# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 473/2007

In the matter between:

**AFFIRMATIVE PORTFOLIOS CC** **APPELLANT**

**V**

**TRANSNET LIMITED t/a METRORAIL** **RESPONDENT**

**Neutral citation:** *Affirmative Portfolios v Transnet*(473/2007) [2008] ZASCA 127 (30 September 2008).

Coram: HARMS ADP, CAMERON, JAFTA, MAYA JJA, et BORUCHOWITZ AJA

Heard: 22 August 2008

Delivered: 30 September 2008

Corrected: 06 October 2008

Summary: Claim based on written agreement – whether prior oral agreement enforceable – application of the parol evidence rule - counterclaim based on unjustified enrichment – *condictio indebiti*– whether the requirement that error not be excusable satisfied – error found not to be excusable.

---

## ORDER

---

_

**On appeal from:** High Court, Durban (Tshabalala JP sitting as court of first instance).

The following order is made:

(1) The appeal succeeds to the extent set out hereunder:

(a) The appeal against the judgment on the appellant's claim of R833 660.87 is dismissed;

(b) The appeal against the counterclaim is allowed;

(c) The respondent is to pay the costs of the appeal, including those occasioned by the employment of two counsel.

(2) The order of the court a quo is set aside and the following is substituted in its stead:

'(a) The plaintiff's claim for R883 660.87 is dismissed;

(b) The defendant's counterclaim for the amount of R515 317.45 is dismissed;

(c) Each party is to pay its own costs.'

---

## JUDGMENT

---

**BORUCHOWITZ AJA (HARMS ADP, CAMERON, JAFTA, MAYA JJA concurring):**

[1] The appellant instituted action against the respondent in the Durban High Court in which it claimed, among other relief, payment of the sum of R883 660.87. The essential basis of the claim was that the respondent had underpaid the appellant in respect of certain services that had been rendered. The respondent, in turn, instituted a counterclaim for re-payment of an amount of R515 317.45 on the basis of unjustified enrichment. The matter

came before Tshabalala JP who dismissed the claim and upheld the counterclaim. The appellant appeals against these orders with leave of the court a quo.

## BACKGROUND

[2] The appellant is a labour broker. In November 1999 the Metrorail Tender Board invited tenders for the supply of access controllers who were to be deployed on station platforms under the control of the respondent. Their function was to ensure that passengers boarding trains had tickets authorising them to do so. The appellant was notified of the acceptance of its tender on 29 March 2000.

[3] Pursuant thereto a written agreement was entered into between the parties in terms whereof the appellant was to supply 200 access controllers for a period of 36 months commencing on 1 April 2000 at a monthly rate of R358 800 plus VAT. Although not specifically spelled out, it is common cause that this figure was based on an hourly rate of R15 for a maximum of 104 hours per month per controller, plus an administration fee of 15 per cent (making a total of R17.25 per hour). The agreement was signed by the respondent on 3 May 2000 and by the appellant on 5 May 2000. It should be mentioned that the appellant had already been providing the services in question to the respondent since September 1999.

[4] Clauses 10.1 and 16.1 of the agreement which are relevant for present purposes provide as follows:

‘10.1 No deviation from the scope, pricing or programme of Service contained herein shall be permitted unless the Client has given prior written consent . . .’

‘16.1 Unless specifically stated otherwise in the Pricing Schedules, all prices are fixed as per the formula agreed upon in Annexure B, for the duration of the Contract and shall not be subject to any variation, except in terms of Clause 10 in particular, shall include all applicable taxes, duties and fees, except for Value Added Tax which is to be stated separately.’

[5] With effect from 1 April 2000, the appellant increased the charge to R17.25 per hour plus the administration fee of 15 per cent. The appellant says it did so because Mr Naicker, the contracts manager of the Durban region of the respondent had informed Mr Xaba, the sole member of the appellant, that Mr Mncube, the Durban regional manager of the respondent, had agreed to this increase. The respondent however disputes having agreed or instructed the appellant to effect the said increase.

[6] The appellant paid the increased charge without complaint for the months of April to

September 2000, both months inclusive.

[7] At a meeting between the representatives of the parties held on 20 December 2000 Xaba, was told that the appellant had been charging in excess of what was allowed in terms of the agreement and that henceforth the appellant was to revert to charging R15 per hour per controller plus a 15 per cent administration fee. Xaba reluctantly agreed to this but reserved the appellant's rights in regard thereto. From the date of that meeting the appellant resumed charging the specified rate of R15 per hour plus 15 per cent.

