act, that it bore responsibility for its own employees and for all other persons under its control. Dr Willem du Toit, Transnet's expert witness on safety, described the plant as a particularly hazardous environment. The potential hazards included those associated with working in close proximity to live machinery, in confined spaces and at height, and the risk posed by

[7] See generally *Minister of Agriculture and Land Affairs & another v De Klerk* & others [2013] ZASCA 142; 2014 (1) SA 212 (SCA) para 39.

falling objects, drowning and electrocution. Then, of course, there was the potentially hazardous manganese dust.

[36] Both Mr Pillay and Intech's safety expert, Mr Schorne Darlow, conceded that there was non-compliance with the OHS Act and its Regulations in several material respects. These included not even having a copy of the OHS Act on site, the absence of a health and safety plan, no appointments having been made as required by the OHS Act and Regulations and no risk assessments having been carried out. As stated, the plant was a highly hazardous site and safety was paramount. Mr Pillay made the following two important concessions:

'First of all, Intech was non-compliant. Their operation was not in accordance with the Occupational Health and Safety Act, construction regulations or any other --- (indistinct) regulations, including SABS. Do you accept that? --- yes. There were serious non-conformances. The second part --- (intervention) --- We are talking about the site, just the site --- On the site yes.

The second part of this is that and we will deal in due course with the events as they unfolded, but there was a joint audit or an audit at which Intech had a representative and scores were agreed. Intech was at that time told, this is around about the 20 March, told what the issues were and in fact it appears from various records which we have only had access to in the context of these proceedings, that Intech did set about trying to get itself compliant following March. Would you agree with that? --- Correct.'

[37] Later during cross-examination, the following crucial concession was made:

'What I am saying to you is that it is part of Intech's case, it has been pleaded that Intech did not know what its shortcomings were or what it needed to do in order to become compliant. What I am saying to you is there is no truth whatsoever in that. --- No, that is not true at all. We knew what to do, we know about safety, we work every day with safety, but I brought in the expert to guide us the first time, to do everything right the first time, because instead of us doing a document and going and giving it to SAPO and they don't accept it.

All right, then we are agreed on the second part, that Intech did in fact know what to do. --- Yes, absolutely.'

[38] The 'expert' referred to by Mr Pillay in the passage above, is Mr Schorne Darlow. He conceded in evidence that 'there was no doubt in my mind that Intech were not complying there was no doubt at all'. Mr Darlow explained that his brief was

to help Intech become compliant, but he was not asked to help draw up a health and safety plan or to do a risk assessment for Intech. He said that had he been instructed to do so, he would have been able to assist Intech to do those things. At some point, when questioned by Koen J, Mr Darlow conceded that Transnet's 'stop works' orders were justified in the circumstances:

'Just let me understand that. If there was no safety plan then you couldn't see whether what was being done was in accordance with the safety plan and then the remedy if you like is you must then stop the construction work until a risk assessment has been done – it can be done maybe in a few days or whatever. --- The risk assessment, Your Honour, is only part of it, it's a small part of it.

So risk assessment and whatever else is required but in the interim the appropriate thing is just to stop the work, am I correct in that? --- Until the plan is put into place. This was how many months? What date did the contract start?'

But, later on, Mr Darlow appeared to suggest that the 'stop works' orders were excessive and that it was not necessary for Transnet to have ordered the stoppage of the entire works. Indeed, Intech's case regarding the alleged unlawfulness of the 'stop works' orders (which it contended amounted to repudiation on the part of Transnet) appears to have mutated into the alleged excessiveness of the orders. This contention is fundamentally flawed on both a factual and a legal level.

[39] Firstly, Mr Darlow conceded that he was not conversant at all with the factual situation which existed at the time of the orders on 5 and 8 March 2007 as far as work on the site was concerned. As a matter of fact, very little work was being done at that time – only Langa was working, doing painting and sandblasting on the gantries and Alstom was performing critical work in the control room. When pressed by Transnet's counsel in cross-examination on how he could express an opinion on this when he did not know what work was being done on the site, he conceded the point:

'All I'm saying is before we can decide whether or not an instruction was excessive you have to know what its actual impact was. --- Well I was under the impression that all work, full stop, no work was allowed to carry on that they were only allowed to stay in their site offices they were not allowed to go off site.'

Later he conceded that he was not in a position 'to debate this issue'. This concession, and that made by Mr Pillay, controvert the contentions before us that the orders were arbitrary and unjustifiably excessive.

[40] Secondly, Intech was in law bound to comply with the statutory requirements contained in the OHS Act, the OHS Regulations and the Construction Regulations. It bound itself thus in the contract. Moreover, even if it purported to do so, Intech could not in law contract out of liability to comply with statutory requirements. Those requirements are peremptory. Section 8 of the OHS Act provides as follows:

'(1) Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.'

