IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***25th NOVEMBER 2015*** Signature: _____

CASE NO: 2015/17593

In the matter between:

TENDERING MARKETING SERVICES CC t/a T M S STEEL Applicant

and

WESSEL & WATSON STEEL (PTY) LIMITED Respondent

JUDGMENT

ADAMS AJ:

[1]. During May 2015, the applicant launched an application against the respondent for an order for payment by the respondent to the applicant of the sum of R328,000.00, together with interest thereon and cost of the application. The application is founded on a written agreement between the parties dated the 1st October 2012, signed by one Dewald Johannes Coetzer *('Wally')* on behalf of the applicant, and signed on behalf of the respondent by one Trevor Roy Watson *('Trevor').*

[2]. In terms of the agreement, the applicant sold to the respondent some of its assets at an agreed purchase price of R358,000.00.

[3]. The respondent opposed the application and set out its defence in its answering affidavit. In addition to certain points *in limine* raised by the respondent, its defence on the merits is set out in the Answering Affidavit as follows:

> *'Nowhere in the agreement does it state when the amounts claimed become due and payable and the applicant bases its cause of action on a document which is deficient and vague.'*

[4]. The respondent disputes the applicant's claim that it (the respondent) is clearly indebted to the applicant in the amount of R328,000.00. Applicant

alleges that there are genuine disputes of fact and that no final agreement was reached between the parties. There was not a meeting of the minds, so it is alleged by the respondent.

THE FACTS

[5]. On the 1st October 2012, a written agreement *('the agreement')* was concluded between the applicant, cited in the agreement as *'TMS Steel CC'* and the respondent. The agreement was signed on behalf of the applicant by Dewaldt Johannes Coetzer *('Wally')* and on behalf of the respondent by Trevor Roy Watson *('Trevor').*

[6]. In terms of the agreement, the applicant sold to the respondent certain of its assets at an agreed purchase price of R358,000.00.

[7]. The purchase price of R358,000.00 was payable, in terms of the agreement, as follows:-

> *'Trevor agreed to pay for all of the assets on the basis of R100,000.00 deposit, and the balance of R258,000.00 to be paid in ten equal instalments of R25,800.00 per month for ten months'.*

[8]. The agreement was closely linked to, albeit completely independent of a contract of employment between Wally and the respondent. In fact,

reference is made in the written agreement of sale to the negotiations relating to the remuneration to be paid to Wally by the respondent. It was, for example, recorded in the agreement that an offer of a gross salary of R38,000.00 was tabled by the respondent, presumably payable to Wally.

[9]. Subsequent to the conclusion of the agreement, the purchase price was never paid by the respondent to the applicant. The respondent failed to effect payment to the applicant of either the deposit of R100,000.00 or any of the monthly instalments of R25,800.00 per month. What did, however, happen was that Wally took up employment with the respondent at the beginning of October 2012. At some point, Wally fell ill and during February 2015, he resigned from the employ of the respondent. An agreement was reached between Wally and the respondent in terms whereof an amount of R30,000.00, in lieu of 2 months' salary paid to Wally by the respondent whilst he was absent from work, would be set off against the amount owing to the applicant. This then reduced the respondent's indebtedness to the applicant to R328,000.00 as and at the 5th February 2015.

[10]. On the 10th March 2015, Wally addressed a communication to the respondent's Trevor in which he states, *inter alia*, the following:

'I questioned Mr Watson on the date on which I can expect payment for equipment bought from me (TMS) in October 2012 as per the signed agreement by myself and Mr Watson.

… …

(The agreed and signed for price R358,000.00 back then, less 2 X R15,000.00 in lieu of salary when I was off ill). This equipment was in use at WWS and other branches of the EET Group of Companies for the last two and a half years without me (TMS) receiving any payment as per our signed agreement.

During this period I did not insist on any payment because I understood that there was a good working relationship between Mr Watson and myself and that he will honour our agreement at a time convenient for WW Steel'.

[11]. The aforegoing advices from Wally, on behalf of the applicant, to the respondent, are viewed by the respondent as confirmation that the original agreement provided that the purchase price became due and payable by the respondent to the applicant *'when it was convenient for the respondent to make payment'.* Alternatively, that the agreement was subsequently amended to provide thus.