[8] In April 2002 the respondent purported to summarily terminate the agreement. The appellant treated this as a repudiation of the agreement and accepted this. The respondent accepted before trial that its repudiation was unlawful and an amount of damages was agreed. The appellant thereupon instituted the action forming the subject matter of the present appeal.

## THE CLAIM

[9] The primary question is whether the written agreement was varied so as to provide for the payment of an increased remuneration calculated on the basis of R17.25 per hour plus the 15 per cent management fee.

[10] The crux of the appellant's case is to be found in para 6 of the particulars of claim where the following allegations are made:

'6. During the month of May 2000 the aforesaid written agreement was varied orally, or tacitly or by conduct by the parties in the following respects:

(a) [clause 10.1 of the agreement was deleted];

(b) the defendant would pay to the plaintiff an increased remuneration calculated on the basis of R17,25 per hour (for normal hourly rates) worked by each access controller plus the 15% management fee, such increase to be paid from the date of such variation.

(c) Clause 16(1) was varied by the deletion of the words following on the words "all prices" where they appear in the first line of such paragraph up to and including the words "clause 10 in particular" where such words appear in the third line of such clause.'

[11] There is no evidence to support the allegations in para 6 of the particulars of claim concerning an oral variation. None of the appellant's witnesses testified that the parties had

agreed to delete clause 10.1 or the alleged portions of clause 16.1. Nor was there evidence that it was orally agreed during May 2000 to increase the applicable rate.

[12] What the evidence in fact establishes is that an oral agreement authorising the increased rate may have been entered into during April 2000. Mr Baxter, who managed the accounting and administrative affairs of the appellant, testified that if there was an agreement to increase the rates this must have occurred during April 2000 because such rate was first reflected in the appellant's invoice which was generated by 30 April 2000. Support for Baxter's contention is to be found in the appellant's letter to the respondent dated 20 December 2000 in which it is stated that the appellant increased the access controllers' wages in the same month that the new rate was communicated to the appellant.

[13] The appellant is precluded from relying on the alleged oral agreement by virtue of the so-called 'parol' evidence or 'integration' rule. The oral agreement for which it contends would have been entered into before the signing of the written agreement and also contains terms which are at variance therewith. It is a well established principle that where the parties decide to embody their final agreement in written form the execution of the document deprives all previous statements of their legal effect. See *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel*[1] and cases there cited. As was stated by Watermeyer JA in *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*:[2]

'. . . this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence.'

[14] Not all oral or collateral agreements are necessarily deprived of legal effect. The parol evidence rule applies only where the written agreement is or was intended to be the exclusive memorial of the agreement between the parties. Where the written agreement is intended merely to record portion of the agreed transaction, leaving the remainder as an oral agreement, then the rule prevents the admission only of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement. This is often referred to as the 'partial integration' rule. See *Johnston v Leal*[3] and the cases there cited.

[1] 1(3) SA 16 (A) at 26A-D.
[2] 1941 AD 43 at 47.
[3] 1980 (3) SA 927 (A) at 944B-E.

[15] A court may look to surrounding circumstances, including the relevant negotiations of the parties, in order to determine whether the parties intended a written contract to be an integration of their whole transaction or merely a partial integration. See *Johnston* 945D-E. The fact that the parties specifically refer to a topic or subject in the wording is generally an indication that the writing was intended to be conclusive as to that aspect of the transaction. This point is aptly made in the following passage in Wigmore on *Evidence*, s 2430:

'(3) In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic negotiation is dealt with at all* in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation . . . .'

[16] The question of prices and the pricing structure is a matter that was specifically dealt with in the written agreement. The preamble expressly states that '. . . the Contractor undertakes to carry out the work described in the contract specifications at the price or prices quoted, and subject to the general conditions of contract attached hereto'. C16.1 provides that '. . . unless specifically stated otherwise in the Pricing Schedules, all prices are fixed as per the formula agreed upon.' follows that the written agreement must be regarded as conclusive in regard to the applicable rate in respect of the appellant's services.

[17] If it was indeed the common intention of the parties that the rates be varied the appellant could have availed itself of the equitable remedy of rectification. In the event, however, it chose not to do so and is bound to the terms of the written agreement.

