THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 157/10

In the matter between:

MSC DEPOTS (PROPRIETARY) LIMITED **Appellant**

and

WK CONSTRUCTION (PROPRIETARY) LIMITED
WYNFORD'S CIVIL & DEVELOPMENT CC **Respondent**

Neutral citation: *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd & another* (157/10) [2011] ZASCA 115 (08 June 2011)

Coram: MPATI P, BRAND, LEWIS, SNYDERS and MAJIEDT JJA

Heard 03 March 2011

Delivered: 08 June 2011

Summary: Contract – breach of – contractor entitled to cancel where no opportunity afforded to remedy defects in construction works.

ORDER

On appeal from: Eastern Cape High Court (Port Elizabeth) (Chetty J sitting as court of first instance):

The appeal is dismissed with costs, which shall include the costs of two counsel.

JUDGMENT

MPATI P (BRAND, LEWIS, SNYDERS and MAJIEDT JJA concurring):

[1] The issue in this appeal is whether absolution from the instance should have been granted at the close of the appellant's case. The respondent, a joint venture comprising of WK Construction (Pty) Limited and Wynford's Civil and Development CC, both carrying on business as civil contractors in Port Elizabeth, was the first defendant in the court below in an action for damages instituted by the appellant. On 15 September 2006 the parties concluded a written agreement in terms of which the respondent was to carry out certain construction works, described in the particulars of claim as 'comprising bulk earth-works, paving, storm water, water and sewerage reticulation and mast lighting' at the appellant's container park in Despatch in the Eastern Cape. In simple terms, the respondent was engaged to construct a container depot where the appellant, a shipping company, was to store, in containers, motor vehicle parts which it would deliver, when required, to Volkswagen South Africa, a motor manufacturer, at its premises in Uitenhage.

[2] The second defendant in the court below was PD Naidoo and Associates (Naidoo) a firm of consulting engineers, which had been appointed by the appellant to carry out the necessary design work for the container depot which was to be undertaken by the

respondent and to carry out the site monitoring of all civil works to be done on the project. The third defendant was an association, which was a joint venture between the second defendant and a firm or partnership of quantity surveyors. It was appointed by the appellant as project manager. Its function was that of principal agent. The lis between the appellant and the third defendant fell away when they settled the matter before the commencement of the trial. A settlement was also reached, during the course of the trial, between the appellant and Naidoo, leaving the respondent as the only defendant in the case.

[3] The terms of the construction agreement between the appellant and the respondent are contained in a standard building agreement commonly known as the JBCC series 2000, prepared by the Joint Building Contracts Committee Incorporated. The construction of the depot was to be in accordance with the design prepared by Naidoo. According to Mr George Georgiev (Georgiev), a transport economist employed by the appellant, container depots operated by the appellant have to be specifically designed so as to withhold heavy loads of handling equipment such as reach stackers and to withhold the weight of the containers. Reach stackers are very heavy machines which lift and move heavy containers with loads of about 25 tons at a height of between four and six meters or more. The surface of the depot therefore has to be even as an uneven surface would be dangerous for the machines and drivers. Georgiev testified that he informed the designers (Naidoo) of these requirements. In fact, during May 2005 representatives from Naidoo visited Rosslyn near Pretoria, where the appellant operates a container depot and where between 30 and 35 containers are moved per day. Naidoo were given the same requirements as those pertaining at Rosslyn for the construction of the container depot at Dispatch. Two reach stackers used at Rosslyn were Fantuzi 45K models with a carrying or lifting capacity of 45 tons.

[4] Construction at the Despatch site commenced on 4 August 2005. In terms of the agreement the civil works were to be carried out in accordance with drawings prepared and supplied by Naidoo. As the construction works continued, several interim payments

were made to the respondent in terms of the agreement.[1] By 17 January 2006 the construction of the depot was virtually completed. On 31 March 2006 an interim certificate was issued by the principal agent for payment of the sum of R827 392.03 and on 25 April 2006 Georgiev approved payment of that amount. Operations on that part of the depot where empty containers were to be stored commenced during April 2006 and the contract between the appellant and Volkswagen SA came into operation on 16 June 2006. Two Fantuzi reach stackers were used. In May 2006 and before payment was made of the amount certified, deflections were noticed in the area of the depot over which the reach stackers frequently traversed when empty containers were being moved around.