The section is clearly peremptory and the only proviso contained therein is that measures must be taken 'as far as is reasonably practicable'. Intech's case was not that it was not reasonably practicable to comply. Construction Regulation 4(1)(e) requires an employer like Transnet to 'stop any contractor from executing construction work which is not in accordance with the principal contractor's health and safety plan'.

[41] Central to compliance with the statutory requirements is a comprehensive health and safety plan, which had to be kept available on site in a health and safety file. As pointed out by Dr du Toit, such a plan would encompass the assessment of risks in the work to be executed, together with detailed method statements regarding the management of those risks. Thus, in the present instance, the health and safety plan would have entailed, amongst others, a fall protection plan[8], lockout procedures and personal protection equipment. Absent a health and safety plan, Transnet was not only entitled, but indeed obliged, to stop the work until an appropriate plan had been put in place. This, said Dr du Toit, emanates from the peremptory provisions of s 8(1) of the OHS Act and Construction Regulation (4)(1)(e). A failure to comply with s 8 constitutes a criminal offence[9].

[8] According to Dr du Toit, statistically most accidents in the construction industry occur with people falling from height or with objects falling on people.
[9] Section 38(1)(*a*) of the OHS Act.

[42] It was argued on Intech's behalf, albeit somewhat faintly, that Transnet acted mala fide and with ulterior motive in the issuance of the 'stop works' orders. These orders were a smokescreen to disguise Transnet's true motive, namely to get Intech off the project, so the argument went. Counsel referred to it as 'a contractual pretext to effectively terminate [Intech's] contract'. This argument is ill-conceived and directly controverted by the facts. The evidence of Mr Reddy and Mr Nxumalo, supported by numerous letters and e-mails written by them, are indicative of a concerted attempt by Transnet to engage Intech with a view to getting it to complete the outstanding work. And, more importantly, it is trite that motive is irrelevant as far as the repudiation of a contract is concerned. A contract can only be repudiated by conduct.[10] Where the 'stop works' orders were justified on the facts, as conceded by Mr Pillay and Mr Darlow, and compulsory by law (s 8(1) of the OHS Act and Construction Regulation 4(1)*e*)), it matters not what Transnet's motive may have been. It is an objective test and intention or belief plays no role whatsoever.[11]

[43] To sum up under this rubric: the 'stop works' orders of 5 and 8 March 2007 were lawful and justified. This was conceded by both Mr Pillay and Mr Darlow. Intech knew exactly what had to be done to remedy the shortcomings to have the orders lifted; this too became common cause in the evidence. Intech concededly failed to remedy the shortcomings. On the facts, ultimately the non-compliance with the statutory prescripts remained until Intech finally abandoned the plant at the end of May 2007. Intech's purported cancellation on the basis of repudiation by Transnet's 'stop works' orders is unsustainable in law. The purported cancellation is itself unlawful and was correctly regarded by Transnet as an act of repudiation. Transnet thus lawfully cancelled the contract on 14 August 2007, on the basis of this and other grounds (including Intech's refusal to perform under the contract and its final abandonment of the site at the end of May 2007). As an aside, it bears mention that the contract became deadlocked not because of the 'stop works' instructions, but rather due to the irresoluble dispute regarding Intech's demand for payments and by Intech's intransigence and refusal to complete the outstanding work. Despite his attention being drawn on more than one occasion to possible remedies under GCC

[10] G B Bradfield *Christie's Law of Contract in South Africa* 7 ed, (2016) at 612; Van Huyssteen et al *Contract General Principles* 5 ed, (2016) at 10.
[11] Ibid.

97, Mr Pillay failed to utilise the dispute resolution mechanisms in the contract. This is perhaps explicable by the fact that neither he, nor any one of Intech's other senior representatives, had ever taken the trouble of reading the contract.

Intech's claims

[44] As stated, Intech sued for:

(a) The refund of all sums held in retention by Transnet. Its case was that it was entitled to this refund '(b)y virtue of the termination of the contract'.

(b) Unpaid invoices, also on the basis that it was entitled to full payment by virtue of the cancellation of the contract.

(c) Interest on invoices paid late.

(d) Loss of profit sustained as a consequence of Transnet's 'unlawful repudiation of the contract and the subsequent cancellation thereof.'

(e) Standing money in respect of the 'hold works' order. This claim was expressly abandoned at the trial and was recorded as such by Koen J in his judgment. It could not be revived on appeal, as counsel sought to do in this court.