[12]. In extensive correspondence between the respondent and the applicant's legal representatives during April 2015, the respondent accepted its liability to the applicant for an amount of R328,000.00. Respondent did, however, indicate that in its view, the amount was not payable because, as Trevor puts it in an e – mail communication of the 22nd April 2015:

> *'The facts changed and there was tacit agreement that the payments would be made as and when the company could afford this, and in fact Wally has confirmed this in the e – mail I sent you':*

[13]. This communication was followed by further negotiations and more attempts to reach some sort of a payment arrangement. In the end, the endeavours to agree on a payment plan were to no avail as the parties could not reach consensus despite the fact that offers and counter – offers were made.

[14]. During this time and more particularly on the 1st May 2015, the respondent in an e – mail to the applicant's attorneys again confirmed that the amount is due to the applicant. However, again it is alleged by the respondent that there was in place a subsequent agreement in terms whereof the respondent would pay the applicant *'when convenient'.*

[15]. After the founding affidavit was deposed to on behalf of the applicant, the respondent made payment to the applicant of two amounts of R27,500.00 each, totalling R55,000.00, which the applicant concedes should be deducted from the amount claimed, thus further reducing the respondent's liability to applicant, on the applicant's own version, to R273,000.00.

POINTS IN LIMINE

[16]. The respondent raised two points *in limine.*

[17]. The first one, which was raised for the first time during arguments before me, relates to the fact that, according to the respondent, the application is irregular in that the affidavits of the applicant (both the founding affidavit and the replying affidavit), do not comply with the provisions of the Justices of the Peace and Commissioners of Oath Act number 16 of 1963 *('the Act')* and its regulations. The basis on which this point is raised is not altogether clear. However, during argument, Counsel for the respondent contended that the non – compliance lies therein that the Commissioner of Oaths, whom he presumes to be a Commissioner of Oaths ex Officio, has not indicated his designation. This, so it was submitted on behalf of the respondent, does not comply with the regulations promulgated under and in terms of the Act. I was not specifically referred to the precise regulation.

[18]. There is no merit to this point *in limine*.

[19]. In terms of section 5(1) of the Act, the Minister may appoint any person as a commissioner of oaths for any area fixed by the Minister, in terms of subsection (2), any commissioner of oaths so appointed shall hold office during the Minister's pleasure.

[20]. In terms of section 6, the Minister may designate the holder of any office as a commissioner of oaths for any area specified in such notice and may, in like manner, withdraw or amend any such notice.

[21]. On the face of it, the Commissioner of Oaths has complied with all his obligations and duties in terms of the Act and the Regulations. His official stamp indicates his full names as *'Raymond Clement Dunn'* and that he is a *'Commissioner of Oaths, Registration Officer, Reference no: 9/1/8/2 Kempton Park, INKOLEKO TRADING 367 CC'.* The way I read the official stamp of the Commissioner of Oaths is that he in fact was appointed in terms of section 5(1) of the Act and not *ex officio* in terms of sec 6. For this reason alone the objection to his commissioning of the affidavit ought to fail, because there would then not be any need for him to indicate his designation.

[22]. Respondent submits that Mr Dunn has not set out any basis upon which to establish that he is indeed a Commissioner of Oaths. For the respondent to succeed with this point, it has to be inferred that Mr Dunn holds himself

out as a Commissioner of Oaths when he is not one. There is, however, no evidence before me from which I can draw that inference. The respondent had open to it the option to investigate whether or not Mr Dunn was indeed a Commissioner of Oaths. It did not do so and instead opted to make the bold and very bald statement, by implication, that the Commissioner of Oaths fraudulently holds himself out as a Commissioner of Oaths when in fact he is not one. This approach is not tenable. In any event, the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium*, also known as the *'presumption of regularity'*, finds application. In terms of this maxim, acts are presumed to have been lawfully done until proof to the contrary is produced.

[23]. Accordingly, the first point *in limine* stands to be dismissed.

