



**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**DELETE WHICHEVER IS NOT APPLICABLE**

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

DATE: **29 August 2019**

SIGNATURE: .....

**Case No. 32290/2020**

In the matter between:

**HAMSA CONSULTING ENGINEERS (PTY) LTD**

**PLAINTIFF**

And

**SIGODI MARAH MARTIN  
 MANAGEMENT SUPPORT (PTY) LTD**

**DEFENDANT**

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**Coram:** Millar J

**Heard on:** 1<sup>st</sup> & 2<sup>nd</sup> August 2023

**Delivered:** 29 August 2023 - This judgment was handed down electronically by

circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 29 August 2023.

**Summary:** Claim for payment of balance of agreed price for engineering services rendered – defence that scope of work insufficiently set out in agreement or pleaded - agreement negotiated between parties who understood the scope of the work to be done – conduct of parties establishing that they were *ad idem* as to what was to be done and what was to be paid for it.

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## ORDER

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**It is Ordered:**

- [1] The defendant is ordered to pay the plaintiff the sum of R4 118 756,52.
- [2] The defendant is ordered to pay to the plaintiff interest on the sum of R4 118 756,52 *a tempore morae* at the rate of 8,75% per annum.
- [3] The defendant is ordered to pay the costs of suit on the scale as between party and party.

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## JUDGMENT

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**MILLAR J**

- [1] This is a case in which the plaintiff, a firm of consulting engineers (HAMSA) sued the defendant (SMM), for the outstanding balance for services rendered. SMM was appointed as a sub-contractor by LTE who was the successful tenderer for works to be done for the Kwa-Zulu Provincial Government. SMM had then, it was asserted, sub contracted HAMSA to do certain of the works.
- [2] The circumstances under which SMM engaged with HAMSA, the agreement between them and their respective subsequent conduct provide the backdrop against which this matter was contested.
- [3] It was the case for HAMSA that a contract had been concluded between it and SMM, it had performed and SMM had partially performed by making certain payments. SMM's case was that there was never any contract between the parties and for that reason it was under no obligation to HAMSA to pay it anything.
- [4] On 18 April 2019, Mr. Andrew Pillay who represented SMM attended at the offices of HAMSA in Umhlanga, Durban. There he met with Mr. Vinodh Munessar for HAMSA, and they concluded an agreement. I pause to mention at this juncture that I refer to what was concluded as an "agreement" because that is what they cast it as. Whether it was in its terms a binding contract is the crux of the case to be decided.
- [5] The agreement was reduced to writing by SMM and provided for the appointment of HAMSA as a sub-contractor to SMM. The appointment which was accepted in writing the same day provided *inter alia* that:

*"Sigodi Marah Martin Management Support Development and Engineering Consultants (SMMMS) has been appointed by the LTE CONSULTING ENGINEERS to conduct a condition assessment of 10 KZN Districts Water and*

*Sanitation Infrastructure and 24 KZN Local Municipalities Licensed Electrical Distributors Infrastructure.*

*As part of the scope this project, we are pleased to inform you that Hamsa Consulting Engineers (Pty) Ltd is hereby appointed for the provision of the above services as a sub-contractor to SMMMS based on the agreed price of **R 8 500 000,00** (Incl. VAT) and inclusive of disbursements for the condition assessment of electrical infrastructure in 10 KZN District Municipalities Water and Sanitation Infrastructure and 24 Local Municipalities Licensed Electrical Distributors Infrastructure. The municipalities are highlighted below .....*

[6] The agreement went on to list the 10 district municipalities at which the electrical component of the water and sanitation infrastructure were to be condition assessed and also the electrical infrastructure of the 24 local municipalities which were licensed electrical distributors. In total 34 separate locations were identified for condition assessment.

[7] The agreement concluded with the following:

*“Kindly note that is as per agreement reached at your offices on 18<sup>th</sup> April 2019.*

*A sub-consultant agreement will follow in due course.”*

[8] It was common cause that no “sub-consultant agreement” was ever entered into.

[9] It was the case for SMM that there was in fact no agreement. This was premised on the contention that “condition assessment” had not been particularized in either the agreement or in the pleadings.

[10] The argument was that in the absence of a proper description of the scope of the works to be undertaken by HAMSA, SMM was not in a position to know

whether HAMSA had complied with the terms of the agreement entitling it to claim payment and what the terms for effecting payment were. Furthermore, even if there was an agreement, it was vague.

[11] It was also argued that the agreement was a synallagmatic one – it did not contain reciprocal obligations but was in its terms a bilateral agreement in which each simply undertook obligations to the other.