[5] Mr Eugene Blignaut, the appellant's regional manager who was located at the depot, had noticed the deflections and immediately informed Georgiev who, having approved payment to the respondent as certified, gave instructions by email on 4 May 2006 that payment be stopped. He did so on the assumption that the deflections were caused as a result of some fault in the construction works. Certain correspondence subsequently passed between the appellant's employees, Naidoo and the respondent and meetings were held to discuss the matter. I shall return to these communications later. It suffices, for present purposes, to mention that following the initial correspondence and the first meeting the respondent did certain remedial work on the paving at the depot, but was instructed by Naidoo, on 22 May 2006, to stop the remedial work as the appellant, according to Naidoo's communiqué, did not feel that the method employed to remedy the defects was adequate. After further correspondence had passed between the interested parties and on 14 August 2006 the respondent gave notice to Naidoo, in terms of clause 38.2 of the agreement,[2] of its intention to cancel the agreement for the reason that the appellant had allegedly breached its terms. A copy of the notice was sent to the appellant.

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[1] Clause 31.1 provided that the principal agent 'shall issue an interim payment certificate every month until the issue of a final payment certificate . . ..'
Clause 31.9 stipulated that the employer (appellant) 'shall pay to the contractor the amount certified in an interim payment certificate within seven (7) calendar days of the date of issue of the payment certificate. Payment shall be subject to the contractor giving the employer on tax invoice for the amount due.'

[2] The subclause reads: 'where the contractor considers cancelling this agreement, notice shall be given to the employer and the principal agent of the default in terms of 38.1. Should a default persist for (10) working days after the date of issue of such a notice the contractor may give notice of cancellation to the employer and the principal agent. Such cancellation shall be without prejudice to any rights that the contractor may have.'

On 29 August 2006 the respondent cancelled the agreement and communicated this fact to the appellant and Naidoo.

[6] Two of the four material breaches alleged by the respondent as the grounds upon which the notice of cancellation was issued were that (a) the appellant 'failed to pay the amount certified in terms of clauses 31.9 and/or 34.1' and (b) the appellant prevented the principal agent 'from exercising his independent judgment regarding the performance of his duties and the contractor [was] being prejudiced by such action'. An additional material breach on the part of the appellant was alleged in the letter of cancellation of 29 August 2006, viz that the respondent was denied the opportunity to remedy any default of which it may have been guilty. The appellant denied that it was in breach of the agreement and stated, in a letter from its attorneys dated 11 October 2006, that the respondent had unlawfully repudiated the agreement by its 'demonstrated intention of no longer wanting to be bound' by it. The letter stated that the appellant accepted the repudiation and terminated the agreement.

[7] The appellant subsequently issued summons against the respondent, Naidoo (as second defendant) and the principal agent (as third defendant) for payment of certain amounts as damages for breach of contract. As I have mentioned, settlement was reached between the appellant and Naidoo and later also between the appellant and the principal agent. The respondent counterclaimed for payment of the R827 392.03 certified as due to it, R1 109 986.53 as damages for breach of contract and R474 654.55 being money retained by the appellant in terms of the agreement. At the end of the appellant's case the court below (Chetty J) granted absolution from the instance with costs of two counsel as well as the qualifying expenses of the respondent's expert witnesses 'in respect of whom expert summaries were filed'.[3] This appeal is with its leave.

[3] The judgment is reported as *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd & others* 2011 (2) SA 417 (ECP).

[8] As was said in *Gordon Lloyd Page & Associates v Rivera & another*, absolution at the end of a plaintiff's case will, in the ordinary course of events, be granted sparingly, but a court should order it in the interests of justice when the occasion arises.[4] The test to be applied by the trial court at that stage of the proceedings 'is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff'.[5] Thus, to survive absolution the appellant had to make out a prima facie case by adducing evidence relating to all the elements of its claim.

[9] The appellant's claim against the respondent was based on two heads viz (a) a breach of a material term of the agreement; and (b) an alleged repudiation of the agreement. The alleged breach was grounded on clause 15.3 of the agreement which reads:

'15.3 On being given possession of the site the contractor shall commence the works within the period stated in the schedule and proceed with due skill, diligence, regularity and expedition and bring the works to:

15.3.1 . . .
15.3.2 Practical completion in terms of 24.0.
15.3.3 Works completion in terms of 25.0.
15.3.4 Full completion in terms of 26.0.'

[10] The following allegations were set out in the particulars of claim:

'The [respondent] breached clause 15.3 of the agreement inasmuch as it failed to carry out the work with due skill, diligence and regularity in that:

(a) The specifications called for the project to include a paved surface of the container park consisting of paving blocks laid in a herring bone pattern;

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[4] *Gordon Lloyd Page & Associates v Revera & another* 2001 (1) SA 88 (W) para 2.
[5] *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 at 409G-H.