[18] Reliance cannot be placed on the allegation in para 6 of the particulars of claim to the effect that the agreement was varied tacitly or by conduct in the light of the aforegoing. Furthermore clause 10.1, which is in effect a non-variation clause, entrenches the pricing provisions against oral or tacit variation. The binding nature of such a provision was emphasised in *SA Sentrale Ko-Op Graanmaatskappy Bpk v Shifren en andere*[4] and affirmed more recently in the case of *Brisley v Drotsky*.[5] Clause 10.1 may be varied otherwise than in writing (as to which see *Clemans v Russon Brothers (Pty) Ltd*).[6] However there is no evidence that the parties agreed or even applied their minds to the question of deleting the clause. It accordingly remains of force and effect.

[4] 1964 (4) SA 760 (A).
[5] 2002 (4) SA 1 (SCA).
[6] 1970 (3) SA 686 (E) at 689E-F.

[19] It was further argued that the respondent's letter dated 1 September 2000 constituted sufficient written authority to increase the rates. This argument is without merit. The letter, in its terms, does not purport to address such issue. The author, Mr Pillay, who was the then financial manager of the Durban region of the respondent, testified that when he wrote the letter he was not aware of any rate increase. He addressed the letter to the appellant because it was experiencing cash flow problems.

[20] In yet a further attempt to neutralise any reliance on the non-variation provision, the appellant sought refuge in the principles of estoppel. It was argued that the appellant had relied, to its prejudice, on Naicker's representation that Mncube had authorised the charging of the increased rate. In order to succeed with a plea of estoppel it had to be shown that Naicker's representation could reasonably have been expected to mislead the appellant. See *Monzali v Smith*.[7] The representation made could not in my view have misled the appellant in view of the formal tender process which was then not yet completed. In these circumstances the appellant could not reasonably have believed that either Naicker or Mncube had authority to increase the rates without the approval of the Tender Board. There was also no representation emanating from the respondent itself that either Naicker or Mncube had authority to vary the rates.

[21] Lastly, and on the assumption that the non-variation clause was applicable, it was argued that the appellant's invoices which were supported by documents signed by officials of the respondent constituted sufficient written authority to vary the rates. This argument cannot be sustained. Clause 10.1 plainly provides that no variation would be permitted unless the respondent had given its 'prior written consent'. The signed invoices or payments certificates do not purport to give consent and even if one were to construe them in that manner such consent was not given prior to any increase.

[22] For these reasons the appeal in respect of the appellant's claim cannot succeed.

## THE COUNTERCLAIM

[23] The respondent seeks by means of the *condictio indebiti* to recover payment from the appellant of the amounts that were overpaid during the period April to September 2000.

[24] The central requirement of the *condictio indebiti* is that the payment or transfer must have been effected in the mistaken belief that the debt was due. It is also an established requirement that the mistake, whether of fact or of law, must be excusable: *Willis Faber*

[7] 1929 AD 382 at 386.

*Enthoven (Pty) Ltd v Receiver of Revenue and another*.[8]

[25] That there was no obligation on the respondent to pay the amounts claimed and that the payments had been made in error can admit of no doubt. The respondent's officials overlooked the unauthorised increase in the rates charged by the appellant and failed to check the rates stipulated in the appellant's invoices against the written agreement.

[26] The court a quo found that although the defendant's conduct was incompetent and negligent it could not be characterised as inexcusable as to be unworthy of the protection of the court. Reliance in this regard was placed on what was stated by this Court in *Bowman, De Wet and Du Plessis NNO and others v Fidelity Bank Ltd*.[9]

[27] For the appellant it was argued that the court a quo had erred in finding that the excusability requirement had been satisfied as the evidence showed that in effecting payment the respondent's officials had been grossly negligent. It was also argued that the court a quo's reliance on *Bowman*was misplaced as the claimant in that case was an executor who fell within one of the recognised exceptions to the excusability principle (see *Bowman*at 44H-45F).

[28] Despite strident calls for its abolition, the excusability requirement has been maintained and applied in a long line of cases beginning with *Rooth v The State*.[10]

[29] It was authoritatively settled by this court in *Willis Faber* a plaintiff seeking to invoke the *condictio indebiti*must prove sufficient facts to justify a finding that the error that gave rise to the payment was excusable. This requirement is not immutable and admits of exceptions particularly in cases involving payments made by persons in a representative position: see *Bowman,*supra (at 40A-C).

[30] Recently there have been renewed calls by academic authors to abolish the requirement. See Daniel Visser *Unjustified Enrichment*[11] and Helen Scott, 'The Requirement of Excusable Mistake In The Context Of The Condictio Indebiti: Scottish and South African Law Compared'.[12] The present matter is clearly not an appropriate case in which to deviate from existing authority since the question of abolishing the excusability requirement was

[8] 1992 (4) SA 202 (A).

