IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: A 706/2006

DATE: 21/11/2008

UNREPORTABLE

In the matter between:

SOUTH AFRICAN POST OFFICE LIMITED Appellant

And

TRANSMAN (PTY) LIMITED Respondent

JUDGMENT

HARTZENBERG, J

I have had the benefit of reading the judgment of Legodi J whilst I was writing this judgment. It became clear that we have a fundamental difference in approach. I have now also had the benefit of the judgment of Webster J. My approach is that the appeal ought to succeed, partially, in that the order for payment of the amount of R995 202, 96 is to be set aside but that the appeal against the other parts of the order of the court *a quo*, i.e. for the furnishing of the information and the declaratory order, is to be dismissed. As this is a minority judgment, what follows are the reasons for my decision:

The respondent initiated the matter by motion proceedings. The respondent's case can be summarized as follows: The respondent is a labour broker. The appellant requires the services of a considerable number of temporary employees throughout the country. It makes use of various labour brokers, including the respondent. Before 2000 there were various arrangements between the parties in terms of which the respondent arranged for temporary staff for the appellant.

During 2000 various tenderers, including the respondent, submitted tenders. Autenmas Placements CC ("*Autenmas*") submitted a competing tender. The respondent's BEE credentials were suspect whilst those of Autenmas were good. The appellant suggested a joint venture between the respondent and Autenmas, having in mind an exchange of know-how from the respondent to Autenmas in this field. The two parties accepted the suggestion and a joint venture was formed. On 30 March 2000 the joint venture and the appellant entered into a written agreement entitled: Temporary Assignments and Permanent Appointments Services Contract (*"The joint venture agreement").* That agreement was for a fixed period from 1 April 2000 until 31 March 2002. In practice the respondent arranged for the placing of temporary workers and Autenmas for the placing of permanent employees. Each one of the parties to the joint venture invoiced the appellant separately for services rendered. There was, however, an agreement that the parties to the joint venture agreement were to have an annual comparison and adjustment of figures. Employees' salaries had to be determined, in terms of clause 3.8.1 of the agreement, with reference to the hourly remuneration of permanent employees for similar work to which had to be added certain benefits in terms

of the BCEA ("*The Basic Conditions of Employment Act"*). There was an addition to the agreement to the effect that what was added to the remuneration of employees was not to exceed 50% of the hourly rate of permanent employees for similar work.

The appellant planned a further tender process. By March 2002 the appellant had no other system in place and on 15 April 2002 the senior general manager, human resources of the appellant wrote a letter to the respondent and Autenmas. In fact, and although the letter was directed to the respondent and Autenmas it was only addressed to Ms. Dick of the respondent at the address of the respondent, P O Box 10000 Pretoria. It does not seem as if a separate letter had been sent to Autenmas. It was certainly not directed to be read by any identifiable individual of Autenmas, and it was not addressed to a different address. In the letter it was stated that the duration of "the temporary assignments and permanent appointments services contract" between the receiver of the letter and the appellant was from 1 April 2000 until 31 March 2002. In the letter it was further stated that the appellant would like to use the services on a month to month basis on the same terms and conditions until otherwise decided by one or both of the parties. It was indicated that the appellant reserved the right to make use of other recruitment providers and to use only one or both parties in a joint venture.

The respondent accepted the offer, provided services and invoiced the appellant. During April 2003 the appellant addressed a similar letter to only the respondent. It was again addressed to A Dick P. O Box 10000, Pretoria 0001. Reference was made to a letter of 25 February 2003 in which the respondent had been notified of the appellant's

intention to terminate the contract on 30 April 2003, and it was stated that "we would like to extend **your** contract on a month-to-month basis, until the tender process is finalized." The respondent alleges that it also accepted that offer and performed in terms of it, until after the institution of these proceedings by it during December 2004, when the appellant addressed a letter to it, referring to the joint venture agreement that had expired on 31 March 2002, and continued to state that the respondent continued to provide services to the appellant on a month to month basis in terms of the letters of 15 April 2002 and 9 April 2003 but the respondent was notified that the appellant terminated the agreement with effect from 31 December 2004. On 11 January and using the same mode of address the appellant extended the agreement until 31 March 2005.