[45] Intech's claims for unpaid invoices and retention monies are bad in law. As stated, the present contract was one of performance specification, without a bill of quantities, often referred to as a 'lump sum' contract. It was an entire contract where entire performance by the contractor (Intech) was a condition precedent for the client's (Transnet's) liability. Intech's right to payment was thus dependent upon full performance of the contract on its part. Partial performance by Intech did not render Transnet liable for partial payment. As Somervell LJ put it in *Hoenig v Isaacs*[12]:

'the builder can recover nothing on the contract if he stops work before the work is completed in the ordinary sense - in other words abandons the contract'.

[46] In order to mitigate hardship to a contractor in the form of, for example cash flow problems, construction contracts often make provision for periodical interim payments to the contractor, prior to completion of the entire works. That was also the case here. These interim payments would usually be structured against interim certificates, sometimes called 'progress certificates'. As the name depicts, these

[12] *Hoenig v Isaacs* [1952] 2 All ER 176 at 178.

certificates are issued from time to time as the works progress, certifying that a certain amount of work has been done. They are issued in the expectation that the entire works will be completed. Although they are made against separate parts of the work being done (usually expressed as an estimation of the percentage of work which has been completed), these interim payments are not payments for separate completed parts of the works. They are provisional only and subject to continuing revision through the issuance of further certificates, be they interim or final certificates. As interim provisional progress payments, they do not through the issuing of interim certificates signify acceptance of the work done.

[47] The issuance of an interim certificate is 'simply a contractual mechanism or method to enable the contractor to finance the continuation and finalisation of his work'.[13] Where a client lawfully terminates a construction contract, as is the case here, the contractor's claims for retention monies and unpaid invoices are not self-standing claims, separate and independent from the remainder of the contract. And, upon such termination, the interim certificates cease to be of any force and effect. They cannot sustain a basis for payment where there can be, in view of the cancellation, no further expectation of a completion of the works.[14] In order to succeed on the interim certificates, Intech had to have acquired an accrued right to payment prior to the termination of the contract, ie a right 'which is accrued, due and enforceable as a cause of action independent of any executory part of the contract.'[15]

[48] The interim payments, made to Intech during the subsistence of the contract, did not render the contract divisible. Intech's remedy for its incomplete performance was to claim a *quantum meruit*, based on the principles of enrichment.[16] In the premises, Intech's claims for unpaid invoices and retention monies are bad in law and were correctly dismissed by the high court.

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[13] Per Nienaber JA in *Martin Harris en Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens; Qwa Qwa Regeringsdiens v Martin Harris en Seuns OVS (Edms) Bpk* 2000 (3) SA 339 (SCA) para 34 (my translation).
[14] *Thomas Construction (Pty) Ltd (In liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 563F-G.
[15] *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 (2) SA 863 (A) at 870 G-H.
[16] *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 424 C.

[49] Intech's claim for interest on the late payment of invoices 1290 and 1321 was dismissed by Koen J on the basis that they were not proved on a balance of probabilities. Intech's counsel did not seek to persuade us that this finding was wrong. The high court cannot be faulted in this regard. Moreover, this claim is in any event extinguished by Transnet's counterclaim through the operation of set-off.

[50] As far as the claim for the loss of profit is concerned, the finding that Intech's purported cancellation was unlawful destroys the substratum of this claim. That purported cancellation constituted repudiation on the part of Intech, which entitled Transnet to cancel the contract. There were other grounds of cancellation relied upon by Transnet, but nothing more need be said about them. The loss of profit claim, premised on the basis of Intech completing the works if it had 'been given a proper opportunity to complete the contract' is therefore unsustainable in law.

Transnet's claim in reconvention

[51] As stated, Transnet sued for a reduced sum of R50 million on a final certificate issued by Mr Young in terms of clause 37(3)(v) in GCC 97.[17] It will be recalled that the JV's brief was extended to manage the work to upgrade and refurbish the entire plant (import and export lines) to 1250 tons per hour per line (ie 2500 tons per hour in total). After initial inspections, first by the JV and thereafter by other experts, extensive repair, refurbishment and upgrade work was done. In drawing up the final certificate, Mr Young used the JV's deliverables according to its extended brief as a starting point. He computed the costs incurred by Transnet to have the works completed and made free of defects following cancellation of the Intech contract as R192 171 916.41. Various contractors were employed to do this work, supervised and managed by the JV. Detailed evidence concerning this work was led, setting out what exactly was done and the cost thereof. The refurbishment and upgrade were completed only in 2014 at a total cost of R600 million. This

[17] In relevant part clause 37(3)(v) reads as follows:
'. . . 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 when so authorized 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.'

increased cost related to the expansion of the terminal to extend its life to a longer period than initially set out in the tender from seven years to 15 years.

