IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 55864/14

In the matter between: 14/2/2017

WORLEY PARSONS RSA (PTY) LIMITED Plaintiff

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

13/02/17
DATE

SIGNATURE

EKURHULENI METROPOLITAN MUNICIPALITY Defendant

JUDGMENT

Tuchten J:

1 The plaintiff provides civil engineering services. The defendant was one of its clients. The defendant decided to upgrade the water supply to Tembisa and for that purpose engaged the plaintiff as a consultant. This was formalised in two instructions. The first instruction, for a new water pressure tower and pump station, ("the pump station instruction") was reflected in a letter of appointment dated 7 March 2005 and a letter of acceptance dated 9 May 2005. The second instruction, to reline the reservoir feed providing the water, ("the

reservoir instruction") was reflected in a letter of appointment dated January 2006 and a letter of acceptance dated 17 February 2006.

2 The contractor appointed by the defendant did not adhere to the work schedule. This meant that the plaintiff had to perform additional services above those specifically identified in the contracts between the parties. The plaintiff was entitled in these circumstances to recover additional fees from the defendant. The plaintiff raised these additional charges under the reservoir instruction. The plaintiff from time to time submitted invoices to the defendant claiming payment. The defendant did not pay anything. It later emerged that the defendant withheld payment because the defendant disputed the plaintiff's entitlement to the additional fees and withheld payment under both instructions because the two instructions were in practical terms linked.

3 The defendant was an established client of the plaintiff and the plaintiff adopted a conciliatory attitude to the defendant's failure to pay what the plaintiff believed was due. In about June 2011, representatives of the parties attended a meeting to settle the matter. The defendant made a written offer of settlement. The settlement offer acknowledged that the amount claimed by the plaintiff under the pump station instruction was due in full. But in relation to the reservoir

instruction, the defendant's offer ignored completely the extra services which the plaintiff was obliged to perform. The plaintiff responded in a letter dated 22 July 2011 rejecting the defendant's offer and making a counter-offer of settlement. The counter-offer was for an amount excluding VAT of R1 308 369,92 under the pump station instruction and, similarly excluding VAT, for R1 010 176,88 under the reservoir instruction. In arriving at the latter amount, ie in respect of the reservoir instruction, the plaintiff reduced its claim in respect of the additional work. There was no immediate response to the plaintiff's counter-offer.

4 In about May or June of 2012, however, Ms Nkabinde, an official within the defendant, contacted the plaintiff's in house legal adviser, Mr Galle, and the plaintiff's general manager, Mr Karemaker, to take up the settlement negotiations again. Ms Nkabinde suggested that the defendant was at that stage prepared to settle on the terms proposed by the plaintiff in its letter dated 22 July 2011.

5 The plaintiff handed the matter over to an attorney, Mr Verhage. In a letter dated 6 June 202, Mr Verhage wrote on behalf of the plaintiff to Ms Nkabinde, offering to settle if the defendant paid R1 010 176,68 *exclusive* of VAT on the reservoir instruction and R1 608 705,14 *inclusive* of VAT on the pump station instruction. Mr Verhage's letter

stipulated that the amounts would have to be paid by 20 June 1012. If not, the letter warned, the plaintiff would go to court to recover the "full amounts plus interest and legal costs on both projects".

6 Almost a year later, in a letter dated 28 June 2013, the acting head of department within the defendant, Mr Molemohi, (referencing Ms Nkabinde for enquiries) on behalf of the defendant purported to accept the plaintiff's counter-offer in the plaintiff's attorney's letter dated 6 June 2012. This purported acceptance was of course ineffectual because the offer in the plaintiff's attorney's letter dated 6 June 2012 had lapsed. The defendant also asked for invoices to reflect the settled amounts.

7 The decision makers within the plaintiff, who included Mr Galle and Mr Karemaker, decided that because of the lapse of time, the counter-offer contained in the defendant's letter dated 28 June 2013 was inadequate. The plaintiff wanted the interest which had accrued on its claims as well.