(b) The [respondent] laid the paving blocks unevenly over the entire site with varying joint widths;

(c) The paving blocks are creeping and opening and the jointing sand between the blocks is being washed out by storm water;

(d) As a result of the foregoing:

(i) the storm water will reach the bedding sand on which the paving blocks are laid;

(ii) once saturated the bedding sand will allow further creep of the paving blocks which will ultimately lead to failure of the underlying works.'

The particulars of claim alleged further that a joint in the paving where the herring bone patterns meet was failing due to lack of interlock which would ultimately lead to the failure of the underlying layers; that concrete aprons surrounding two service manholes in the paved surface had failed as a result of lack of compaction around the manholes; that large settlements and deflections had occurred along construction stake lines due to incorrect construction processes and compaction; and that the in-situ material was poorly compacted, thus impacting on the bearing capacity of the paving.

[11] In its plea the respondent denied that it was in breach of the agreement as alleged and pleaded that the failures in the works as listed in the particulars of claim were manifestations of defects in the design of the works. It also denied that it had repudiated the contract. As to the alleged breach the respondent pleaded in the alternative that even if the defects enumerated in the particulars of claim were not attributable to defects in the design of the works they were 'maintenance items that [it] was at all material times willing and able to repair and that could easily have been corrected'.

[12] Clause 38.6 of the agreement provides that the contractor (respondent) 'may not exercise his right in terms of 38.0 if he himself is in breach of a material term of this agreement'. The 'right' referred to in clause 38.6 is the right to cancel the agreement on

grounds of the employer's (appellant's) default. Thus, to have survived absolution at the end of its case the appellant was required to have adduced prima facie evidence relating to the question whether (a) the respondent was in breach of clause 15.3 and therefore precluded from cancelling the agreement (clause 38.6) and (b) whether the appellant suffered any damages as a result of the respondent's alleged breach and repudiation. Failure to adduce evidence on any one of these issues would ordinarily prove fatal to the appellant's case.

[13] It does not appear to me to be in dispute that the appellant's failure to pay the amount of R827 392.03 certified by the principal agent as due and payable to the respondent, would have entitled the latter to cancel the agreement,[6] absent a breach by itself of a material term. In the appellant's heads of argument, however, counsel submitted that should it be held for any reason that the respondent was not in breach of clause 15.3, then the latter's cancellation of the agreement was in any event invalid. Various reasons were proffered for this submission. I consider it unnecessary to mention all of them save one that deals with the failure to pay the amount certified by Naidoo as payable. Counsel contended that in its request for further particulars for trial to the respondent's counterclaim the appellant enquired how it was alleged to have prevented Naidoo from exercising its independent judgment. The response was that the appellant did so by instructing Naidoo, against his advice, not to facilitate payment to the respondent. In this regard Georgiev denied in his testimony that he interfered with Naidoo's independent judgment. He went on to say that the decision not to pay the respondent was his and not Naidoo's.

[14] It will be recalled that the respondent's letter of 14 August 2006 giving notice of its intention to cancel the agreement was addressed to Naidoo and the appellant was provided with a copy of it. Counsel's argument was accordingly that there was, in the circumstances, prima facie evidence before the court a quo that the respondent 'had

[6] Clause 38.1 provides: 'The contractor may cancel this agreement where: . . .
38.1.6 The employer fails to pay the amount certified in terms of 31.9 and 34.10.'

purported to cancel the agreement in circumstances where it was not entitled to do so'. The implication was, as was argued before the court below, and in fact pleaded in the particulars of claim, that the respondent was not entitled to cancel the agreement because no notice of an intention to cancel was given to the appellant. In respect of that argument the court below said:

'Clause 38.2 of the JBCC 2000 provides that "*where the contractor considers* cancelling the agreement notice shall be given to the employer and the principal agent of the default in terms of 38.1 . . .". The clause merely requires that notice of the intended cancellation be given to the employer. The mere fact that the letter was addressed to the [respondent] and copied to the [appellant] is a spurious complaint.'[7]

I agree with these sentiments, particularly because there was no suggestion that the appellant never received a copy of the letter.

[15] I also agree with the following reasoning by the court below in this regard:

'It is not in issue that [Naidoo] issued payment certificate number 4 [certifying that R827 392.03 was payable to the respondent] and that [the appellant] authorised such payment. What then transpired is that the [appellant's] director, Mr *Georgiev,* countermanded payment which in turn elicited a response from [Naidoo] that such a recommendation would constitute a breach of the agreement. Notwithstanding, the amount was not paid, remains outstanding and the [respondent's] entitlement thereto has clearly been established. . . . The JBCC 2000 vested [Naidoo] with full authority and obligation to act in terms of the agreement, but, despite the latter's recommendation that payment be effected, the [appellant] desisted from acting in compliance with the principal agent's recommendation. In such circumstances there can be no question that the [appellant] prevented [Naidoo] from exercising its independent judgment regarding the performance of its duty. Quite clearly the [respondent] suffered prejudice thereby, which entitled it to cancel the agreement.'[8]

The court a quo also considered the other grounds upon which the respondent intended to cancel the agreement and concluded that upon those too the respondent was entitled to cancel. It is not necessary to refer to them. I am thus satisfied that provided it was not in

[7] Para 16.
[8] Para 21.

breach the respondent was entitled to cancel the agreement. What now requires consideration is whether the respondent was in breach of clause 15.3 of the agreement.