[9] 1997 (2) SA 35 (A) at 44C-G.
[10] 1888 (2) SAR 259.
[11] (2008) 316-318
[12] (2007) 124 *SALJ*827.

neither pertinently raised nor argued by the parties.

[31] This court has been reluctant to lay down rules or formulations in order to circumscribe what is excusable and what is not. See *Bowman* at 44D-E. One is however able to discern certain general principles that have emerged from the decided cases. Grossly negligent conduct or inexcusable slackness in the conduct of one's own affairs is generally (but not necessarily) regarded as inexcusable conduct. This has been derived from the statement of Voet 16.2.7 that the ignorance of fact should appear to be 'neither slack nor studied' (*nec supine nec affectata*) or of a fact concerning the plaintiff's own affairs.

[32] Whether the defendant had induced the mistake in the plaintiff has often played an important part in the court's view of what constitutes an excusable error. See for example the facts in *Willis Faber Bowman*.

[33] In *Willis Faber* (at 224E-G) Hefer JA provided the following indications as to what factors might determine the excusability of a particular error:

'It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that, if the payer's conduct is so slack that he does not in the Court's view deserve the protection of the law, he should, as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others, and vice versa. Much will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no *debitum* and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment.'

[34] The nature of the mistake perpetrated by the respondent when each payment was made is clear, but the reason is not. The respondent has failed to explain why the mistake occurred and why it occurred repeatedly over a seven month period.

[35] The written agreement was readily accessible to the respondent's officials. It originated from a formal tender process. Its terms were approved by the Metrorail Tender Board and were a matter of public record. The failure by the respondent's officials to detect the unauthorised increase and to check the rates stipulated in the appellant's invoices with the written agreement can only be attributed to extreme slackness or negligence on their part.

[36] It was argued on behalf of the respondent that the overpayments were induced by the

fact that the appellant had submitted invoices claiming the increased rate of R17.25 per hour plus the 15 per cent administration fee. That submission cannot be sustained. The evidence of both parties was to the effect that there was a careful checking of invoices and supporting documentation before any payment was made.

[37] Having regard to all the circumstances I am of the view that the respondent's conduct was culpable to a degree rendering same inexcusable, and for that reason the trial court ought to have dismissed the counterclaim.

[38] There is yet a further reason why the counterclaim cannot be sustained. It is clear from the evidence that most of the moneys that the appellant received from the respondent were paid to the appellant's employees and the relevant regulatory authorities. The appellant only retained a small percentage thereof in respect of its administration fee. The extent of the appellant's enrichment was therefore minimal. What finds application in the present case is the defence of non-enrichment as enunciated by this court in *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd*,[13] which essentially amounts to this. Where the receiver has lost or disposed of part of that which has been paid to him, he will only be liable for what remains in his hands at the time when the action is instituted. See *Senwes Ltd v Jan van Heerden & Sons CC*;[14] J G Lotz *Enrichment*, 9 *Lawsa* (2 ed), para 213. As the counterclaim ought, for the reasons stated, to be dismissed it is unnecessary to determine the extent of the appellant's enrichment.

## CONCLUSION

[39] It follows that the appeal should be allowed only to the extent of the counterclaim. As the appellant has achieved substantial success on appeal it is entitled to its costs including those occasioned by the employment of two counsel. As far as costs in the court below are concerned these should be borne equally by the parties as each achieved a comparable measure of success.

## THE ORDER

[40] The following order is made:

(1) The appeal succeeds to the extent set out hereunder:

(a) The appeal against the judgment on the appellant's claim of R833 660.87 is dismissed;

(b) The appeal against the counterclaim is allowed;

[13] 1978 (3) SA 699 (A) at 713F-H

[14] [2007] 3 All SA 24 (SCA) para 34.

(c) The respondent is to pay the costs of the appeal, including those occasioned by the employment of two counsel.

(2) The order of the court a quo is set aside and the following is substituted in its stead.

'(a) The plaintiff's claim for R883 660.87 is dismissed;

(b) The defendant's counterclaim for the amount of R515 317.45 is dismissed;

(c) Each party is to pay its own costs.'

_____

**P BORUCHOWITZ**
**ACTING JUDGE OF APPEAL**

Appearances:

For Appellant: D J Shaw QC
E A Matthis

Instructed by
J H Nicholson Stiller & Geshen, Musgrave
Symington & De Kok, Bloemfontein

For Respondent: C J Pammenter SC
Z P Pungula

Instructed by
A P Shangase & Associates, Durban
Mthembu & Van Vuuren Inc, Bloemfontein