8 Mr Karemaker proceeded to convey this to Mr Molemohi, Ms Nkabinde and Mr Verhage in separate telephone conversations. Mr Karemaker then sent an email (the spreadsheet email) to Mr Verhage on 8 July 2013. The email read:

> [The plaintiff is] happy to accept the offer from [the defendant] provided the interest is also paid as we discussed as follow:

9 These words in the spreadsheet email are followed by a small spreadsheet in relation to the two instructions, adjusting the capital amounts offered to include VAT. The final field in the spreadsheet contains what Mr Karemaker called "Conditions", which were common to both instructions. The text in the Conditions field read:

> Accept without prejudice to our right to claim interest. Offer only valid if payment made in 14 days as offered and interest also covered in FY13/14[1] budget.

10 Mr Galle explained in evidence that the plaintiff had learnt from experience that its state organ clients such as the defendant were often more amenable to settlement around June of a particular year because the financial year of such organs closed on 30 June. It happened that around the close of its financial year, such an organ might have unexpended funds which it could allocate towards an unpaid debt such as those in question. The plaintiff was therefore anxious to take the plaintiff up on its offer as regards the capital immediately but was prepared to give the defendant time to pay the interest.

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1 FY13/14 means the 2013-2014 financial year.

11 Mr Verhage submitted the spreadsheet email to Ms Nkabinde under cover of an email sent on the same day, 8 July 2013 which read as follows:

> Herewith confirmation of the acceptance of [the defendant's] offer. As soon as I receive the invoices it will be forwarded to you. All my client's rights are reserved.

12 Ms Nkabinde sent an email to Mr Verhage with a copy to Mr Molemohi on 9 July 2013. She wrote:

> Thank you for the response and please if your client can send an invoice to tomorrow before end of business; it will be highly appreciated. Thanking you in advance.

13 Mr Verhage sent two invoices generated with date 30 June 2013 to Ms Nkabinde under cover of a letter dated 10 July 2013. This letter records the acceptance of the defendant's offer to pay the capital amounts to the plaintiff. In numbered paragraph 2 of the letter, it is recorded that the acceptance was subject to a reservation of the plaintiff's right "to claim interest on both the" capital amounts and to payment's being made within 14 days from the date of the letter.

14 The defendant paid the capital amounts within the period of 14 days stipulated. It paid the capital due under the pump station instruction on 13 July 2013 and that due under the reservoir instruction on 16 July 2013.

15 By letter dated 11 October 2013, Mr Verhage wrote to Ms Nkabinde to submit an invoice to the defendant for the interest claimed by the plaintiff. The letter clearly sought to distinguish between the two instructions but, in a patent error, referred to both instructions under a heading applicable to the reservoir instruction. However the letter makes clear that the plaintiff was claiming interest on the two claims on slightly different bases. In relation to the reservoir instruction, in respect of which the plaintiff had abandoned part of its claim, the plaintiff sought an interest payment calculated from 6 June 2002, the date when the capital settlement figure was proposed by the plaintiff. In relation to the pump station instruction, the plaintiff sought interest from the various due dates of the invoices which went to make up its claim in this regard. In both cases, interest was calculated up to date of payment. Mr Verhage also submitted invoices dated 27 September 2013, setting out how the plaintiff's interest claims were calculated.

16 The defendant did not respond to the letter from Mr Verhage dated 11 October 2013. By summons dated 28 July 2014, the plaintiff instituted action against the defendant, claiming the interest identified in Mr Verhage's letter.

17 The plaintiff pleaded the initial instructions, alleging that they contained terms entitling the plaintiff would be entitled to levy interest on arrear amounts. The defendant admitted that the terms of the initial instructions permitted the recovery of interest on arrear amounts. Initially the defendant alleged that it had not contracted at all with the plaintiff. This assertion arose because the plaintiff changed its name. The defendant however did not persist in its denial of privity of contract with the plaintiff.

