HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 12146/15
Appeal Court Case: A36/17

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

14/12/2018
DATE SIGNATURE

In the matter between:

BERGVILLE MALL (PTY) LTD **APPELLANT**

and

BILTWORX (PTY) LTD **RESPONDENT**

(Represented by its joint liquidators
M J BEKKER & M ROUX N.N.O)

JUDGMENT

SENYATSI AJ:

[1] This is an appeal against the judgment of the court *a quo* which dismissed the claim to order the Respondent to issue a tax invoice to the Appellant.

[2] Biltworx, a company with limited liability was liquidated voluntarily in December 2010. Prior to its liquidation, Biltworx allegedly performed construction work for the Appellant by virtue of a standard JBCC series 2000 building construction agreement dated 1 May 2010. A liquidation inquiry was instituted as a result of which litigation was instituted in 9 (nine) actions against various Parties who included the Appellant.

[3] The causes of action in various actions in which the Appellant was not a Defendant were based upon the impeachment provisions contained in sections 26, 29, and 31 of the Insolvency Act, 24 of 1936. Two of the actions related to the recovery of amounts allegedly owed under the loan account. From all these actions, it was only in the action against the Appellant that there was a vatable claim.

[4] In the action in which the Appellant was a Defendant there were 7 different claims, the first 5 claims of which had nothing to do with vatable supplies. Claim 6 related to the building construction and it was only in this claim that there is a vatable supply. Claim 7 was an alternative to claims 1 to 5 and it was based on written acknowledgement of debt.

[5] The combined value of all the claims without VAT amounted to R4 102 157.76. The value of those claims which were not vatable supplies amounted to R9 357 261-22.

[6] Following the litigation against the various parties including the Appellant, a settlement agreement was concluded with the five parties. In terms of the settlement, the parties agreed to pay R 5 500 000-00 in full and final settlement of the claims. The settlement agreement was concluded on 30 October 2013.The appellant was also a party to the settlement agreement. As a consequence, the liquidators of the respondent prepared a liquidation and distribution account which laid open at the Master's offices. The liquidation and distribution account was not objected to by anyone including the appellant. The account was confirmed on 29 January 2014.

[7] It is important to note that SARS did not submit any claim for VAT against? Following payment of the settlement amount the creditors of the Respondent were paid dividends.

[8] On the 19 March 2014, the Appellant's attorneys addressed a letter to the liquidators in terms of which they demanded that a VAT tax invoice be issued for payment of R 3 871 469-90. It is common cause that when the compromise was reached, there was no agreement with the liquidators and the Parties involved on allocation of the R 5.5 million between the Parties involved therein. The liquidators refused to issue

the VAT invoice on the ground that the liquidation and distribution account had been finalised and that such invoice will disrupt the dividends already paid to the creditors in accordance with the confirmed account.

[9] The Appellant launched an action which was dismissed by the court *a quo*. The issue for determination is whether or not the court *a quo* erred in holding that the Respondent's liquidators were entitled to refuse to issue the VAT invoice.

[10] Mr Ellis S.C. ("Mr Ellis") submitted on behalf of the Appellant that the liquidators of the Respondent were obliged to issue such VAT invoice on account of section 26 of the Value Added Tax Act, 89 of 1991 which provides that:

> *"The obligations and liabilities under this Act or the Tax Administration Act of any person in respect of anything done or omitted to be done by that person while that person is a vendor shall not be affected by the fact that that person ceases to be a vendor or by the fact that, being registered as a vendor, the commissioner cancels that person's registration as a vendor."*

[11] It was also contended on behalf of the Appellant that the relief sought did not seek to upset the liquidation and distribution account. The reason advanced for this submission by Mr Ellis was that SARS has not proven a claim in the estate.

[12] Mr Ellis furthermore submitted that the relief sought against the Respondent was a mandatory interdict to perform an act of administrative nature, which the Respondent is obliged to give effect to in terms of the Value Added Tax Act, 1991.

[13] Furthermore, it was contended for the Appellant that the full amount of settlement was disclosed as "settlement amounts" in the liquidation and distribution account. A further amount, paid by the Appellant to the Respondent, after having been sued for it, was R187 360-57 which was equally accounted for in the liquidation and distribution account. Mr Ellis submitted that there was no suggestion that these payments were made by the Appellant for any other reason, or from any other cause than from the building contract. He argued furthermore that a liquidator cannot change the nature of a debt by calling it "settlement" in a liquidation and distribution account and cannot, by doing so, avoid the legal obligation placed upon him by statutory enactments. We do not agree with this contention for reasons that will be given later.

