REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 42209/2012

2/2/18

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

2 February 2018

In the appeal between:

SBHALE FIRE SERVICES CC PLAINTIFF

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA DEFENANT

JUDGMENT

RAULINGA, J

[1] The plaintiff is Sbahle Fire and Safety Services CC, a close corporation duly incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business situated at 11 Crestwood

Business Park, Cnr Le Roux and Richards Drive, Halfway House, Midrand.

[2] The defendant is Passenger Rail Agency of South Africa (Limited), a public company duly incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business situated at Umjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg. The defendant was previously known as South African Rail Commuter Corporation Limited ("SARCC").

Background

[3] On or about 18 December 2008 and at Midrand, alternatively, Pretoria the plaintiff and defendant concluded a written agreement ("the first agreement") in terms whereof the defendant appointed the plaintiff as Fire Consultant in respect of the defendant's Mabopane Bridge Development ("the project"). It is common cause that the first agreement is contained in Annexure "POC1" to the plaintiff's particulars of claim and Annexure "A" on pages 21 to 24 of the pleadings bundle to the defendant's plea and claim in reconvention.

[4] It is, further, common cause that the first agreement contains, *inter alia*, the following terms:

> *"1. The Client will not entertain any extra fee claims unless he introduces a sustainable or material change to the scope of the Project;*

2. *The fee shall be paid in accordance with the agreed fee as per Annexure 'A'.*

Fees:

The Client shall pay to the Consultant as full remuneration for the performance by the Consultant of the Services in accordance with this Agreement.

The Fee shall, be deemed to be inclusive payment for the Services and for all disbursements, costs, expenses, overheads or profits of every kind incurred or to be earned by the Consultant in connection therewith.

If the Consultant is required by the Client to provide material additional Services by reason of any alterations, project extension or modifications to the Project as required by the Client, then the Client shall pay to the Consultant additional amounts in respect tof the Fee, commensurate with the additional services performed by the Consultant.

However, should the extent of the extra work or alterations that the same shall have been necessitated in whole or in part, by any negligent act, omission or default on the part of the Consultant, the Client will not pay to the consultant additional amounts in respect to the fee.

The total fee for Consultant's services on the above project is based on Annexure "A"."

[5] It is common cause that Annexure "A" to the first agreement, *inter alia*, contains the following express terms:

> *"Total Fee: (excl.) VAT: R796, 185.72. Effective date is 2nd January 2009 until Contractual Completion date: 31 May 2010.*
>
> *Should the estimated project value decrease the tariff of R796, 185.72 of the project costs will be applied on final value and should the estimated project value increase the services will be free until the completion of the project, 31 May 2010.*
>
> *The fees initially will be fixed based on the costs of works as agreed to by the client in terms of the aforementioned principle."*

[6] It is apposite to record that the plaintiff is referred to in the first agreement as the "Consultant" and the defendant as "the client".

[7] The plaintiff claims payment of the amount of R1, 227, 999.21 in respect of the first agreement, together with interest and costs. The plaintiff, *inter alia*, alleges the following:

7.1 The Project was not completed on the anticipated contractual completion date, being 31 May 2010.

7.2 The extension of the project was not necessitated in whole or in part by any negligent act, omission or default on the part of the plaintiff.

7.3 As per the agreement, if the plaintiff is required by the defendant to provide material additional services, *inter alia*, by reason of alterations, project extension or modification to the project then the defendant shall pay to the plaintiff additional amounts in respect of the fee commensurate with the additional services performed by the plaintiff.

7.4 The plaintiff is rendering the same services as it rendered up to and including 31 May 2010.

7.5 Up to 31 May 2010 the plaintiff was entitled to a total contract fee of R796 185.72 exclusive of value added tax, over a period of seventeen (17) months, at a monthly rate of R46 834.45 exclusive of value added tax, amounting to R53 391.72 per month, inclusive of value added tax.

7.6 The defendant breached the terms of the agreement by neglecting and/or failing to pay the plaintiff for services rendered over the period June 2010 to March 2012. The plaintiff's invoices,

rendered to the defendant during said period, are attached to the particulars of claim as Annexure "POC2" to "POC25" on pages 25 to 48 of the pleadings bundle.