[12] SMM argued that the agreement was, properly construed, nothing more than an agreement to agree and for that reason it could not be considered to be a binding agreement – there being no deadlock breaking mechanism in the agreement. I was referred to *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC*<sup>1</sup>, *Southernport Developments (Pty) Ltd v Transnet Ltd*<sup>2</sup> and *Makate v Vodacom Ltd*<sup>3</sup> as authority for this proposition.

[13] SMM's argument in this regard was predicated upon the last line in the agreement in which it was stated "*a sub consultant agreement will follow in due course*". From this, the inference to be drawn was that what had been agreed was not binding and that the further sub consultant, which was never concluded, would have contained the further material terms which would have made the agreement binding.

[14] Having regard to the agreement as a whole, it seems that this clause was not the proverbial "agreement to agree" that SMM contended for but rather a statement of intent on the part of SMM. This intent never manifested and what is left is what preceded the statement of intent, which was in its express terms,

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<sup>1</sup> 2020 (2) SA 419 (SCA) at para [1] – the clause in issue in this matter provided "*that the rental and costs shall be mutually agreed*". No such provision was agreed in the present matter.

<sup>2</sup> 2005 (2) SA 202 (SCA) at para [17] where it was held "*For what elevates this agreement to a legally enforceable one and distinguishes it from an agreement to agree is the dispute resolution mechanism to which the parties have bound themselves.*" No such provision was agreed in the present matter.

<sup>3</sup> 2016 (4) SA 121 (CC) at para [97]. Distinguishable from the present case as there the agreement was to negotiate in good faith. In the present case the agreement had been reached and reduced to writing.

the agreement between the parties. On this basis, the authorities to which I was referred are distinguishable on the facts from this case.

- [15] In any event, it was the case for HAMSA that there was no 'deadlock' to be broken. The dispute concerned the failure of SMM to honour a part of the agreement by paying the outstanding balance of the agreed price – after there had already been full performance by HAMSA.
- [16] HAMSA called the evidence of two witnesses – Mr. Vinodh Munessar (Mr. Munessar) and Mr. Sunil Chundrikpersad (Mr. Chundrikpersad).
- [17] Mr. Munessar testified that he is an electrical engineer and one of the directors of HAMSA. He has worked as an engineer for 23 years, 21 of those with HAMSA. He confirmed the agreement entered into between HAMSA and SMM and that he had signed it on behalf of HAMSA and that Mr. Andrew Pillay (Mr. Pillay) had signed on behalf of SMM. He testified that he was aware that SMM had been sub-contracted by LTE to carry out electrical infrastructure condition assessments. He confirmed that the written agreement had been negotiated by himself and Mr. Pillay. He also testified that although the agreement reflected that a sub-contract agreement would follow in due course, no such agreement had ever eventuated.
- [18] His evidence was that meetings had been held between himself and Mr. Pillay at which what was required of HAMSA had been discussed as well as how HAMSA would execute the work. All the work requested had been done save in respect of one particular municipality which was under administration and where HAMSA had been prevented from carrying out any work. Notwithstanding the quoted price for all 34 condition assessments, HAMSA was only seeking payment for the 33 that had actually been done. In this regard, the particular invoice for that municipality incorrectly reflected a charge for the work having been done and this was to be adjusted.

- [19] HAMSAs was well aware of what the “condition assessments” entailed and no other particularity was needed in the agreement. Mr. Munessar explained that since the parties that had negotiated the agreement were engineers, what was entailed was well understood and was in fact what had been done by HAMSAs. The work had commenced, and invoices were submitted to SMM. Payments were received in July 2019 in the sum of R1 200 000,00. Between July and December 2019, work had been held back because of non-payment but payments had subsequently been made in October and November 2019.
- [20] The difficulty with receiving payments from SMM had been raised with them and had resulted in a payment schedule signed by Mr. Lansana Marah, a director of SMM being sent to HAMSAs on 27 September 2019. This was because there was no agreement that HAMSAs would wait for payment of its invoices.
- [21] The payment schedule resulted in further payments of R300 000.00 in October 2019 and R1 million in November 2019. A further payment of R300 000.00 was made in January 2020. In April 2020, HAMSAs had instructed its attorneys to send a letter in terms of section 345 of the Companies Act<sup>4</sup> to SMM and in response to this, a further payment of R1 million was received. Throughout his dealings with SMM, they had never disputed that the work was done or that payment was due or for that matter, the amount to be paid.
- [22] He also testified that when the work had been completed, he had informed both Mr. Pillay as well as LTE and that confirmation had been received from LTE that they were satisfied that the work had been completed. All the relevant documents required by LTE had been sent to them electronically.<sup>5</sup> On this aspect his evidence was corroborated by Mr. Chundrikpersad.

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<sup>4</sup> 61 of 1973.