Shortly before December 2004 the respondent was brought before the NBCRFI (*"the National Bargaining Council for the Road Freight Industry"*) on charges that it had failed to remunerate some of its employees in accordance with the minimum wages prescribed by law. It applied to have the appellant joined as a party to that proceedings but the appellant resisted the application. In an affidavit, deposed to by Mr. Sipho Nkese, the appellant maintained that it was the respondent's obligation to comply with collective agreements and arbitration awards and that in terms of clause 5.4.4 of the agreement between the respondent and the appellant, the respondent indemnified the appellant against its breaches of the collective agreement. The clause 5.4.4 to which the deponent to the appellant's answering affidavit referred is a clause in the joint venture agreement.

The respondent's claim was that the joint venture agreement provided that it had to pay the salaries of temporary employees and that it had to do so in terms of the provisions of the joint venture agreement, which were of necessity incorporated in the month to month extension thereof as between the appellant and the respondent. To be able to pay the salaries it had to be paid by the appellant on the basis that it was entitled to invoice the appellant in terms of clause 3.8.1 of the joint venture agreement. That entailed that the appellant had to supply it with the necessary information to enable it to determine the hourly rate payable to permanent workers for similar work. In addition thereto the respondent claimed a declaratory order to the effect that the payments were to be calculated in terms of the joint venture agreement.

The respondent's case was that it provided services in many areas throughout the country. From the outset it experienced a problem to get paid the amount to which it was entitled in terms of the contract. Firstly the appellant failed to provide the necessary information to determine the hourly rate. More importantly there was a complete lack of communication between the regional managements and the head office of the appellant. In order to get payment from head office the regional managers had to approve the amounts that were to be paid to the respondent. The regional managers were not prepared to approve figures outside of their budgets. On the other hand there were *de facto* about 400 temporary workers. If they all stopped working simultaneously it would disrupt the services of the appellant but more importantly those 400 workers would lose their incomes. The respondent then arranged with regional managers that it would invoice the appellant with amounts that could be approved by the managers in terms of

their budgets and that the respondents would negotiate with head office to receive the shortfall to which it was entitled. There is no serious dispute that the respondent endeavoured to negotiate with top management of the appellant but that for various reasons the negotiations never moved past a point where the respondent was requested to submit written representations. It is not as if the respondent had been informed that their claim for payment of a shortfall was without any basis and was rejected. On the contrary it seems as if it would not have been unreasonable for the respondent to think that a settlement in terms of which it was to be paid extra monies could be reached.

In its application the respondent alleged that based on information received from one Hougaard of the appellant's Human Resources Management (Staffing and Administration) Division the respondent is able to compute the minimum amount payable to it. The information was allegedly in the form of a short description of the job specification and the hourly salary of six categories of employees with effect from 1 April 2000. It annexed a schedule consisting of more than 500 pages of calculations and concluded that according to that schedule the minimum amount payable to it was R 8 393 062,96 on one basis and R4 565 225,96 on the basis that it was not entitled to more than a 50% increase on the hourly rates. The appellant attacked the calculations on the basis that it did not understand the schedules in that they were without *inter alia* sufficient information in respect of periods worked, employees involved and places where the work had been done. The appellant furthermore maintained that some of the amounts had prescribed.

In the replying affidavit the respondent tried to circumvent the attack upon the calculations by accepting the lower basis of calculation and by deducting from it payments claimed for the period 1 April 2000 to 31 March 2002. It left the aforesaid amount of R995 202, 96. The respondent maintained that on that basis the argument in respect of prescription completely fell away and it only related to the period after the joint venture agreement had expired by effluxion of time. It tried to avoid a possible attack based on the non joinder of Autenmas. Moreover it maintained that it is entitled to the relevant information about the remuneration of all the relevant categories of employees and that it is entitled to a declaratory order defining the basis upon which the actual remuneration that was payable to it by the appellant is to be determined.