[16] The clause required the respondent to proceed with 'due skill, diligence, regularity and expedition' and bring the works to practical completion,[9] works completion[10] and final completion[11] in terms of clauses 24, 25 and 26 respectively. And a breach of clause 15.3 by the respondent would entitle the appellant to cancel the agreement.[12] Whether or not the clause contains a material term of the agreement is of no consequence. Once there is a breach of it 'the materiality of the breach is irrelevant and the court will not enquire into the conscionableness or unconscionableness thereof'.[13] It will give effect to the clause that confers the right to cancel (clause 36.1 in this case) upon such a breach. But it does not follow that the term breached is necessarily material. In the present matter, however, it is unnecessary to embark upon an enquiry on whether or not clause 15.3 contains a material term of the agreement. I shall assume, without deciding, that it does, particularly because counsel for the respondent did not suggest otherwise and accepted, it seemed, that the respondent would not have been entitled to exercise its right to cancel the agreement had it been in breach of clause 15.3.

[17] The design for the container depot made provision for the construction of a number of layers consisting of different materials which had to be compacted to specific strengths. The two upper levels were stabilized with cement. The surface consisted of a concrete pavement made of paving blocks laid on bedding sand in a herring bone pattern. According to Mr Binks Marais, an engineering surveyor employed by the respondent but who testified for the appellant, the levels of the different layers were marked on a number

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[9] Practical completion is defined as 'the stage of completion where, in the opinion of the principal agent, completion of the works has substantially been reached and can effectively be used for the purposes intended'.

[10] Works completion means 'the stage of completion where in the opinion of the principal agent, the work on the works completion list has been completed'.

[11] Final completion means 'the stage of completion where, in the opinion of the principal agent, the works are free of all defects'.

[12] Clause 36.1 provides: 'The employer may cancel this agreement where the contractor:

3.6.1.1 Fails to comply in terms of 15.1 or 15.3

3.6.1.2 Refuses to comply with a contract instruction subject to17.2.'

[13] Compare *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785A–C.

of wooden pegs that he placed into the ground at specific points in the construction area as indicated in the design documents. Each individual layer was compacted to its correct level as marked on the wooden pegs, which were removed after the second stabilized layer was compacted. Steel pegs were then used to mark the level of the paving blocks.

[18] I mentioned earlier that upon discovery of the deflections in the paving of the container depot, letters (electronic and otherwise) were exchanged between the relevant parties and meetings were held in an attempt to resolve the problem. The first meeting was held on site on 8 May 2006, where it was agreed that the respondent would attend to the affected areas. The method of the remedial work to be undertaken was agreed upon as also a number of other aspects, one of which was to test the whole area to the loads of the Fantuzi reach stackers and containers. Immediately after the testing the respondent commenced with remedial work. On 10 May 2006 Georgiev wrote to certain individuals involved in the project, including Mr Calvyn Ferreira of the respondent, advising inter alia that the appellant wanted 'to perform further investigations on the problem' and also requesting Naidoo and the respondent 'to discuss the design and the work done' with a certain Mr Giovanni Belfiore. The respondent responded by writing to the quantity surveyors on 15 May 2006 advising that all material tests done on the project 'complied with the requirements as specified'. It reminded that in terms of clause 4.1 of the agreement[14] it was 'neither responsible nor liable for the design of the works'. As has been mentioned above, the respondent was instructed to stop the remedial work on 22 May 2006. A further meeting was then held on 5 June 2006 between representatives of Naidoo, the joint venture (third defendant) and the respondent, at which a report prepared by Naidoo dated 31 May 2006, following certain tests conducted on control samples, was discussed. Certain recommendations were made in the report, but the parties at the meeting agreed that an independent commercial laboratory be appointed to conduct soil

[14] Clause 4.1 stipulates: 'The contractor shall not be responsible for the design of the works other than the contractors' or his sub-contractors' temporary works. The contractor shall not be responsible for the primary co-ordination of the design element.'

tests. The report had also noted that grading of the bedding sand did not conform to specification as it was too fine. It was thus agreed at the meeting that the respondent would submit a report to Naidoo on the availability of the specified sand.