<sup>5</sup> The documents were too large to send by email, so they had been sent by WE-Transfer which had then generated a download receipt for HAMSAs once they had been downloaded by LTE.

- [23] His evidence was that of the R8.5 million that had been quoted, taking into account the R3,8 million paid, the outstanding balance was R 4 345 834,51. Deducting the adjustment for the municipality where they had been unable to do the work in the amount of R227 077,99 left an amount of R4 118 756,52 for which judgment is sought.
- [24] It was put to Mr. Munessar in cross examination that the agreement did not specify what the “*condition assessments*” entailed and he explained that it was an engineering term and that engineers knew what it meant. He fairly conceded that the agreement did not specify when the works would be complete or how payment would be made. Furthermore, he conceded that the agreement did not refer to interim payments or specify when HAMSA would in fact be entitled to payment.
- [25] Mr. Chundrikpersad testified that he is the payment coordinator employed at HAMSA. His evidence was that he oversaw the payments of all invoices and followed these up until the project was completed. He has been with HAMSA for 13 years. He attended a number of prior meetings with SMM to discuss the implementation plan of the agreement, prior to the signature of the agreement.
- [26] He confirmed the evidence of Mr. Munessar that an email had been sent to LTE confirming the completion of the work and that all the relevant documents had been sent electronically. His evidence was that LTE had acknowledged that the work was completed.
- [27] Mr. Munessar’s evidence was not disturbed in cross examination and Mr. Chundrikpersad was not crossed examined.<sup>6</sup> Both their evidence stands unchallenged. Both were in my view impressive witnesses who testified in a forthright manner and Mr. Munessar in particular made concessions in favour of

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<sup>6</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para [61].



SMM when there was no reason for him to do so. It bears, in my view, testament to, in particular his truthfulness and I have no hesitation in accepting his evidence.

[28] SMM chose to confine its engagement in the case to “within the four corners of the pleaded case”. For this reason, neither Mr. Munessar nor Mr. Chundrikpersad were cross examined on anything outside these parameters. In the circumstances, SMM failed to engage at all with the evidence of Mr. Munessar that the parties knew and understood what was required for purposes of what was required for the “condition assessments.”

[29] SMM, in adopting this course of action, relied upon *Minister of Safety and Security v Slabbert*<sup>7</sup> in which it was held:

*“[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and to seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.”*

*[12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd, this court said:*

*“However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue.”*

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<sup>7</sup> 2009 JDR 1218 (SCA) at paras [11] – [12].

- [30] Counsel for SMM placed on record on more than one occasion, the reason for failing to cross examine was so as to ensure that it could not be argued that the issue of what was meant by “condition assessments” had been canvassed at the trial.
- [31] The evidence led on behalf of HAMSA was consistent with the agreement and the documents referred to by them in evidence relating to the engagements between HAMSA and SMM subsequent to 18 April 2019. SMM called no witnesses and closed its case. Accordingly, the evidence of the witnesses for HAMSA stands uncontradicted.
- [32] What is not in issue between the parties is that the agreement was signed on 19 April 2019, that HAMSA invoiced SMM for work done and that SMM made payments to HAMSA in the sum of R3.8 million. Furthermore, over the 12-month period between the signature of the agreement and the last payment in the sum of R1 million, there is nothing before the court to indicate that the fact that HAMSA had done the work or that SMM was liable to HAMSA was ever placed in issue, before the amendment of SMM’s plea and the trial – long after HAMSA’s performance had been complete. The evidence led at the trial which corroborated the documents that had been exchanged between the parties established that the work that HAMSA had been contracted to complete had been completed to the satisfaction of LTE.
- [33] HAMSA characterized the defences raised, which are somewhat technical in nature as indicative of SMM “not wanting to fully pay for services completely rendered.”
- [34] In *ABSA Bank v Swanepoel N.O.*<sup>8</sup>, it was held that:

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<sup>8</sup> 2004 (6) SA 178 (SCA) at paras [6] & [7].

“[6] *At its simplest, a contract is an enforceable promise to do or not to do something. But when parties record an agreement in writing, they often add provisions that do not embody such promises. A contract may have a preamble. It may contain ‘recordals’ and ‘recitals’. It may document prior events, or record the parties future intentions. It may contain clarificatory or explanatory statements. The parties may place on record matters that bear on the interpretation of what they have undertaken. It is therefore wrong to approach a written contract as though every provision is intended to create contractual obligations. ”*

And

“[7] *. . . but the question whether a contractual provision has operational content is fundamental to the ambit of the obligations the parties undertake, and it precedes the application of rules designed to establish the proper interpretation of their undertakings. Only once it is determined that a provision was intended to have contractual effect will the Court try to interpret it so as to give it business efficacy. If it was not so intended, those rules of interpretation do not come into play. No ‘business meaning’ can be conjured out of a clause that was not intended to have contractual effect at all.”*

[35] In *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*<sup>9</sup> it was held:

*“It would be useful for a few aspects of the principle of reciprocity and its application by means of the exceptio non adimpleti contractus to be mentioned:*

1. *In contracts wherein reciprocal obligations are created it is basically a matter of interpretation whether the obligations are so closely linked that the principle of reciprocity applies. If, however, no other intention appears, the*

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<sup>9</sup> 1979 (1) SA 391 (A) at the headnote.