[14] It was submitted that once it is established that the payment made by the Appellant was in payment of a vatable debt, it matters not whether he made the payment in terms of the original agreement or a settlement thereof.

[15] Mr Ellis argued that payment is not a unilateral juristic act, but a bilateral one requiring both the payer and the payee to be *ad idem* as to the payment and allocation thereof. He referred us to Voet 46.3.16 who said:-

> *"If the person who makes payment is indebted on several accounts he can choose on what account his payment is to be taken, but if he makes no election, the creditor determines it, provided he does so as he would do if he had himself made the payment, and consequently not discharged of a debt in dispute, or not yet due, or only due naturalites. It is however, necessary that the appropriation should be made, whether by the debtor or the creditor, immediately, that is as soon as the payment is made, or while it is being made, so that it may be free to the creditor not to accept, or the debtor not to pay, if either party wish to have the payment taken in respect of a debt which the other does not choose; but afterwards it is not allowed but then rather the rule of law begins to take effect."*

[16] We were also referred to **Standard Bank v Oneanate Investment (Pty) Ltd [1995] A ALL SA 128 (C)** on appropriation of credits. The Court in that case briefly stated the law regarding appropriation of credits as follows:-

> *"A debtor who is indebted to his creditor in respect of more than one debt can when making payment indicate, expressly or tacitly, how the payment is to be allocated. The creditor is not always bound to accept the payment on the basis tendered ... where the debtor fails to appropriate the payment the power to*

do so passes to the creditor who can then appropriate the payment, provided that he does so immediately and that he communicates his choice to the debtor within a reasonable time. The creditor's power is not an unlimited one. He cannot act inequitably ... failing appropriation by the debtor and the creditor, the common law developed a set of residual rules which guide the court unless it is found that the parties or the circumstances have either expressly or tacitly excluded one or more of them ... the common rules seek to appropriate the payment on the principles of appropriation first to the debt which is not onerous to the debtor – the one which he has most interest in discharging..."

[17] It was contended on the Appellant's behalf that the first indication of the Parties' intention must of course be the terms of the settlement agreement which was annexed to the founding affidavit. The settlement, continues the submissions, must in turn be interpreted against the background of all the background facts of the now famous dictum by Wallis JA in **NATAL MUNICIPAL PENSION FUND V ENDUMENI MUNICIPALITY 2012(4) SA 593 (SCA)** at *para* 18 which reads as follows:-

"Interpretation is the process of attributing meaning to the words used in the document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence... A sensible meaning is to be preferred to the one that leads to insensible or

unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make the contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[18] In dealing with this principle, we were referred to **Bothma Batho Transport (Pty) Ltd v Bothma and Sons Transport (Pty) Ltd 2014 (2) SA** at *para* 12, Wallis JA said:-

"Whilst the starting point remains the words of the document which are only relevant mediums through which the parties have expressed their contractual intentions, the process of interpretation does not stop at the perceived literal meaning of those words, the court considers this in *the light of all relevant and admissible context, including circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances never very clear, has fallen away, interpretation is no longer a process that occurs in stages, but is essentially one unitary exercise. Accordingly, it is no longer helpful to refer to the earlier approach."*

[19] It was further argued for the Appellant that the first step is to consider the document. Paragraph 3.1 of the settlement agreement provides:-

> *"The defendants shall collectively pay and shall be liable jointly and severally to the plaintiffs for an amount R 5 500 000-00 ... in full and final settlement of all claims of whatsoever nature, which the plaintiffs may have against the defendants."*

[20] Mr Ellis further argued that although the settlement agreement does not expressly determine the appropriation of the payment to any particular debt, it records in paragraph 6.2:-

> *"It is recorded that the plaintiffs have agreed that Bergville Mall (Pty) Ltd has a claim against the estate in the amount of R2 735 000-00. Upon payment of the final instalment of R2 187 322-00 in terms of this agreement the plaintiff shall be obliged to immediately file a notice of withdrawal of all the actions instituted against the defendants, as referred to in paragraph 1..."*

[21] The Appellant submitted that from a linguistic treatment of the settlement agreement, it was clear that the Parties had agreed that upon payment of the amount of R5 500 000-00 the Appellant would have:-

21.1. Discharged its obligations towards the Respondent for payment of the outstanding amount with regard to the building contract;

21.2. Become entitled to lodge a claim against the estate, for its damages; and

21.3. That in the amount of R5 500 000-00 the Appellant had made payment of an amount of R3 871 469-90 for vatable supply.