[19] On 9 June 2006 a Mr Potgieter, the regional director of Naidoo, addressed a letter to the appellant in which the following appears in the third paragraph:

'It is now evident that the current design was based on a 10 year life span and does not comply with the original brief (e.g. 20 year life based [on] anticipated traffic).'

Naidoo did not admit, however, that the deflections observed at the container depot were occasioned as a result of design life specification as, according to them, it was patent from a trial hole that had been excavated 'that the in-situ layer works [were] not in accordance with normal standards or specifications'. In the meantime, the respondent had, on 29 May 2006, advised Naidoo that it was appointing an independent third party engineer, at its own cost, to check the design life of the pavement structure. It appointed Ninham Shand Consulting Engineers who subsequently submitted their report dated 30 June 2006.[15] In it Ninham Shand questioned the design of the pavement. A design computer program known as the 'Lockpave program', specifically used for the design of segmental block pavements, indicated that 'a much thicker pavement would be needed for in-situ soil conditions'. The program was used to ascertain the weight-bearing capacity of pavement at the depot by loading certain data onto it. Ninham Shand also advised in their report that remedial measures in respect of the pavement would be difficult. I mention these issues to show that from the outset the respondent placed the suitability or adequacy of the design for the container depot as the cause of the deflections.

[20] After the respondent had given notice of its intention to cancel the agreement a further meeting was held on 17 August 2006 between representatives of both Naidoo and the respondent. In an unsigned minute of the meeting it is recorded that the respondent

[15] The date reflected on the report as 30 June 2005 was erroneous.

objected to a suggestion by Naidoo that an additional layer be constructed, but expressed its preparedness to remedy the construction joints if found to be below specification. The respondent made it clear, it seems, that it would not bear the cost of remedying the construction joints in the event of a possible design inadequacy. However, the remedial work on the pavement was undertaken by another construction company in accordance with measures prescribed by Mr Richard Doyle, a civil engineer, who was mainly involved in roads and civil infrastructure and commercial development. According to Blignaut, the remedial work commenced 'mid-2007' and was completed towards the middle of December 2007. But the depot was in use throughout (since June 2006), with empty and full containers being moved and stored.

[21] Doyle was also the author of a report that had been requested by the appellant from Vawda Thornton, a firm of consulting civil and structural engineers. Their brief was to undertake a visual inspection of the depot and to comment on the failures there. Doyle visited the site on 9 November 2006 and noticed decimations on the paving at regular intervals along the path traversed by the wheels of a reach stacker. His conclusions (as contained in the Vawda Thornton report) are the basis of the factual allegations in the appellant's particulars of claim and conclusions drawn from them, as quoted in paragraph 10 above. During his testimony Doyle was referred to a report prepared by Naidoo in August 2006 (which was discussed at the meeting of 17 August 2006 between Naidoo's and the respondent's representatives) and another report prepared by Mr Galilodien Waggiet, a civil engineer technician specialising in materials and doing business through a company trading as Indlela Soils Laboratory. Waggiet's company was commissioned by the respondent to undertake an investigation of the settlements or depressions at the depot. I shall refer to his report as 'the soils report'.

[22] Doyle's testimony on his findings and conclusions may be summarised thus: His observations as reflected in his (Vawda Thompson) report were much the same as those recorded in the soils report, which noted, inter alia, the presence of oversize material such as gravel (quarry) and stone within the layers and varying thickness of the bedding sand below the interlock paving blocks. During the remedial work he noted that 40 per cent of

the bedding sand was in excess of the specification required by the South African Bureau of Standards. The compaction of the bedding sand varied between a thickness of 20mm to 50mm across four test pits whereas the specified thickness is 15mm to 35mm. Several timber level pegs were found within the layer works. It seemed that the paving blocks, which should have been laid from one side for the interlock to meet up perfectly, were laid from two different directions, which made it almost impossible to meet properly. The result was a butt joint with a series of cut blocks which dramatically weakened the load characteristics of the pavement. The blocks started to break up against the butt joint and the joint consequently failed. The manholes were damaged by the reach stackers running over their concrete aprons. Doyle conducted an independent test of the bedding sand and noted that it did not meet the required grading. A large percentage of it was considerably finer. As to the oversize material (he referred to the stone as 'boulders') in the layer works he said the effect would be that during compaction the compaction equipment would ride over it 'without actually acting on the material that surrounds [it]', with the result that the desired compaction around the large material would not be achieved. The same would apply to the area around the timber pegs. The in-situ material, he said, was poorly compacted, thus impacting on the bearing capacity of the pavement.