The appellant's attack against the respondent's case was, and still is, that the respondent should have foreseen factual disputes incapable of being decided on paper and should have instituted action. Another defence is that the contract on which the respondent relies did not survive the demise of the joint venture and that accordingly there was a series of *ad hoc* agreements between the respondent and the regional managers of the appellant in terms of which both parties have fully complied with all their obligations leaving no scope for any form of adaptation based on an expired agreement. A further defence is that the respondent is not entitled, in terms of the *exception non adimpleti contractus,* to enforce a contract that it has breached. The appellant also denies that the respondent has supplied admissible evidence about the *quantum* of its monetary claim that enables a court to grant judgment in favour of the respondent. Two of the appellant's original defences e.g. prescription and the non-

joinder of Autenmas have become academic for the purposes of this appeal, because of the respondent's decision to limit its claim to monies payable only as from 1 April 2002.

Two of the appellant's defences are mutually destructive. On the one hand the appellant argues that the respondent cannot rely on the joint venture agreement because the joint venture agreement fell away. From that basis the appellant argues that it is not clear what agreement between the parties came into existence when the respondent accepted the offers contained in the letters of 15 April 2002 and 9 April 2003. The argument is that the phrase "The Post Office would like to continue using your service on the same terms and condition (*sic)*, on a month-to-month basis" need not necessarily refer to the joint venture agreement but may refer to the *ad hoc* agreements between the respondent and the regional managers and that in any event the joint venture agreement was for a fixed period that had expired on 31 March 2002. The argument proceeds that the matter should have been referred to evidence because that would be the only way in which the court could ascertain what the terms of the agreement were.

If that argument is correct there is no basis upon which the appellant can argue that because of the working of the *exception non adimpleti contractus* the respondent has no claim against it. For that argument the appellant has to rely on the terms of the joint venture agreement. I shall accept that these are alternative arguments depending upon whether the court finds that the terms of the joint venture agreement were taken up in the month to month agreements or whether the court accepts the appellant's contention that the joint venture agreement came to an end.

The argument that the joint venture agreement fell away and that it is not clear what the terms of the agreement are that came into existence during April 2002 is not correct. In the letter of 15 April the joint venture agreement is mentioned by name. "..the duration of **the temporary assignments and permanent appointments services contract** between yourself and the South African Post Office was from 1 April 2000 until 31 March 2002". It is made clear that the agreement in question was between the appellant and the receiver(s) of the letter and it is put beyond any doubt by the duration of the agreement that "the terms and condition(s)" cannot refer to anything else than the terms and conditions contained in the joint venture agreement. In my view the appellant's doubt about the terms and conditions of the agreement is without foundation. It is an afterthought as is evidenced by its own letter of 24 December 2004 and the letter during early 2005 as well as Mr. Nkese's affidavit.

The appellant placed a lot of emphasis on the fact that the respondent accepted payments below the amounts to which it maintains that it was entitled and invoiced the appellant in those lower amounts, for a period of years without demanding the higher amounts and instituting proceedings for the payment thereof. As I have already mentioned the respondent approached many people in the top management of the appellant, explained its problem and was not summarily told that its claim for payment was without foundation. In paragraphs 62 to 89 of the founding affidavit the respondent explained steps taken by it to resolve the problem about the appellant's failure to provide it with necessary information about the income of permanent workers and to pay the correct amounts to it. These allegations were not really disputed.

The respondent alleged that the little co-operation that existed between the senior managers on site and appellant's head office ceased after March 2001. During 2001 the respondent was advised that the post of senior human resources manager in head office was vacant. Upon being directed to approach Mr. Serage, the human resources manager, based in Braamfontein, the latter advised that he could not assist nor could he direct the respondent to any other senior manager within the region or at head office. The respondent tried to arrange an interview with Mrs. Khomotso Thoka, senior general manager – human resources at the appellant's Pretoria head office. Despite repeated attempts to arrange a meeting with her she could not fit the respondent into her schedule. The respondent approached a general manager one Roy Scahill but he could not assist. During 2002 the respondent located a general manager, Mr. Vinesh Naidoo. He was informed about NBCRFI gazetted increases and was prepared to accept responsibility for it in his area of responsibility i.e. transport and logistics. He could not accept responsibility for staff affected by the BCEA or staff employed in other divisions of the appellant. Significantly, like in respect of all the other instances of alleged representations to particular members of the appellant's staff and nonsensical evasive answers by the appellant, the appellant's reaction to this specific allegation about the conduct of its general manager, transport and logistical services, is that as there is no confirmatory affidavit by him, the allegations attributed to him are hearsay and should be struck out.