[8] The defendant pleads the following in its amended plea:

8.1 It is admitted that the project has not been completed, the defendant, however, denies that the plaintiff is still rendering the services to the defendant.

8.2 The defendant denies that the plaintiff is rendering the same service as it rendered before 31 May 2010 and avers that the plaintiff was entitled to, and did, render same services after 31 May 2010 in accordance with the extended period up to 28 February 2012.

8.3 The defendant denies that it breached any terms of the first agreement as alleged, or at all.

8.4 The defendant pleads that the first agreement terminated on 31 May 2010 before the project was completed but the period thereof was extended until 28 February 2012.

8.5 The defendant pleads, further, that the parties retained original contractual prices which remained the same after the extended period.

[9] It is, further, common cause that during or about December 2008 and at Midrand, alternatively, Pretoria, the plaintiff and the defendant concluded a written agreement ("the second agreement") in terms whereof the defendant appointed the plaintiff as Safety Consultant in respect of the project. It is common cause that the second agreement is contained in Annexures "POC28" and "POC29" to the particulars of claim, on pages 61 to 64 of the pleadings bundle, and Annexure "B" to the amended plea.

[10] It is common cause that the following are the express terms of the second agreement are, *inter alia*, relevant for purposes hereof:

> "2.5 *The said Consultant will also be required to assist the contractor and the Client in drawing up a comprehensive construction site safety plan. This plan shall be reported at all the site meetings and at any other time when required by the client.*
>
> *3. The Client will not entertain any extra fee claims unless he introduces a substantial or material change to the scope of the Project.*
>
> *The fee shall, be deemed to be inclusive payment for the Services and for all disbursements, costs, expenses, overheads or profits of every kind incurred or to be earned by the Consultant in connection therewith.*

If the Consultant is required by the Client to provide material additional services by reason of any alterations, project extension or modifications to the Project as required by the Client, then the Client shall pay to the Consultant additional amounts in respect of the Fee, commensurate with the additional services performed by the Consultant."

[11] Again, the plaintiff is referred to as the "Consultant" and the defendant as "the Client".

[12] Schedule "A" to the second agreement contains the following common cause terms:

"The fee shall be paid in accordance with the agreed fees as per Annexure 'A'.

Total Fee (exc. VAT: 5% of the Project Costs. Effective date is 2nd January 2009 until Contractual Completion date: 31 May 2010.

Should the estimated project value decrease the tariff of 5% of the project costs will be applied on final value and should the estimated project value increase the services will be free until the completion of the project, 31 May 2010.

The fees initially will be fixed based on the costs of works as agreed to by the client in terms of the aforementioned principle."

[13] The plaintiff claims payment of the amount of R9 095 968.47 together with interest and costs from the defendant in terms of the second agreement and, *inter alia*, relies on the following allegations in support of its claim.

[14] The project was not completed on the anticipated contractual completion date, being 31 May 2010.

[15] The project has still not been completed and, as a result the plaintiff is still rendering services to the defendant.

[16] The extension of the project was not necessitated in whole or in part by any, negligent act, omission or default on the part of the plaintiff.

[17] As per the agreement, if the plaintiff is required by the defendant to provide material additional services, *inter alia*, by reason of alterations, project extension or modifications to the project, then the defendant shall pay to the plaintiff additional amounts in respect of the fee commensurate with the additional services performed by the plaintiff.

[18] The plaintiff is rendering the same services as it rendered up to and including 31 May 2010.

[19] Up to 31 May 2010 the plaintiff was entitled to a total contract fee of R5 897 462.50 excluding value added tax, over a period of seventeen (17) months, at a monthly rate of R346 909.56 exclusive of value added tax,

and amounting to a monthly rate of R395 476.89 inclusive of value added tax.

[20] The defendant breached the terms of the agreement by neglecting and/or failing to pay the plaintiff for services rendered over the period June 2010 to February 2012.

[21] The defendant pleads the following in its amended plea:

21.1 It is admitted that the parties agreed to extend the contractual period from 31 May 2010 to 28 February 2012 subject to the retention of the original contract prices to remain same, the defendant admits the allegations contained herein.