[22] It is common cause that the payment that was received from the Appellant and other Parties was not appropriated to any particular amount owing. It was for settlement of various actions.

[23] In a letter addressed by the Appellant's attorney dated 19 March 2014, the following is recorded:

"This debt paid by Bergville Mall (Pty) Ltd in the amount of R3 871 469-90 was in respect of a pre-liquidation debt in respect of work done by Builtworx (Pty) Ltd prior to its liquidation for and on behalf of Bergville Mall (Pty) Ltd."

[24] It was submitted on behalf of the Appellant that this letter was in line with the background and surrounding circumstances and confirmed the Appellant's intention at all relevant times to appropriate that payment to the pre-liquidation debt owed to the Respondent in respect of the building work.

[25] Mr Ellis submitted that as the appropriation of payment was not in contention, the rule laid down in **Stigligh v French [1891] – [1892] 9 SC 286**, Lawrence JP at 393 held:

"The first rule is that 'the debtor, when he makes payment, is at liberty to declare under what head or to what account he wishes it to be entered' ... The second rule, as laid down by Van der Linden, is that

'when the debtor neglects to appropriate, the creditor is at liberty when he has different accounts against the debtor to specify by his receipt the account which he means to place it.' This quotes the rule as laid down in the Digest and discusses at some length the commentary of Bachovius to the effect that as long as the thing is entire and as long as the debtor has not received from the creditor an acquittance, importing the implication, he may object to the application which the creditor would make to account of the debts which the debtor had least interest to acquit, and consequently may demand that the creditor should either make an equitable application by his acquittance or restore the money."

[26] Mr Ellis contends that as at the date of appeal, the Respondent has not communicated any allocation to the Appellant. Consequently, he submits that the Appellant's allocation of the payment to the outstanding building works, stands in the absence of a contrary allocation by the Respondent.

[27] He argues in the alternative that, the common law applies, in terms of which the most onerous debt is deemed to be paid by an unallocated payment received. He contends that in many cases, that approach has been construed as meaning the oldest debt because the fact that such debt arose prior to liquidation, all other debts for which summons had been issued against the Appellant were debts based either on alleged loan agreements repayable on demand where demand was made only after liquidation, or on debt allegedly arising from the provisions of the

Insolvency Act, the obligation of which only came about when the Respondent was liquidated.

[28] Mr Ellis contends that there is no merit in the Respondent's contention that:

28.1. The Parties can, by forming intention, determine the nature of a service as taxable or not. There is no legal foundation for this argument. Consequently the Appellant is entitled to a tax invoice relating to the aforesaid payment.

28.2. Insofar as the Respondents contends that since the payments were included in the liquidation and distribution account finally approved and confirmed by the Master and therefore renders the issue that the tax invoice that was not included in the account unassailable. The Appellant contends that the relief sought does not seek to upset the liquidation and distribution account and that the present appeal does not include a claim for an order in terms of section 112 of the Insolvency Act.

[29] Section 112 of the Insolvency Act, 1936 reads as follows:

"When a trustee's account has been opened to inspection by creditors as hereinbefore prescribed and–

(a) No objection has been lodged; or

(b) ...

(c) ...

The Master shall confirm the account and his confirmation shall be final save as against a person who may have been permitted by a court before any dividend has been paid under the account, to reopen it."

[30] Mr Ellis submitted that the court *a quo* erred in finding that "a VAT vendor is only entitled to claim retrospectively the VAT on transactions for a maximum period of five years before the invoice is issued." He contends that there is no such requirement in the Value Added Tax Act.

[31] He contends that the Appellant cannot deduct input tax in the absence of a VAT invoice having been issued to it and without having paid such VAT.

[32] He contends that the court *a quo* erred in finding that appropriation must be the result of an express agreement. This finding loses sight of the common law rules set out in his heads of argument where the payee makes his intention known.