[23] Importantly, Doyle confirmed what he noted in his report that the design works (for the depot) by Naidoo were deficient in three respects, namely (a) the absence of beams to restrain the paving blocks from substantial movement (caused by the weight of the load over areas where there was an excess in the bedding sand) so as to keep creeping of the blocks to a minimum; (b) the manhole aprons were not designed to have sufficient strength; and (c) no provision was made for drainage of both surface and subterraneous water. In cross-examination he added that there was also a defect in the design of the layer works in that there was no specific instruction for their stabilization with lime. He concluded, however, that the failures in the pavement at 10 meter intervals across two lines traversed by the reach stackers were indicative of a construction issue and not due to the defect in the layer works. He said the failures would have been the result, possibly, of the contractor's failure to properly compact the layer works at 'grid lines' along which level pegs would be placed indicating the level of the layer works. But he conceded that if the layer works design was insufficient for the pavement to take the load to which it was

subjected, then the layers will deflect. He also agreed with a view expressed by Dr Brian Shackle,[16] an engineer, in a summary of his expert opinion, that the absence of the drainage mentioned above was 'a very serious design defect'.

[24] Except for the finer grading of the bedding sand and the damaged manhole aprons, which were not in issue before us, the aforegoing, according to counsel for the appellant, constitutes the evidence of a breach by the respondent of clause 15.3 of the agreement, in that it all indicates that prima facie, at least, the respondent failed to construct the container depot in accordance with the design. Counsel submitted, however, that this in itself does not amount to a breach of clause 15.3 because an isolated defect in the works would not constitute a breach. But where a failure to construct in accordance with the design results in the pavement failing, rendering it unsuitable for the purpose for which it was intended, so the argument continued, this must surely constitute a failure to carry out the works with either 'due diligence' or 'due skill'. I may mention that during cross-examination of Doyle it was suggested that the butt joint in the paving was created because of an instruction to the respondent, by Naidoo, to lay the interlock paving blocks from opposite ends. I am prepared to accept, for present purposes, and as counsel for the appellant submitted, that such an instruction did not constitute a contract instruction as defined in clause 1 of the agreement.[17] In this instance a representative of the respondent, Mr Ferreira, sent an email to a representative of the site engineer, a Mr Danford, saying: '. . . *the paving contractor can split the area in three equal area[s], a row of headers'*. As mentioned earlier, Mr Ferreira was a representative of the respondent and not of the principal agent.

[25] Before I consider counsel's contention on the existence of prima facie evidence of a breach, by the respondent, of clause 15.3 of the agreement I propose to deal briefly with the evidence of two further witnesses who testified for the appellant. One of them, Waggiet, has already been mentioned above – he is the author of the soils report. Doyle

[16] He was to testify for the respondent.
[17] A contract instruction is defined as 'a written instruction signed and issued by or under the authority of the principal agent to the contractor'.

agreed with counsel for the respondent in cross-examination that he was not qualified to express a view on the number of layers the pavement should have had or the strengths of the layer works in order to withstand the load of the reach stackers. He testified that in his review of the material he 'felt that there was a deficiency in the design' and therefore had it checked by Mr Johan McLeod who he believed to be 'highly experienced in road rehabilitation'.

[26] McLeod is a civil engineer employed by Eyethu Engineers, a firm of consulting engineers. He was approached by Doyle, who gave him the soils report and asked him for his opinion on how long the pavement, in respect of which the report had been prepared, would last. He was also given certain information relating to the type of vehicles that would be used on the pavement and their loads and the number of times a load would pass over the pavement (referred to as 'repetitions') during its design life. Using a computer program designed by Dr Shackle (the Lockpave program), into which he fed the information made available to him, he concluded that the pavement would not last 20 years as required by the appellant, but would last for only 3.8 years. To a question as to what his conclusions would be had the deflections been noticed within a month of the first use of the depot, and at a time when the repetitions were less than the figure given to him for purposes of calculating the life of the pavement, he said he would assume that there was *possibly* a construction related problem that resulted in even earlier failures. McLeod could not make a definitive statement that there was indeed a construction deficiency in the pavement, because, he said, he had not been to the site but only looked at the soils report and drew his conclusions of a possible construction fault from the Lockpave program. In running the test (on the program) he used the Naidoo design specifications. He agreed in cross-examination that the actual pavement was 'modularly stronger' than the Naidoo design, that is the work as constructed was better than designed; that the materials used in the top four layers were better than those required by the design and that the compaction in those layers was higher than the levels of compaction required in terms of the contract.