[24]. The second point *in limine* relates to the issue of authority to act on behalf of the applicant, a Close Corporation. This point was not pursued with any conviction during arguments before me by the respondent's Counsel and, in my view, for good reason. The respondent's objection to the deponent's authority is along the lines that no proof that Wally is authorised to bring this application, for example in the form of a resolution, has been provided. This point, in my view, is defeated by the fact that a resolution was attached to the applicant's replying affidavit. Even without the resolution, I am not convinced that the point ought to succeed. The point is that the

deponent is the sole member of the applicant and there can accordingly be little, if any, doubt that he would have authorised the proceedings.

[25]. Therefore, the second point *in limine* also has no merit and should fail.

THE ISSUES & RESPONDENT'S DEFENCES

[26]. The defences of the respondent are twofold.

[27]. The first being that the written agreement between the parties is *'deficient and vague'* in that whilst the agreement expressly indicates that it is entered into between the applicant and the respondent, it is provided in the body of the agreement that Trevor agreed to pay for all the assets on the basis of a R100,000.00 deposit and the balance of R258,000.00 to be paid in ten equal instalments of R25,800.00 per month for ten months. This, according to the respondent, means that it is unclear who the parties to the agreement are.

[28]. It is submitted on behalf of the applicant that on a proper reading of the written agreement, there can be very little, if any, doubt that the agreement was concluded between the applicant and the respondent and that the reference to Trevor agreeing to pay was obviously a reference to him agreeing to pay on behalf of the respondent. I agree with this submission

for the simple reason that this would be the logical interpretation of the contract. I shall revert to this reasoning in more detail later on in my judgment.

[29]. Secondly, it is contended by the respondent that nowhere in the agreement is provision made for the date on which the contract price is payable. Closely aligned to this contention is the claim by the respondent that the events subsequent to the conclusion of the agreement confirm that the intention of the parties had always been that the purchase price would be paid by the respondent to the applicant whenever it is convenient for the respondent. I get the impression that at times, especially if regard is had to the correspondence during April 2015, it is the respondent's case that after the agreement was entered into, there was a tacit agreement in terms of which the payment terms had been amended to the effect that payment falls due when the respondent could afford to make the payment. Either way, by the time the application was launched, so it is submitted by the respondent, even if the amount is owed, it was not due and payable.

[30]. The respondent therefore argues, seemingly in the alternative, that the agreement that the contract price would be paid when convenient for the respondent, was a novation of the agreement entered into between the parties on the 1st October 2012.

[31]. As regards the *'alternative defence'*, the respondent has to show that the agreement that the respondent would pay when in a position to do so was intended by the parties to novate the original agreement. The last time the respondent communicated with the applicant's attorney was on 2nd May 2015 and he had this to say towards the end of the e – mail:

> *'You see I have never contested the fact that I owe Wally the money for the assets. He will be paid irrespective of what you do. My issue is the terms of the settlement because <u>these were definitely altered by mutual agreement'</u>* (my emphasis).

[32]. Although there is no mention specifically made of novation in the subsequent correspondence between the parties, the implication from a proper reading of the correspondence between the parties is that, according to the respondent, the original agreement was novated.

[33]. I am of the view that the dispute raised by the respondent is not a genuine dispute of fact but a dispute of law and that it is a matter of legal argument to be determined by the court. The dispute raised by the respondent is a matter of contractual interpretation. In my opinion, this court is called on to interpret, first and foremost, the written agreement and in particular, the clauses relating the payment terms relative to the date of payment, if any.

THE LAW

[34]. I now turn to the applicable law, including the principles relating to the interpretation of contracts.

[35]. In *Plascon – Evans v Van Riebeeck Paints,* 1984 (3) 623 (AD), the principles relative to the assessment of factual issues in motion proceedings are set out as follows at pg 634:

> *'It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or* bona fide *dispute of fact (see in this regard* Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 1155 (T) at 1163 - 5;* Da Mata v Otto NO*, 1972 (3) SA 858* (A) at 882D - H). *If in such a case the respondent has not*

availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd, *1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg* Rikhoto v East Rand Administration Board and Another*, 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the* Associated South African Bakeries case*, supra at 924A)*.

[36]. It is trite that the principles applicable to the interpretation of written documents apply to the interpretation of written contracts, namely that the primary meaning of the document must be determined from the language in accordance with the well-known rules of interpretation.