[33] It was furthermore submitted that the court *a quo* erred in finding that the liquidation and distribution account confirms no VAT payable. Mr Ellis submitted that what the liquidation and distribution account confirms is that the estate was entitled to a VAT refund, without disclosing that the payment was made in respect of a VAT-able transaction. In such a case, goes the argument, SARS is not bound by the compromise without the full facts being disclosed to it.

[34] Mr Van der Merwe SC ("Mr Van der Merwe") on behalf of the Respondent contends that the claim against the Appellant had become settled and that the settlement agreement constitutes a compromise and that is therefore *res judicata.* He contends that as a result of novation of the claim, the liquidators had only claims as provided for in the settlement agreement and these do not mention in any specific terms what the Appellant contends. He contends that *res judicata* is an absolute defence. We were referred to the case of **Karson v Minister of Public Works 1996 (1) SA 887 (E) at 893 F** – I where the court held:-

> *"It is well settled that the agreement of compromise, also known as transactions, is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something either by diminishing his claim or by increasing his liability … It is thus the very essence of a compromise that the parties thereto, by mutual assent, agree to the settlement of previously disputed or uncertain obligations."*

[35] He contends that by virtue of the settlement, the payments made under the settlement cannot be construed as payment in relation to work allegedly done by the Respondent for the Appellant.

[36] Mr Van der Merwe furthermore submitted that Mr Lowe, the brain behind the Appellant's group of companies, in his evidence under oath at the

liquidation enquiry of the Respondent, created the impression that the Respondent was in fact not entitled to claim anything from the Appellant for building works, and reliance was also placed upon an alleged counter-claim.

[37] It was furthermore submitted that payments received in terms of the settlement agreement were included in the liquidation and distribution account finally approved by the Master. If the relief were to be granted, it would affect the approved account as specific dividends were paid to creditors. Consequently the granting of relief will be pre-judicial of the other concurrent creditors and will reduce the free residue by the amount of VAT which is R475 443-66. He contends that as the account was approved, the entries therein became unassailable.

[38] It was also submitted on behalf of the Respondent that section 112 of the Insolvency Act, 24 of 1936 provides that the confirmation of the account by the Master is final, save as against the person who may have been permitted by the court before any dividend has been paid under the account to reopen it.

[39] Mr van der Merwe also submitted that the liquidators stated in their affidavit that had they been aware of the fact that the payment related to a vatable transaction, they would have demanded VAT to be paid on top of the settlement amount. If VAT was not specifically added on top of a vatable supply there is usually only presumption that VAT is included,

but any presumption can be rebutted by evidence. The liquidator stated that the VAT issue was not dealt with at all in the settlement agreement. They also contend that the settlement agreement is a contract and they deny that they had the intention of including the settlement agreement on the basis that the payments made to them would be inclusive of VAT.

[40] It was submitted that the submissions made on behalf of the Appellant that because the Respondent had not stipulated how payment had to be applied, the appellant had the choice to decide how to appropriate the payments and to decide which debt to pay. Mr Van der Merwe submitted that this reasoning was flawed. After the settlement was concluded, all prior debts were extinguished and it was no longer open for the appellant to decide to appropriate a certain amount to a vatable supply. The only debt that remained after the compromise was that which was created by the settlement agreement and not a vatable supply debt.

[41] It was submitted that reliance by the Appellant on section 26 of the Value Added Tax Act was not applicable. The Respondent was a vendor and as a fact, had not issued an invoice to the Appellant. The building work was done already prior to December 2010. The application was brought during February 2015 for the VAT invoice for work done prior to December 2010. It was furthermore submitted that a VAT vendor is only entitled to claim retrospectively the VAT on

transactions for a maximum period of 5 years before the invoice is issued.

[42] It was furthermore contended on behalf of the Respondent that payment is a bilateral act and requires the concurrence of both Parties. We were referred to a case of **Volkskas Bank v Bankorp Bkp (H/A Trust Bank) & 'n Ander 1991(3) SA 605(A) at 612C** where the Supreme Court of Appeal held:-

"Derdens: betaaling is 'n tweesydige regshandeling wat, tesyn anders ooreengekom, die medewerking van bide partye verg."