[27] Waggiet's responsibility as a soils technician is to identify materials, good or bad, for road building construction and buildings. Although his instruction to investigate the

deflections at the depot came from the respondent, the investigation works were supervised by Naidoo. He confirmed his report and testified that if there was insufficient compaction of the bedding sand under the paving blocks there would be movements in the paving and that a very weak lower layer would cause a depression (when subjected to heavy loads). From four test pits excavated at the depot he found evidence of oversize aggregate and sandstone boulders that exceeded specification. But contrary to the assumptions made by McLeod, Waggiet testified in cross-examination that (a) the compaction of the layers was substantially higher than that specified in the contract document (design); (b) density tests done on the lower and upper sub-base levels revealed that the contractor (respondent) had done its work to a standard better than specified in the design; and (c) the material used in the construction of the pavement was of good quality and 'met the requirements specified for that class of material'. He also testified that the cemented layers were well constructed and that an air compressor (commonly referred to as a jack hammer) was used to excavate through the upper and lower sub-base levels. The exercise took longer than was envisaged.

[28] When one considers Waggiet's findings and conclusions one finds it difficult to understand how McLeod could have drawn an inference of a possible construction problem in the layer works. Despite the oversize material the compaction of the layers was higher than specified. It is manifest from Waggiet's testimony that the presence of oversize material and timber pegs in the layers was not the cause of the deflections, ie their presence did not compromise the compaction process in the layers. I therefore agree with the court a quo when it said:

'The evidence adduced is moreover insufficient to establish [I would add; 'even prima facie'] that the deflections which occurred along the stake lines were attributable to incorrect construction processes or compaction. The Indlela report confirms that the compaction was properly executed, and, upon an appraisal of the evidence adduced on behalf of the [appellant], I am unable to find that the [respondent] did not perform the work properly.'[18]

[18] Para 11.

[29] Did the failure to compact the bedding sand evenly and to specification and the laying of the paving blocks from opposite ends contrary to design result in the pavement failing, rendering it unusable for the purpose for which it was intended, or did it contribute to the failure of the pavement? Counsel for the appellant contended that if the answer is in the affirmative the respondent would have failed to carry out the work with either 'due diligence' or 'due skill'. The short answer is to be found in the Ninham Shand report, read with Waggiet's evidence referred to above. Around 30 June 2006 the appellant knew what was contained in the Ninham Shand report. Georgiev confirmed that he had received it, although he stated at first that he could not remember when he received it. This report was clear that the weak sub-grade would be unable 'to carry the very large surface loads' and that bearing capacity failure will take place in it and in the overlying layers. In these circumstances 'deflections, chipping and cracking of the block pavers are to be expected'. It can therefore not be contended successfully that the failure to compact the bedding sand and the laying of the paving blocks from opposite ends resulted in the pavement failing.

[30] Again, I agree with the court below that 'it is of fundamental importance to . . . take cognisance of the fact that clause 15.3 has a number of subparagraphs which, as a matter of common sense and logic, requires that the entire section be read conjunctively' and that '[i]t is apparent . . . that the clause identifies . . . distinct phases in each of which duties and obligations are cast upon the contractor and the principle agent'. As has been mentioned earlier, the clause requires the contractor to proceed with due skill, diligence, regularity and expedition and bring the works to practical completion, works completion and final completion. When the deflections were noticed the works had substantially reached practical completion and were being used for the purposes for which the pavement was intended, albeit that only empty containers were being moved. And as counsel for the respondent correctly argued, the respondent was entitled to an opportunity, and in fact obliged, to remedy defects that manifested themselves in the works before or after the works had reached practical completion. This was common cause between the parties. Indeed, on 7 and 14 March 2006 Naidoo issued a list of areas that still required attention. Clause 24.3 of the agreement reads:

'The contractor shall give timeous notice to the principal agent of the anticipated date of practical completion to enable the principal agent to inspect the works on or before such date. Where, in the

opinion of the principal agent, after such inspection the works:

> 24.3.1 . . .
>
> 24.3.2 Has not reached practical completion, the principal agent shall forthwith issue a practical completion list defining the outstanding work and *defects* to be rectified to achieve practical completion to the contractor.' (My emphasis.)

And clause 26 provides that –

> '26.1 The *defects* liability period for the works shall commence on the date of works completion and at midnight (00:00):
>
> 26.1.1 (90) calendar days from such date.
>
> . . .' (My emphasis.)

Clause 27 makes provision for a latent defects liability period and stipulates that defects that appear up to the date of final completion 'shall be addressed in terms of [clauses] 24 to 26'.