18 The plaintiff went on to plead that the spreadsheet email and the email response of Ms Nkabinde sent on 9 July 2013 constituted a settlement agreement. The defendant accepted that the two emails constituted a settlement agreement. The only defence persisted in by the defendant at the trial was that the settlement agreement, properly interpreted, did not oblige the defendant to pay the interest as calculated by the plaintiff. The computation of the interest, should the plaintiff succeed in establishing its interpretation, was not placed in issue during the trial.

19 The interpretation of the interest provision advanced by the plaintiff was that the parties had excluded from the settlement the interest due to the plaintiff under the initial instructions. The settlement agreement, thus the plaintiff, *preserved* the plaintiff's rights to interest as they existed at the date of conclusion of the settlement agreement. The date from which the plaintiff claimed interest under the reservoir instruction was, the plaintiff conceded, arbitrarily selected by the plaintiff but this was to the benefit of the defendant because its obligation to pay interest in fact arose at an earlier date, in each case some 60 days after submission of the plaintiff's invoice in respect of the work there identified. In relation to the pump house instruction, where there was no dispute at all, the due date was in each case 60 days after invoice.

20 The quantum of interest for which the plaintiff contended at the trial, 15,5% per annum, was that calculated under s 1 of the Prescribed Rate of Interest Act.[2] The applicability of the figure of 15,5% was not placed in issue by the defendant. The undisputed evidence of Mr Karemaker was that failure to pay the amounts owed under the instructions carried interest at 2% per month in accordance with the agreements between the parties. The rate of interest claimed by the plaintiff is therefore lower than that to which it was entitled.

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2 55 of 1975.

21 On behalf of the defendant, it was submitted that the reference to interest in the spreadsheet email which formed the offer to settle should be interpreted to render the defendant liable for interest only if the defendant failed to pay the capital amounts as there stipulated. In its plea, the defendant asserted that it was not the intention of the parties to the settlement agreement that if the defendant paid the capital amounts, invoices rendered prior to the settlement agreement would accumulate interest.

22 I must thus interpret the settlement agreement. The modern approach to the interpretation of documents, including statutory provisions, has been authoritatively set out in a number of cases decided in the Supreme Court of Appeal. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA paras 18 and 25-26, the SCA set out how a court should interpret documents, whether contractual or statutory or otherwise:[3]

> 18 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

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3 In the quotations which follow, I have omitted references to footnotes.

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. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to 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 a 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.

...

[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed

differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.

[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader

> operation of the legislation or contract under consideration.

23 In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 6 SA 520 SCA para 16, the court held:

> *Chartered Accountants (SA) v Securefin Ltd and Another* and *Natal Joint Municipal Pension Fund v Endumeni Municipality* ... make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset.

24 In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 2 SA 494 SCA para 12, the court held in relation to the interpretation of a provision in a contract:

> Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the 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'.

25 In *Commissioner, South African Revenue Service v Bosch and Another* 2015 2 SA 174 SCA para 9, the court held in relation to the interpretation of a provision in an income tax statute:

> The words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material. There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions ... .

26 I think that in this case it will be useful to identify the purpose for which the interest provision was included in the settlement agreement. Only two possible purposes come to my mind and no other was suggested by counsel during argument. The first possible purpose (which I shall

call the narrow purpose) is, as relied upon by counsel for the defendant, to cater for the eventuality that the defendant did not pay the capital sums as stipulated. The second possible purpose (which I shall call the wide purpose), as relied upon by counsel for the plaintiff, is to provide for the calculation of the interest due to the plaintiff pursuant to the failure of the defendant to pay on their due dates the amounts owed under the two instructions which preceded the settlement agreement.

27 I think the language of the spreadsheet email, which constitutes the (counter-)offer to settle, points to the wide purpose. If all the parties sought to achieve were the narrow purpose, then it would not have been necessary to deal with interest at all. This is because interest is generally due by operation of law if a payment is not made by due date.[4] And if the parties had wanted to provide specifically for this possible purpose, then no more would have been needed than that the defendant would be liable to pay interest on the capital sums if they were not paid by due date.