21.2 It is admitted that the project has not been completed, but the defendant denies that the plaintiff is still rendering the services to the defendant as alleged in this paragraph or at all beyond the extended period of 28 February 2012.

21.3 The defendant denies that the plaintiff is rendering the same services to the defendant and aver that the plaintiff only rendered such services beyond 31 May 2010 by virtue of an extended period up to 28 February 2012.

[22] The defendant instituted a claim in reconvention for payment of an amount of R2 034 938.00 paid by the defendant to the plaintiff on 15 October 2013.

[23] Based on what is pleaded in defence to the plaintiff's claims, the defendant alleges that aforesaid amount was paid for no justifiable cause or some or any other obligation in law, alternatively in the *bona fide* but mistaken belief that the money was due and payable to the plaintiff.

[24] If it is, therefore, established that the plaintiff, in fact, was required to render material additional services during the period 1 June 2010 to 28 February 2012, the defendant will be liable to contract to pay the plaintiff for any services the plaintiff can prove it rendered during said period.

[25] On 19 November 2015, MABUSE J handed down an order in this court which reads as follows:

> *"Unless there is an agreement between the parties in terms of which they have agreed that the plaintiff should render the services set forth in the said clause, there will be no rights created for the plaintiff and furthermore in the absence of such an agreement the defendant will not incur any obligations."*

[26] This order mirrors the order that is reflected in the judgment of MABUSE J handed down on 14 April 2016.

[27] It is important to note that, after the close of pleadings, and the pre-trial conference having been held, the matter was set down for hearing in the week of 15 November 2015.

[28] The parties agreed at the pre-trial conference that the issues should be limited to the interpretation of the contract between the parties before any evidence could be led to hear the merits of the claim. The parties differed in so far as the interpretation of the contract was concerned.

[29] It is also instructive in this regard to recall that the parties contemplated that if the contract was interpreted in favour of the applicant/defendant, that would be the end of the matter and the claim would be dismissed with costs. If it was interpreted in favour of the respondent/plaintiff the trial would continue and costs would be against the applicant/defendant.

[30] It seems to me that the defendant dissatisfied with the order of MABUSE J on interpretation, launched an application with a view to clarify or vary the order. The said application does not seem to have been proceeded with. Moreover, when the hearing of this matter commenced on 20 June 2017 this being the position, it means that this court must also consider the issue of interpretation in this matter.

[31] MABUSE J, in his judgment of 14 April 2016 concluded that the issue can best be resolved without any reference to the conduct of the parties. For that reason MABUSE J disagreed with the defendant's approach that the issue can only be resolved with reference to the pleadings. As a consequence, he did not deal with the issue how much money the

safety. If there was non-compliance with safety standards the plaintiff had the power to order the main contractor to stop working and could issue compliance orders.

[35] Like all other professional teams in the project plaintiff had to attend meetings which were to be held twice a month. In those meetings, the plaintiff would report on fire and safety issues.

[36] Mr Khuzwayo testified that as the project was intended to commence on 2 January 2009 and be completed by 31 May 2010, the contract was therefore for the duration of 17 months. However, the project could not start on 2 January 2009. It only started on 11 August 2009, 7 months after the commencement date. Furthermore, the project was not completed by the 31st of May 2010 and to date it is still not completed.

[37] During the course of the construction of the bridge there were certain problems that were encountered by the main contractor. These included the fact that the community wanted to dictate their own terms to the main contractor. They wanted their own people to be employed as sub-contractors. The major delay pertained to the land issue on the western side of the bridge. Apparently, the land owner did not want the bridge to land on his property (Erf No. 433). The architect therefore had to change the design so as to cause the bridge not to land on that property. The architect had to reduce the size of the bridge.

[38] Mr Khuzwayo also gave evidence that the defendant also wanted a derailment wall to be built and that extra stores be built on the western

side of the bridge. There was also a need to build PRASA offices underneath the bridge. He testified that in any event all of these had to be done by the main contractor, Siyavuna. His close corporation was merely required to supervise and monitor the main contractor for fire and safety which is what it was appointed to do. He testified, however, that as a result of that change he had to redesign the fire protection system.