It is alleged that Naidoo submitted the respondent's claim to the appellant's legal services and that one Marius Otto was placed in charge of the investigation. Mr. Otto

advised Mr Naidoo that the respondent was indeed liable to pay at least the NBCRFI gazetted increases for affected staff and that Naidoo then approved increases during July 2002, which increases were backdated to March 2001. The appellant paid the backdated invoice in an amount of R322 499, 93. The appellant's reaction to this allegation was that the allegations are patently hearsay and should be struck out. The appellant admits that the amount of R322 499, 93 was paid to the respondent but ingeniously argues that the relevant document does not specifically indicate that the payment had been made in respect of a pre-existing liability!!! It does not gainsay the respondent's allegation that it was late payment for monies owed to it in terms of their agreement.

Mr. Naidoo was approached in respect of NBRCFI increases due in March 2003 but he left the appellant. The respondent was then directed to Mr. Serage to whom a written submission and all the documentation were handed, on 20 March 2003. He failed to respond. Mr. Serage's response is that he refused to accept liability for Bargaining Council rates, that he invited written submissions and passed them on to Ms. Samodien.

The respondent further alleged that apart from Mr. Serage written submissions were handed to Mr. Kopke, operations manager - speed services who failed to respond and that during July 2003 written submissions were made to Mr. Naude of the appellant's legal services, who also failed to respond. Kopke's response to the allegation is that employees of the respondent approached him about outstanding money owed to the respondent, that he asked for a breakdown and after the lapse of some time received a thick file through a colleague, which he did not understand and passed on to Ms,

Samodien. Naude admits receipt of the document but pleads that as he had no background knowledge he was not able to deal with it. It is also common cause that the appellant's chief financial officer, Mr. Buick refused to speak to the respondent.

The respondent approached Mr. Motileng general manager – transport and logistics during August 2003 and handed him a written submission. A further meeting was held with him in November 2003. He failed to respond. The applicant approached Kopke again in August 2003, and a regional manager Mr. Robert Sihlangu during October 2003. During November 2003 the **appellant** sent Mr. Binnendell to the respondent to investigate its submission. The appellant's response to those allegations is that it is accepted that Mr. Motileng was approached and that Mr.Sihlangu was approached. About Binnenndell Mr. Naude of legal services denies that he was sent by **legal services** as he was an internal auditor in another department.

The respondent alleged a meeting with Ms. Samodien during April 2004, after having been referred to her by Mr. Motileng. It was alleged that she agreed that the appellant was liable at least for gazetted increases. During July 2004 she advised that there was a problem. Ms. Samodien admits that there were discussions but denies having made any admissions. It is common cause that during July 2004 there was a discussion with Mr. Sipho Nkese, senior manager, human resources and with Mr. Serage, general manager, human resources and that a written submission was handed to Mr. Nkese.

From the aforegoing it is evident that the appellant's argument that the respondent for a period of years did nothing to assert its claim based on the original agreement is not correct. The respondent constantly pleaded with people in the employment of the appellant for payment. It also searched astutely for the person who could deal with its claim. Moreover the appellant in fact accepted liability for short payment in the amount of R322 494, 96 and paid a backdated invoice. In addition thereto it is not disputed that Mr. Binnendell was sent by someone of the appellant to give attention to the respondent's claim for outstanding payments. If one adds to that that there are many labour brokers and that the institution of an action by the respondent would in all probability have caused the appellant to terminate the agreement with the respondent, as in fact was done during December 2004, the appellant's emotive argument that the respondent's conduct can only be interpreted as showing that it did not believe that it had a claim for extra remuneration against the appellant, falls flat.

It has transpired during argument of this appeal that the respondent has instituted action against the appellant for payment of the shortfall. We were informed that the period for which payment is claimed is from 1 April 2000 until termination of the agreement by the appellant. The respondent indicated that it plans to counter a plea of prescription by relying on its inability to quantify its claim as a result of the appellant's failure to supply the necessary information to it, to do so. I mention this aspect as the institution of the action makes it unnecessary to refer this matter to evidence only for the purpose of quantifying the respondent's claim