[52] The figures in the final certificate were contentious. But no controverting evidence was led by Intech. Mr Young's evidence was challenged only on the basis that he misunderstood what Intech's deliverables were in terms of the contact. The basis of his calculations of what work had to be done by other contractors to complete Intech's work and to remedy its defective workmanship, was misconceived, so the cross-examination purported to show. This line of argument was vigorously pursued in this court. It was contended on behalf of Intech that extensive work which fell outside Intech's original scope, such as repairing reclaimers, fixing a gantry and other maintenance work, was wrongly included in the computation. Much was made in the heads of argument about the so-called LSL report which contained a pre-tender engineering assessment commissioned by Transnet. But reliance on that report is misplaced. It was never part of the evidence and was not confirmed under oath on affidavit. The same applies to the Chapelow report. As Koen J correctly found, the criticism levelled against Mr Young's final certification and his evidence is unfounded. As far as the scope of works is concerned, this criticism departs from the flawed premise that Intech only had to do certain items of work. As set out above, its brief was to achieve the outcomes stipulated by Transnet in the tender.

[53] Mr Young's evidence was also challenged on the basis of an allegation that Transnet had failed to properly maintain the plant. Apart from the fact that this was nothing more than a speculative probe, Mr Young persuasively demonstrated various instances where he had excluded from the computation items which fell outside Intech's scope of work, or where damage was caused by Transnet itself. If anything, Mr Young's figures were on the conservative side.

[54] It may at first blush appear strange that a tender for work in the initial sum of some R44 million ended up costing just over R200 million for the work to be completed and defective work remedied. Upon closer analysis though, it is plain that Intech had hopelessly underestimated the scope and concomitant cost of the works. That can largely be ascribed to its lack of experience in executing tenders of this nature and size. It explains why the other two tenderers were not prepared to tender

for the entire project itself, but only for initial investigative studies to determine precisely what work the refurbishment and upgrade entailed. And it comes as no surprise that a large multinational company such as Alstom was only prepared to bid for the instrumentation and software part of the tender. As an aside, it appears as if Transnet itself was in the dark about what the work entailed. But that is the nature of a 'lump sum' performance specification contract – a prospective tenderer carries the risk and is thus required to make a careful, informed assessment of what exactly is required to achieve the stipulated outcomes, before submitting its tender.

[55] Transnet claimed penalties in the sum of R10 786 031, excluding VAT. Clause B of the Special Conditions of Contract provided that penalties may be imposed for the late completion of the works for every day beyond the completion date at a rate of one fourteenth percent of the total value of the contract. This was also set out in the earlier invitation to tender. Intech was warned during September 2006 and again at a meeting on 21 February 2007 that Transnet reserved its right to impose penalties. This warning was repeated in subsequent correspondence. Clauses 17 and 28 of GCC 97 made provision for Intech to apply to Transnet for the extension of the completion date where delays occurred, but Intech did not avail itself of this option. Again, it may be ascribed to the fact that neither Mr Pillay not his senior Intech colleagues had ever read the contract.

[56] In its plea to the claim in reconvention, Intech raised three defences to the claim for penalties, namely waiver, repudiation and a time at large defence. All of these defences were rejected by the high court, correctly so in my view. I have already dealt with the repudiation aspect. Waiver, being an unequivocal abandonment of rights, was not proved at all. I agree with Koen J that the agreed rescheduling from time to time of work programmes does not amount to a formal extension in terms of the contract, nor does it affect the agreed completion date. The facts pleaded regarding the time at large defence were not proved at the trial:
(a) There was no evidence that Transnet had rescheduled the shutdown, as alleged. But in any event, as the high court correctly found, rescheduling of the shutdown was permitted by the contract and Intech's remedy in that instance was to apply for an extension of time.

(b) The allegation that Transnet had frustrated the completion of the contract by inducing Lorbrand to refuse to perform in terms of its subcontract with Intech, was not borne out by the evidence. It became clear from the evidence of Mr Granich of Lorbrand that the relationship with Intech had broken down as a result of the latter seeking to renegotiate the terms of the subcontract and for failing to make payment to Lorbrand timeously.
(c) There was no evidence of extra work after 16 November 2006 which Intech had to perform, as it alleged. And the 'hold works' order of December 2006 could have been remedied by Intech availing itself of the contractual option of seeking an extension of time. It did not do so. In any event, Transnet has given Intech the benefit of this delay from 15 December 2006 to 21 February 2007 (71 days) in the computation of its claim. Transnet has thus reduced its claim for penalties to R6 982 600.

Conclusion

[57] For these reasons, the high court was correct in its findings on the issues outlined above. The appeal must consequently fail and costs must follow the outcome.

[58] The following order issues:

1 The appellant's late filing of the record is condoned. The appellant is ordered to pay the costs of the application for condonation, including the costs of two counsel where so employed.
2 The appeal is dismissed with costs, including the costs of two counsel.

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S A Majiedt

Judge of Appeal

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