28 The reference to payment of interest to be made from the defendant's budget for the following year suggests that a substantial sum of interest was contemplated. There was no reason to believe that the

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[4] *Crookes Brothers Limited v Regional Land Claims Commission, Mpumalanga* 2013 2 SA 259 SCA para 14

defendant would not be in a position to pay the capital sums as stipulated. But there *was* reason to believe that the defendant would, at the time the settlement agreement was concluded, not have money on hand to pay the plaintiff's substantial interest claim. The defendant had re-engaged in settlement negotiations precisely because it *was* in a position to make speedy payment of the capital. If all that the settlement agreement contemplated was interest on the late payment of the capital, then no reference to the following financial year would have been needed.

29 Finally, on the topic of language, the first sentence of the spreadsheet email is against the narrow purpose. It recites that the plaintiff was happy to accept the offer *provided* ***the interest is also paid as we discussed***.[5] This language suggests, strongly, that interest *would* be (not *might* be) paid. And interest *would* only be paid if the obligation to pay it arose whether or not the defendant paid the capital as stipulated.

30 The evidence that the interest was to be paid *as we discussed* was given by Mr Karemaker, the author of the spreadsheet email. Very shortly before the conclusion of the settlement agreement, Mr Karemaker had discussions with Mr Molemohi, Ms Nkabinde and Mr

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5 My emphasis.

Verhage explaining the basis on which Mr Karemaker required interest to be paid. This conclusion is reinforced by the conjunction "and" in the Conditions field of the spreadsheet email. If the payment of interest was only to be contingent on the failure to pay the capital, it would be unnecessary to make payment of interest a condition, *together with* the condition relating to the due date for payment of the capital, for the validity of the (counter-)offer.

31 As I see it, then, I may safely conclude that the interest provision in the settlement agreement was not designed to achieve the narrow purpose. It therefore follows as a matter of logic that the provision was included in the settlement agreement to achieve the wide purpose.

32 I am fortified in this conclusion by two considerations. Firstly, by the terms of Mr Verhage's letter to Ms Nkabinde dated 10 July 2013, the day after the conclusion of the settlement agreement in which he *reserved* the plaintiff's right to claim interest. This language is consistent with the wide purpose, which was to exclude the plaintiff's right to interest from the ambit of the settlement. If the narrow purpose had been contemplated, no reservation of rights would have been needed. And secondly, the fact that the defendant did not dispute the reliance by the plaintiff on the wide purpose until the plaintiff applied for summary judgment. If Ms Nkabinde or Mr Molemohi had regarded

the narrow purpose as being the correct one, they would have said so when Mr Verhage wrote to claim the interest on 11 October 2013..

33 The reliance by the plaintiff on the wide purpose was not an opportunistic afterthought. In paragraph 13 of the particulars of claim prepared by counsel, the plaintiff pleaded that the defendant was in breach of its obligations arising from both its appointment of the plaintiff and the settlement agreement

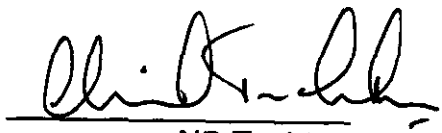
34 The plaintiff has therefore made out its case for the payment of interest. The computation of that interest was not placed in issue. The plaintiff seeks a punitive costs order on the ground that the defendant advanced patently unmeritorious defences in its plea and discovered no documents and called no witnesses in support of its contentions. In my view, however, the defence in which the defendant did persist and with which I have dealt in this judgment does not fall into this category. The conduct of the defendant and its legal representatives in the trial itself before me cannot be and was not criticised. I do not think that a punitive costs order is warranted.

35 I make the following order:

1 The defendant must pay the plaintiff the sums of R608 752,07 and R173 7436,55.

2 The defendant must pay interest on the sums in 1 above at the rate of 15.5% per annum from 21 October 2013 to date of payment.

3 The defendant must pay the plaintiff's costs of suit.



NB Tuchten
Judge of the High Court
13 February 2017

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