As far as the calculation of the amount of R995 202, 96 is concerned, as appears from observations earlier in this judgment, it is the result of more than 500 pages of calculations. When during argument Mr van Blerk was invited to explain to us how the calculations had been made he informed us that the matter was referred to a labour expert and that the expert did the calculations. He admitted that he does not have an idea of the basis upon which the calculations had been made and that he accepts the conclusion to which the expert had come. There is no affidavit by the expert explaining his method of calculation or even just confirming as correct the various amounts that are the result of his calculations. Mr van Blerk argued that the appellant could have employed its own labour expert to check their expert's calculations. In my view there must be sufficient material before the court from which it can satisfy itself as to the basis from which the calculations are to be made and furthermore as to the method of calculation. Quite evidently the court did not have any information of what the basic inputs were that the expert used and why he used them and was accordingly not entitled to grant judgment on the unconfirmed and unexplained calculations of someone who is unknown to all the interested parties. It follows that the appeal against the order that the appellant is to pay an amount of R995 202, 96 is to succeed.

That conclusion does not necessarily mean that the appeal has to succeed in its entirety. In the first place it is unnecessary to refer this matter to evidence for the quantification of the applicant's claim as it has already instituted action during which that can be done. Then, as I have indicated the relief claimed was not solely for payment of the amount of R995 202, 96. As a matter of fact it was evident that the main bone of

contention between the parties was whether the respondent was contractually entitled to further payments over and above the payments that it had received on submission of its invoices. The respondent's stance was that all the services rendered by it were rendered in terms of the provisions of the joint venture agreement. In contrast thereto the appellant maintained that the joint venture agreement "fell away". If it was possible to decide that issue by way of motion proceedings and if the issue was decided in favour of the respondent there was no reason why the court would not have been entitled to order the appellant to furnish the information which it had to furnish because of the agreement, to the respondent. Likewise if the court could find that the joint venture agreement regulated the contractual position between the parties there was no reason why the court could not grant a declaratory order as to the interpretation thereof.

In the result it is necessary to ascertain whether in respect of the real issue between the parties there was a dispute of fact that could not be determined on the papers. In my view the common cause facts overwhelmingly indicate that it was the relevant provisions of the joint venture agreement that formed the basis of the agreement between the appellant and the respondent. I say so for the following reasons:

(a) They were both parties to the joint venture agreement. It is common cause that the respondent rendered services to the appellant, during the period 1 April 2000 until 31 March 2002, completely separate from Autenmas and that it was entitled to invoice the appellant for services rendered by it to the appellant and to receive payment for those

services. The appellant had no interest in the annual comparison of figures and adaptation thereof between the respondent and Autenmas.

(b) The appellant was aware of a strained relationship between the respondent and Autenmas. In a letter dated 2 August 2001 the respondent indicated to the appellant that it stuck to its side of the bargain and provided at its costs training to Ms. Moswa of Autenmas in all aspects of the staffing industry, that Ms. Moswa did not provide the respondent with any information in respect of the joint venture and in fact avoided contact with the respondent and that in breach of the joint venture agreement it rendered services to the appellant which it was not entitled to render. It was stated that the respondent "might ultimately be obliged to seer the relationship with" Autenmas.

(c) The extension of the agreement both in 2002 and in 2003 was a temporary arrangement as the appellant on both occasions said so in so many words and as it is clear that it had failed to arrange a permanent system. It is clear that there were no negotiations between the parties, in respect of the terms of the agreement, and that the terms of the agreement are to be gleaned from the correspondence alone. As the arrangement was only temporary, one would certainly have expected the appellant, if it had a different arrangement for the interim in mind, to have stipulated precisely what new terms would apply. It did not do so. I can accordingly not go along with an argument that the appellant

had a mental reservation about BEE and transformational provisions in the temporary arrangement.

(d) The appellant was at all times under the impression that what had happened since 31 March 2002 was only an extension of the relationship between the parties that existed before that date. The letter of 15 April 2002 refers to the joint venture agreement by name. As I have indicated it was in fact addressed to the respondent and the address of Autenmas does not even appear on the letter. The contents of the letter make it plain that the relationship that existed between the appellant and the respondent (mentioned by name), was to be extended on the same terms for an interim period. There can be no doubt that the letter of 9 April 2003 was only an extension of the previous arrangement. In my view there is no scope to argue that there were different agreements with different terms. The notice of termination dated 24 December 2004 is also unequivocally to the effect that the respondent had rendered services in terms of the joint venture agreement and the letters of 15 April 2002 and 9 April 2003. It most certainly did not create a new or other contractual relationship between the parties. A dead giveaway is Mr. Nkese's affidavit relying on the joint venture agreement towards the end of 2004. There is just no scope for the appellant to argue that the agreement in respect of the respondent's remuneration for services had changed or that the joint venture agreement was terminated before 2005. If it had, one would

have expected information as to when, where and to what extent it had been changed and by whom and how the amendments had been effected.