[43] The issue to be decided is whether the conclusion of the settlement agreement under these circumstances constitutes a vatable supply for which a VAT invoice had to be issued. Furthermore, it has to be decided whether at the conclusion of the settlement agreement the Parties intended that the Appellant would be entitled to be issued with a VAT invoice.

[44] We have considered the arguments submitted on behalf of the Parties by both counsel. We have also considered the reasons given by the court *a quo* in dismissing the application.

[45] At the hearing of the appeal, counsel for the Appellant maintained that the granting of the relief sought would not affect the liquidation and distribution account already approved by the Master as SARS had not

filed any claim. This submission is flawed. It ignores the fact that once such order is granted, the liquidator would need to seek leave of this court to re-open the account and the dividend payments made to the concurrent creditors in order to account to SARS about the VAT invoice and pay same over to SARS. This will be untenable and in our view, the Court *a quo* correctly dismissed the application. Mr van der Merwe's submission that the granting of relief would indeed have an adverse effect on the account is correct. The facts of this matter do not support such proposition.

[46] It is common cause that at the conclusion of the settlement agreement, the Respondent had long ceased being a vendor. It is also trite law that when the settlement agreement was concluded, all various claims against the Parties were compromised. As a consequence, it was no longer open for the Appellant to choose which debt payments made were to be allocated. This is more so that the estate of the Respondent was in the hands of the liquidators and that no invoice for the vatable supply work had been issued. The reliance on section 26 of the Value Added Tax Act, 89 of 1991 is therefore ill conceived. This section would be relevant if the vendor had issued a tax invoice and received such tax but failed to account to SARS in regard thereto.

[47] The words used in the settlement agreement are clear. All previous debts of the various Parties, including the Appellant, have been extinguished and replaced by the compromise. It is therefore illogical to

seek allocation of payment to any particular old debt that has been extinguished.

[48] The application of the liquidation and distribution account at the Master's office called upon anyone to object thereto. The common facts are that the Appellant did not object. The common facts are furthermore that the payments received in terms of the settlement did not reflect any VAT due to SARS. Having regard to these facts, it is our considered view that the contention that the court *a quo* erred in not finding for the appellant, is without merit as it is not supported by the facts before us.

[49] We now deal with the contention that the Appellant was entitled to appropriate the debts to which payment related to, that is, vatable supply debt. This argument misses the principle that payment is a bilateral act at the time when it is made. The facts before us do not support the contention that the Appellant was at liberty to allocate payment to a particular debt in accordance with the approved liquidation and distribution account.

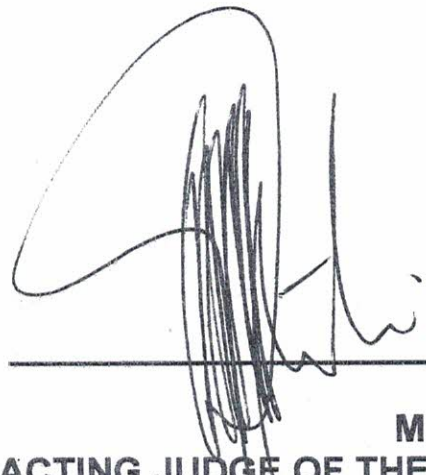
[50] When payment was made, following the compromise, it was not the intention of the Appellant and the liquidators that allocation of such payment would be made for vatable services. This is true given that Appellant itself did not insist on such allocation. The liquidators and distribution account was approved with no query raised in regard to vat.

[51] It cannot be denied that when payment was made in terms of the compromise, no invoice had been issued. More importantly, the Respondent did not withhold any information regarding VAT invoices that were not accounted for to SARS. In our view section 26 of the Value Added Tax Act would find application in cases where the vendor fails to account for Vat and ceases to be a vendor subsequent to such omission. The obligation to account for Vat does not simply cease by virtue of no longer being a vendor.

[52] The Respondent was therefore not obliged to issue the VAT invoice.

ORDER:-

The appeal is dismissed with costs.



M. L. SENYATSI
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, PRETORIA

I AGREE

M. MUNZHELELE
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, PRETORIA

I AGREE

M.J .TEFFO
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, PRETORIA

Appearances:

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Instructed by : Nixon & Collins Attorneys

Hatfield, Pretoria

Counsel on behalf of Respondents: Adv M. P Van der Merwe S.C

Instructed by : Shapiro & Ledwaba Inc