[39] Although the project was not completed by 31st of May 2010, the contractor continued to work on the bridge and the plaintiff continued to render the same services beyond the 31st of May 2010.

[40] It is therefore common cause that the only version put before the court is that of the plaintiff, since the defendant called no witness to testify on its behalf. It simply means that the evidence of the plaintiff is not controverted, and as such there is no counter version rebutting the evidence of the plaintiff.

[41] The relevant clause of the contract under discussion as repeated in the plaintiff's particulars of claim reads as follows:

> *"The fee shall, be deemed to be inclusive payment for the services and for all disbursements costs, expenses, overheads or profits of every kind incurred or to be earned by the Consultant in connection therewith. If the Consultant is required by the Client to provide material additional services by reason of any alterations, project extensions or modification to the Project as required by the Client, then the Client shall pay to the Consultant additional*

amounts in respect of the fee, commensurate with the additional services performed by the Consultant."

[42] The argument advanced on behalf of the defendant is that the plaintiff cannot claim payment in lieu of additional services as it is pleaded that it rendered the same services. Firstly, that there was no agreement between the parties to extend the contract and thus no obligation existed.

[43] In my view, the argument advanced by the defendant does not hold water. This is confirmed by the tail-end of the clause quoted above. "If the Consultant is required by the Client to provide material additional services by reason of any alterations, project extensions or modification to the project as required by the Client, then the client shall pay to the Consultant additional amount in respect of the fee commensurate with the additional services performed by the consultant."

[44] The defendant submits that the contract could not have been extended with a view to increase the agreed amount. They argue that the extension of time was merely made in order to enable the plaintiff and the contractor to complete their work for which they have fully paid. The defendant seems to misconstrue the clause referred to above in that the plaintiff performed material additional services by reason of alterations, project extensions and modification to the project as required by the defendant. All these were not due to negligence, mistakes or fault on the part of the plaintiff. It was due to unforeseen disruptions of works by members of the community and the fact that the defendant modified its plans.

[45] I recognise that the defendant concedes the extension of the time. The extension of time is not a solitary issue standing on its own. It is linked to additional services performed by the plaintiff. Therefore, the plaintiff is entitled to additional amount commensurate with additional services. The plaintiff should be paid such additional amounts up to and including 28 February 2012.

[46] Reference to the dicta in Municipal Manager: *Qaukeni Local Municipality v FV General Trading CC* 2010 (1) SA 356 (SCA) is a misconception of the chronological events in this case. There was no need for the plaintiff and the defendant to have entered into another tender process since the said process had already been followed and completed when the parties concluded the contract including the events that unfolded thereafter. As a consequence there is no breach of procurement procedures.

[47] The additional amounts now payable to the plaintiff are in terms of the second agreement concluded between the plaintiff and the defendant in December 2008. The fee was deemed to be inclusive of payment for the services and disbursements, costs, expenses, overheads or profits of every kind incurred or to be earned by the plaintiff in connection therewith. (Annexure "POC28" and "POC29" bear reference).

[48] Schedule "A" to the second agreement contains the following common cause terms:

"The fee shall be paid in accordance with the agreed fee as per Annexure 'A'.

Total Fee (excluding VAT: 5% of the Project Costs. Effective date is 2 January 2009 until Contractual Completion date: 31 May 2010.

Should the estimated project value decrease the tariff of 5% of the project costs will be applied on final value and should the estimated project value increase the services will be free until the completion of the project, 31 May 2010.

The fee initially will be fixed based on the costs of works as agreed to by the client in terms of the aforementioned principle."

[49] One is mindful of the fact that the Project was not completed on the anticipated contractual completion date, being 31 May 2010. The Project has still not been completed and as a result, the plaintiff is still rendering services to the defendant. The extension of the Project was not necessitated in whole or in part by any negligent act, omission or default on the part of the plaintiff. As per the agreement, if the plaintiff is required by the defendant to provide material additional services, *inter alia*, by reason of alterations, project extension or modifications to the project then the defendant shall pay to the plaintiff additional amounts in respect of the fee commensurate with the additional services performed by the plaintiff. The plaintiff is rendering the same services as it rendered up to and including 31 May 2010.