(e) The only possible basis upon which the appellant can argue that a new agreement came into existence is to argue that the parties by their conduct cancelled the agreement, that a new situation established itself and that the respondent was satisfied to enter into *ad hoc* agreements with regional and branch managers all over the country. I cannot think of any conduct on the side of the appellant that makes it plain that the appellant was no longer prepared to be bound by the joint venture agreement. On the contrary the conduct of the appellant throughout was that the joint venture agreement remained in place until it was finally terminated in the letter of 11 January 2005. One thinks about the letters, the payment of a shortfall of R322 499, 93, the various requests that the respondent was to submit written submissions and the fact that Mr. Binnendell of the appellant's management visited the respondent to investigate its claim based upon the joint venture agreement. Nor does the conduct of the respondent justify an inference that the respondent disassociated itself with the provisions of the joint venture agreement. Although it dealt with regional and branch managers for the reasons explained by it, it throughout dealt with the top management of the appellant and claimed payment on a uniform basis based upon the joint venture agreement. I do not read anything

> sinister therein that the respondent did not specifically refer to clause 3.8.1 of the joint venture agreement. It was for it a difficult situation, where the appellant had to be approached very diplomatically. It was a large contract which could easily be terminated if there was out-and-out confrontation. In addition, cancellation of the agreement would have deprived literally hundreds of employees of their jobs and income. There was, therefore, all the reason in the world to try and convince the appellant to pay glaring shortfalls like gazetted increases.

I am in agreement with the court *a quo* that there is no real dispute between the parties as to what their agreement was. In terms of the agreement the remuneration of employees is based upon the hourly rate of permanent employees for similar work. The appellant is in possession of the information and has to supply it to the respondent. It follows that, except for the argument based upon the *exceptio non adimpleti contractus,* I am satisfied that the court was correct to order the appellant to supply the information and to make a declaratory order as to the basis upon which the respondent's remuneration is to be calculated.

The argument based upon the *exceptio non adimpleti contractus* is to the effect that in terms of the joint venture agreement the respondent was obliged to pay to the employees wages in accordance with statutory provisions. The argument is that it appears that the respondent did not comply with that obligation and that it is accordingly prohibited from maintaining that the appellant must perform in terms of the agreement.

In this connection it is of importance to note that it is the respondent's contention that it could not increase the employees' wages as a result of the appellant's failure to give it the higher remuneration to which it was entitled. It appears that some of the temporary employees working for the appellant resorted to industrial action and that the respondent had to pacify them by assuring them that it would take action against the appellant. In my view the court *a quo* was correct when it approached the matter upon the basis that the main obligation of the respondent was to supply employees to the appellant. The respondent fulfilled those of its obligations. The appellant does not have a direct interest in what the respondent pays the temporary employees as they can take action against the respondent and can `compel the respondent to fulfil its statutory obligations towards them. The appellant cannot deny that the respondent has performed and the respondent is accordingly entitled to counter performance by the appellant.

The result is that in my view the appeal against the payment of the amount must succeed but the remainder of the order is to be left intact. The respondent argues that in such an event the appellant's success was very limited as the main argument was directed at persuading the court that the matter had to be referred to evidence. The appellant maintains that it was substantially successful. In my view it would be fair to make no order as to costs.

In my view the following would have been the correct order:

1. The appeal succeeds in that the order of the court *a quo* is amended as follows: Paragraphs 1.1 and 1.2 of the order are set aside, but the remaining paragraphs, i.e. 2, 3 and 4 are left intact.

2. No order of costs is made in respect of the appeal.

W J HARTZENBERG
JUDGE OF THE HIGH COURT

HEARD ON : 8 October 2008

ON BEHALF OF THE APPELLANTS

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