[37]. The written agreement between the parties must be read as a whole to determine the true intention of the parties thereto and if unambiguous, no intrinsic facts or evidence are permissible to contradict, amend or qualify the terms thereof. In that regard, I have had regard to the matter of *Total*

SA (Pty) Ltd v Bekker, 1992 (1) SA 617 (A) at 624J-625B where Smalberger JA held that:

> *'What is clear, however, is that where sufficient certainty as to the meaning of a contract can be gathered from the language alone it is impermissible to reach a different result in drawing inferences from the surrounding circumstances... The underlying reason for this approach is that where words in a contract, agreed upon by the parties thereto, and therefore common to them, speak with sufficient clarity, they must be taken as expressing their common intention..."*

[38]. Also, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2012 (4) SA 593 (SCA), at paragraph 18 where Wallis JA held that:

> *'The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning*

is possible, each possibility must be weighed in the light of 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'.

[39]. It is settled law that interpretation is a matter of law and not fact. The interpretation is a matter for the court to decide and not for a witness. This was set out in *KPMG Chartered Accountants SA v Securifin Ltd & Another,* 2009 (4) SA 399 (SCA) at par 39***.***

[40]. The law of novation is defined as the replacing of an existing obligation by a new one, where the existing obligation is discharged in full. This is set out in Christie on Contracts, 6th Edition, page 466 and 467. It is essentially a matter of intention and consensus. There must be a *'clear', 'cogent' and 'unequivocal'* intention by the parties that a novation was intended as set

out in *Rodell Financial Services (Pty) Ltd v Naidoo & Another,* 2013 (3) SA 151 (KZP) at para 12**.**

[41]. There is in our law a presumption against novation. The party alleging novation has the onus to show that a novation was indeed intended by the parties. It is presumed that a creditor intends strengthening and/or confirming an existing right with a new contract that is creating a second obligation rather than destroying it through novation. This is also set out in the *Rodell* case *supra*.

[42]. There can be no objection in principle to a second obligation arising in respect of an existing debt. This is set out in *Adams v SA Motor Industry Employers' Association,* 1981 (3) SA 1189 (A) at 1198D***.***

[43]. Thus, two independent obligations can co-exist in respect of the same performance or common debt. Unless novation is intended, which is not presumed, two obligations can and do co-exist. Also set out in the Adams case *supra.*

[44]. If a second contract does not novate the first contract, the debtor faces the possibility of being sued on either of them. This is no hardship as the debtor has agreed to both contracts and the risk of being sued under and in terms of both contracts. The right of a creditor to enforce the original

contractual obligation may be suspended until the maturity of the second contract or obligation. However, where the debtor is in breach of its obligations under the second contractual obligation, the creditor will be entitled to enforce his rights under the first contractual obligation.

APPLYING THE PRINCIPLES TO THE FACTS *IN CASU*

[45]. Having regard to the principles set out above, I now turn to consider their application to the facts of this case.

[46]. All things considered and applying basic logic, it has to be accepted that the written agreement was concluded between the applicant and the respondent. The reference to Trevor paying the purchase price clearly means that he would pay in his representative capacity for and on behalf of the respondent. This is the most sensible interpretation. In that regard, I have had regard to the following principle enunciated in the *Natal Joint Municipal Pension Fund* matter (supra): *'A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'.*

[47]. I am, therefore, of the view that the written agreement was concluded between the applicant and the respondent and I reject the respondent's contention that it is not clear from the contract who the parties to the agreement were.

[48]. The second issue requiring an interpretation of the terms of the agreement relates to the clause providing that the respondent would pay the purchase price *'… on the basis of R100,000.00 deposit, and the balance of R258,000.00 to be paid in ten equal instalments of R25,800.00 per month for ten months'.*

[49]. Again, if one applies the *'sensible meaning'* approach, as against one which leads to an unbusinesslike result, the inescapable conclusion is that the parties intended the deposit of R100,000.00 be payable on the date of signature of the agreement, being the 1st of October 2012 and the balance to be paid in ten monthly instalments of R25,800.00 each, with the first instalment being payable on or before the 1st November 2012 and the subsequent instalments being payable on or before the 1st of each and every succeeding month until the last instalment, which was payable on or before the 1st of August 2013.

[50]. I therefore find that there is no merit in the contention on behalf of the respondent that the agreement does not provide for a date or dates on which the purchase price would have become due and payable.