[50] A summary of the principles of interpretation and how same are to be applied is found in *KPMG v Securefin Ltd* 2009 (4) SA 399 (SCA) where the following is stated at 409G-410B:

> *"[39] First, the integration (or panel evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts.*
>
> *If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and accordingly, interpretation is a matter for the court and not for witnesses or, as said in common-law jurisprudence, it is not a jury question.*
>
> *Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document whether statute, contract or patent (Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Further, to the extent that evidence may be admissible to contextualise the document (since context is everything) to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (Delmas Milling Co. Ltd v Du Plessis 1955 (3) SA 447 (A) at 455B-C. The time has arrived for us to accept*

that there is no merit in trying to distinguish between 'background circumstances and surrounding circumstances'.

The distinction is artificial and in addition, both terms are vague and confusing. Consequently everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See Van der Westhuizen v Arnold 2002 (6) SA 453 (SCA) ([2002]) 4 All SA 331) paras 22 and 23, and Masstores (Pty) Ltd v Murray & Roberts (Construction (Pty) Ltd and Another 2008 (6) SA 654 (SCA) para 7)."

[51] I agree with the plaintiff that taking cognisance of background and context in order to interpret an agreement does not equate to making a contract for the parties. All that aforesaid entails is that the document has to be read in context, having regard to the purpose of the relevant provisions in order to ascertain the intention of the parties:

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA and at 603F-604D, where the court stated the following:

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a 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. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. ... 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."

[52] In my view, it is clear from the wording of the second agreement that the parties agreed that the defendant would pay to the plaintiff amounts in respect of the fee commensurate with the additional services performed by the plaintiff. The words used in that agreement are clear and express the common intention of the parties. The ordinary grammatical meaning of the contractual provisions *in casu* is clear and unambiguous.

[53] In this matter, objectively speaking, considering the language used in the agreement, purpose and scope and background of the document, the context is such that it confirms the nature of the transaction between the parties as it appears from the entire contract. *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* (1) SA 64 (A) at 646G. The wording of the agreement is unambiguous and therefore both the plaintiff and the defendant are bound by the said second agreement.

[54] I am inclined to agree that, it is common cause on the pleadings that the plaintiff rendered the same services as it rendered up to and including

31 May 2010 and up to at least, 28 February 2012. Therefore, the further services are an extension of the services contracted for and the plaintiff was integrally involved with the Project, having been engaged in it since its inception. Consequently, there was no new services agreement resulting therein that it was not necessary to follow another bidding process in this regard. *Gauteng MEC for Health v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at paras [24] and [25].

[55] In its claim in reconvention the defendant claims the sum of R2 034 938.19 paid to the plaintiff on or about 15 October 2013. The payment was made pursuant to plaintiff's invoice for said amount in respect of fire consultancy services. As a result of that, the plaintiff is no longer proceeding with its claim. The claim amount is included in the payment made after summons was issued.

[56] I agree with the plaintiff that to succeed with a claim for repayment of money paid *sine causa* the party carries the *onus* of proving the requirements of the applicable enrichment claim being the *condicio indebiti*: *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 2002 (A) at page 224 and *Senwes Ltd and Others v Jan van Heerden and Sons CC and Others* [2007] 3 All SA 24 (SCA).

[57] The defendant failed to prove these requirements. Further, the defendant knew that it was transferring money which was legitimately owed to the plaintiff.

[58] The defendant did not call any witnesses to testify why the payment was made. In this regard the defendant could have called the official who made the payment and the person in authority who approved that the payment be made. In the event, the defendant cannot succeed with its claim in reconvention.

[59] It is therefore clear that the contract price would be adjusted if the plaintiff was required to render material additional services as a result of the extension of the project.

[60] In the premises I make the following order:

60.1 The defendant is ordered to pay the plaintiff the amount of money claimed in the second claim with costs.

60.2 The claim in reconvention is dismissed with costs.

T J RAULINGA
JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	19 June 2017
For the Plaintiff :	Adv D Prinsloo
Instructed by:	Ngeno & Mteto Inc.
For the Defendant :	Adv Tokota SC

Instructed by:	Ndumiso Voyi Inc.
Date of Judgment:	02 February 2018