*principle applies by operation of law to certain well known contracts, such as, eg, the contract of sale and locatio conductio operis.*

2. *The sequence of performance and counter-performance also depends upon the contractual provisions. If, however, another intention does not appear, the contractor, in locatio conductio operis for example, must first perform.” (my underlining)*

[36] In the present matter, the terms of the agreement properly construed constitute a *locatio conductio operis*<sup>10</sup>. The conduct of the parties makes plain that the parties understood that the agreement was not synallagmatic but was in fact one which created reciprocal obligations between the parties – HAMSA would render services to the client of SMM, LTE, and SMM would pay HAMSA for those services.

[37] In *Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd*<sup>11</sup> it was held:

*“In the past, where there was perceived ambiguity in a contract, the courts held that the subsequent conduct of the parties in implementing their agreement was a factor that could be taken into account in preferring one interpretation to another. Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision. It is therefore relevant to an objective determination of the*

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<sup>10</sup> A contract where services are rendered in exchange for remuneration.

<sup>11</sup> 2012 JDR 1734 (SCA) at para [15]. See also *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) at para [46] and in particular “words without context mean nothing, and context is everything. It has given a wide remit to the admission of extrinsic evidence as to context and purpose so as to interpret the meaning of a contract.”

*meaning of the words they have sued and the selection of the appropriate meaning from among those postulated by the parties.”*

- [38] *“Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.”*<sup>12</sup>
- [39] In the present matter, I find that the agreement signed between the parties on 18 April 2019 was a binding agreement with reciprocal obligations. Insofar as SMM argued that the agreement was void for vagueness, I was referred to *Levenstein v Levenstein*<sup>13</sup> in which the court set out the four situations in which contracts could be so classified. The first and fourth are not relevant to the present matter. It was argued that the second *“where the vague and uncertain language justifies the implication that the parties were never ad idem”* and the third *“where there is no concluded contract as in the case of ‘continuing negotiations’ broken off in medio”* should find application in this matter.
- [40] The evidence establishes that the language used in the agreement was clear and unequivocal as between the parties. The completion of the work by HAMSA and the partial payment as and when it was called for by SMM lead to the ineluctable inference, as a matter of common sense, that the parties knew what they had contracted for. It follows that they were *ad idem*. I have already dealt with the issue of sub consultant agreement – it too is of no moment in the present matter for the reasons that I have stated.
- [41] The only point of dispute is that SMM failed to make full payment of what was agreed.

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<sup>12</sup> *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 (HL) at 514. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) – *“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.”* (my underlining).

<sup>13</sup> 1955 (3) SA 615 (SR) at 619.

[42] For the reasons that I have set out above, I find that SMM is liable to HAMSA for the balance due to it under the agreement.

[43] In regard to costs, it was argued on behalf of HAMSA that a punitive order for costs should be made. This was predicated on what was argued as being dilatory conduct on the part of SMM insofar as having the matter brought before the court for hearing was concerned. On consideration of the matter of a whole, I am not persuaded that a punitive order for costs is appropriate. In the circumstances I intend to make the costs order that I do.

[44] In the circumstances, I make the following order:

[44.1] The defendant is ordered to pay the plaintiff the sum of R4 118 757,02.

[44.2] The defendant is ordered to pay to the plaintiff interest on the sum of R4 118 757,02 *a tempore morae* at the rate of 8,75% per annum.

[44.3] The defendant is ordered to pay the costs of suit on the scale as between party and party.

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**A MILLAR**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

HEARD ON:

1<sup>ST</sup> & 2<sup>ND</sup> AUGUST 2023

JUDGMENT DELIVERED ON: 29 AUGUST 2023

COUNSEL FOR THE PLAINTIFF: ADV. M Z SULEMAN

INSTRUCTED BY: LARSON FALCONER HASSAN PARSEE INC

REFERENCE: 22/H361/036

COUNSEL FOR THE DEFENDANT: ADV. A B ROSSOUW SC

INSTRUCTED BY: CARI DU TOIT INC ATTORNEYS

REFERENCE: C DU TOIT/SIG1/0064