[31] It was clear at the meeting of 8 May 2006 that all concerned (Naidoo, the principal agent and the respondent) understood, correctly so, that the respondent was obliged to attend to the defects (deflections) that manifested themselves on the surface of the pavement. And the respondent attended to them until it was stopped from doing so on 22 May 2006. It was never suggested to the respondent that it was not proceeding with due skill and diligence to bring the works to practical completion, works completion or final completion. The reason given, as contained in an email addressed to the respondent dated 22 May 2006, was that the remedial work being undertaken was not adequate 'in terms of taking into account the longitudinal joints between layer works and the long term stability' and that Naidoo were 'currently investigating an alternative method that would be a long term solution'. By then Naidoo had discovered that the deflections were not the result of the bedding sand being uneven, nor the laying of the paving blocks from opposite ends, but rather as a result of a fault in the longitudinal joints between the layers. It is not in dispute that the respondent never received any instruction to continue with its remedial work thereafter, or at least up to the date it gave notice of its intention to cancel the agreement.

[32] I agree therefore with the contention by counsel for the respondent that the appellant failed to adduce evidence to show that the respondent was at any stage unwilling or unable to remedy any problems that could be ascribed to defects for which it was responsible. During his cross-examination it was put to Georgiev that 'right up until the last day before this contract was cancelled by the contractor, [the latter] was still tendering to remedy defects for which [it] was responsible . . .?' Georgiev answered in the affirmative. And the fact that he might not have known who was at fault, ie whether there was a construction or design defect when he continued to refuse payment of the amount of R827 392.03 due to the respondent, because of the conflicting reports of Ninham Shand and Naidoo, does not assist the appellant.

[33] Before us counsel for the appellant argued that the nature of the tender by the respondent to remedy its breach is not known; that evidence may well later show that there was no proper tender; that the onus was on the respondent to show that it was prevented from doing remedial work and that Georgiev could not make admissions on matters not within his personal knowledge. On the last aspect I need only say that the appellant cannot have its cake and eat it. Georgiev gave specific evidence that the statement that the respondent had tendered to remedy defects for which it was responsible was correct. Counsel did not take up that issue in re-examination of Georgiev and it cannot now be argued that Georgiev could not make that admission because it was a matter outside of his personal knowledge. On the issue of the onus it must be remembered that we are not now dealing with the respondent's counterclaim. We are dealing with the appellant's claim based on the respondent's alleged breach by allegedly repudiating the agreement. It seems to me, therefore, that it is the appellant who, at the end of its case, should have placed evidence before the court below that the respondent was unwilling or unable or failed to remedy defects for which it was responsible as required by the terms of the agreement and that therefore it was in breach of the agreement by purporting to cancel it whilst it was itself in breach. As I have mentioned, the appellant failed to adduce any such evidence.

[34] With regard to the contention that evidence may well later show that no proper tender was made, counsel relied on the following passage from the judgment of Wunsh J in *Etkind & others v Hicor Trading Ltd & another:*[19]

'The agreement, therefore, on the plaintiffs' own approach to its meaning and effect, provided for the allotment of the shares in Hicor without the receipt of the consideration and is, therefore, invalid. Moreover, the plaintiffs are claiming performance of the defendants' obligations without their having fulfilled their obligations and without a tender to do so, except a general offer to perform their obligations "insofar as any of (them) have not been complied with". This is not a proper tender. Where the plaintiffs claim performance and have not performed themselves, they had to tender to fulfil their obligations (*Crispette and Candy Co Ltd v Oscar Michaelis NO and Leopold Alexander Michaelis NO* 1947 (4) SA 521 (A) at 537).'

Again we are not here dealing with a claim for performance of a contractual obligation the performance of which was conditional on the performance of a reciprocal obligation by the claimant.[20] In the present matter the respondent's entitlement to payment of the amount certified, which payment was stopped by Georgiev, was not dependent, or conditional on, any reciprocal obligation on its part. In any event, Georgiev's evidence that performance of remedial work was tendered still stands.

[35] I agree with the court a quo that where a contractor is willing and able to attend to defects that manifested themselves prior to final completion being reached in terms of clause 26, such contractor cannot be in breach of clause 15.3 provided he remedies such defects with due skill, diligence, regularity and expedition.[21] There being no prima facie evidence that the respondent was in breach of its obligations under clause 15.3 of the agreement at the end of the appellant's case absolution from the instance was, in my view, correctly granted by the court a quo.

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[19] *Edkind & others v Hicor Trading Ltd & another* 1999 (1) SA 111 (W) at 127B-C.
[20] Cf *Crispette and Candy Co Ltd v Oscar Michaelis No and Leopold Alexander Michaelis No* 1947 (4) SA 521 (A) at 537.
[21] Para 22.

[36] The appeal is dismissed with costs, which shall include the costs of two counsel.

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L Mpati

President

APPEARANCES

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