[51]. For the same reasons, notably an approach based on a sensible meaning of a contract, I reject the respondent's submission that the original agreement provided that the purchase price would be due and payable at

the convenience of the respondent. The said submission is unsustainable. In any event, if this contention is accepted, then it begs the question why it was necessary for the parties to provide for payment in instalments, as they did in the contract if the respondent could pay only when he could afford to do so.

[52]. This then leaves me with the issue relating to whether or not the agreement was subsequently amended / novated to allow the respondent to pay the purchase price and when he could afford to do so.

[53]. As I indicated above, in our law, there is a presumption against novation and the respondent bears the onus to demonstrate that the parties, in their subsequent dealings, intended to novate the above the original contract.

[54]. What I have before me is evidence that there were discussions with a view to agreeing on a *'payment plan'* so as to accommodate the respondent and the financial hardships it was experiencing. The applicant makes it clear that it did not insist on payment because of the relationship between the parties at the relevant time. In my view, this does not, however, even begin to translate into a novation. It is clear that at all relevant times the applicant had no intention of novating the agreement and it therefore cannot be said that there was a *'clear', 'cogent' and 'unequivocal'* intention

by the parties to novate, as was required in *Rodell Financial Services (Pty) Ltd v Naidoo & Another*, 2013 (3) SA 151 (KZP).

[55]. At best for the applicant, the events subsequent to the date on which the written agreement was concluded gave rise to a second obligation in respect of an existing debt. This is as per *Adams v SA Motor Industry Employers' Association,* 1981 (3) SA 1189 (A) at 1198. This would mean that two independent obligations co-exist in respect of the same performance or common debt. The applicant would then be entitled to sue the respondent on either one of the two causes of action.

[56]. This is no hardship as the debtor has agreed to both contracts and the risk of being sued under and in terms of both contracts. The right of a creditor to enforce the original contractual obligation may be suspended until the maturity of the second contract or obligation. However, where the debtor is in breach of its obligations under the second contractual obligation, the creditor will be entitled to enforce his rights under the first contractual obligation.

[57]. For all of these reasons, I am of the view that there was no novation of the original written agreement and, therefore, the respondent is liable to the applicant in terms of the written agreement dated the 1st October 2012.

[58]. I therefore intend granting judgment against the respondent in favour of the applicant for the amount of R273,000.00. Applicant also claims *mora* interest from the 1st of October 2013. I am of the view that, in light of my findings above relating to the dates on which the purchase price ought to have been paid, the applicant is entitled to interest at the legal rate from this date, being the 1st October 2013, to date of final payment.

COSTS

[59]. Counsel for the applicant argued that the opposition to the its' application was vexatious. Accordingly, so it was submitted, the respondent should pay the applicant's cost on the scale as between attorney and client.

[60]. I have had regard to the matter of *In re: Alluvial Creek Ltd,* 1929 CPD 532, in which case the principle is laid down that, in its discretion to award a punitive costs order, the court should have regard to the proceedings by a party which are vexatious in that they put the other side through unnecessary trouble and expense which the other side ought not to bear. The applicant's bone of contention relates to the fact that, by all accounts, the respondent had accepted liability for the amount claimed but raised a defence that payment was not due on rather spurious grounds.

[61]. Whilst it may well be that the respondent ought to have adopted a more compromising approach to the applicant's claim, I am of the view that this

does not warrant the court showing its displeasure by granting a punitive costs order.

ORDER

In the circumstances I make the following order:

1. The respondent shall pay to the applicant the amount of R273,000.00.

2. The respondent shall pay to the applicant interest on R273,000.00 at the rate of 15.5% per annum from the 1st October 2013 to the 17th July 2014 and at the rate of 9% per annum from the 18th July 2014 to date of final payment.

3. The respondent shall pay the plaintiff's taxed or agreed party and party costs on the High Court Scale.

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L ADAMS
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	5th November 2015
JUDGMENT DATE:	25th November 2015
FOR THE APPLICANT:	Mr S B Friedland
INSTRUCTED BY:	Beder – Friedland Incorporated
FOR THE DEFENDANT:	Adv B A Morris
INSTRUCTED BY:	Salant Attorneys