

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	<input checked="" type="checkbox"/>
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	<input checked="" type="checkbox"/>
(3) REVISED.	
24/11/2016	
<u>DATE</u>	<u>SIGNATURE</u>

CASE NO: A374/2015

DATE: 24/11/16.

IN THE MATTER BETWEEN:

**STRATEGIC ENVIRONMENTAL
FOCUS (PTY) LTD**

Appellant (Defendant *a quo*)

and

GIS GLOBAL IMAGE (PTY) LTD

Respondent (Plaintiff *a quo*)

JUDGMENT

KOLLAPEN J:

1. The appellant, having been granted leave by the Court *a quo*, appeals against the whole of the judgment and order of that Court, wherein it was ordered to pay the respondent the sum of R180 000 together with interest and costs,

arising out of a contract for services the respondent performed for, and on behalf of, the appellant.

2. The following common cause facts underpin the appeal:

2.1 The parties entered into a written contract which described the nature of the work to be performed as follows:

‘Strategic Economic Focus (Pty) Ltd (SEF) has been appointed to undertake the compilation and implementation of a census data base, to facilitate a social survey of the households within the study area. As previously agreed with Marilene Heunis of Strategic Environmental Focus (the ‘lead consultant’) GIS Global Image (PTY) LTD (the ‘sub-consultant’) has indicated that it is willing to act as a specialist consultant for the project and it is agreed by the parties thereto that this letter (the ‘agreement’) serves to confirm the appointment of the sub-consultant and sets out the conditions of appointment.’

2.2 The contract provided further as follows with regard to the arrangements for payment:

1.2 The Sub-consultant is to submit their invoice directly to the Lead Consultant.

1.3 The Lead Consultant will reimburse the Sub-consultant on receipt of payment from the Client.'

- 2.3 The respondent rendered the services it was required to in terms of the contract and submitted an invoice in this regard to the appellant as was contemplated in Clause 1.2 of the contract.
 - 2.4 There is no dispute that the respondent rendered the services contracted for in a satisfactory manner, and discharged diligently all its obligations in terms of the contract.
3. The only issue in dispute and for determination was whether clause 1.3 of the contract constituted a condition suspending the appellant's liability for payment or whether it merely constituted a time stipulation in respect of the liability to pay.
 4. The court *a quo* in finding for the respondent concluded that there was a lack of consensus between the parties and then proceeded to apply the *contra proferentum* rule in favour of the respondent. The rule is described in *Christie's The Law of Contract in South Africa* 6th edition at page 232 as follows:

'The first point to remember about the contra proferentum rule and its associated rules is that, unlike the other rules of construction, they are not concerned with ascertaining the common intention of the parties. They are only to be applied as a last resort, when all methods of ascertaining the common intention of the parties have failed, in order to cut the Gordian knot. They are therefore rules of law rather than rules of construction.'

5. In argument before us the appellant persisted in its stance that clause 1.3 of the contract created a condition for the coming into existence of the liability of the appellant, namely that its legal obligation to pay the respondent would only arise upon it being paid by the client.
6. In interpreting the contested provisions of the contract the Court is enjoined to follow the approach enunciated in ***NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY 2012 (4) SA 593 (SCA)*** at 603F to 604B:

'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 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.'

7. Indeed in ***SAKHIWO HEALTH SOLUTIONS (LIMPOPO) (PTY) LTD v MEC OF HEALTH, LIMPOPO PROVINCIAL GOVERNMENT [2015] JOL 33718 (SCA)***, the Court endorsed this approach in the following terms at paragraph 25:

'The principles governing the construction of a contract are well-stated. I do not propose to rehearse them. In ascertaining the meaning the court must establish what the parties intended – what the purpose of the contract was. In doing so, a court must consider all of its provisions and may not isolate any of them and consider them in a vacuum.'

And at paragraph 28 the Court added:

'Moreover, a contract must be interpreted so as to give effect to its purpose, and to make business sense.'

8. Finally in ***VENTER AGENTSKAPPE (EDMS) BPK v DE SOUSA 1990 (3) SA 103 (A)*** the court was required to distinguish between a condition precedent to creating liability, and a time clause where the agreement provided that estate agents' commission would be payable from the first available cash paid in terms of the contract.

The court found that the term constituted a time clause as to when the commission which had already been earned, would become payable. In its judgment the court referred to the work of Pothier *A treatise on the law of Obligations* in underpinning the distinction between a condition and a term as follows at 111E-G:

'A term differs from a condition, inasmuch as a condition suspends the engagement formed by the agreement: whereas a term does not suspend the engagement, but merely postpones the execution of it. A person who promises to pay upon a certain condition is not a debtor until the condition has taken place; there is merely an expectation of his becoming so; therefore if he pays what is the object of the obligation, by mistake and before the condition is accomplished, it may be reclaimed, as we have seen in the preceding article; on the contrary, a person who

owes anything subject to a term not yet expired, is a real debtor, and if he pays within the time he has no right of repetition, for he has only paid what was in effect due from him; but though he is a real debtor, he is not compellable to discharge his obligation until the expiration of the term.'

9. Thus when one has regard to the language of clause 1.3 of the contract, as well as the context and the circumstances attendant upon its coming into existence it becomes evident that clause 1.3 does not create conditions but merely constitutes a time clause. The following in my view supports such a conclusion:

- 9.1 Clause 1.2 provides for the submission of an invoice and the date of submission is not linked to payment being on hand from the client.
- 9.2 Clause 1.3 does not in any manner whatsoever suggest that payment will ONLY (*my emphasis*) be made on receipt of payment from the client.
- 9.3 In opposing summary judgment, the stance of the appellant was that the client was indebted to it for various amounts including the claim of the respondent. It is inconceivable that if the claim of the respondent following the submission of its invoice had not created legal liability, that the appellant would have described the amount as constituting an indebtedness to it on the part of the client.

9.4 The evidence was clear that the agreement concluded between the appellant and its own client did not provide that the appellant rendered its services on a risk basis. It would hardly make good business sense or give effect to the purpose of the contract for the respondent to provide its services to the appellant on a risk basis, particularly in light of a client whose identity was unknown to it.

10. In my view the facts that present themselves are indistinguishable from those that prevailed in the *VENTER AGENTSKAPPE (EDMS) BPK* matter (supra) and the conclusion therefore that should follow should be no different.

11. In the circumstances I am of the view for the reasons given that clause 1.3 constitutes a time clause and it being clear that the event stipulated in the clause will not arrive (the appellant having not received payment and having elected not to pursue payment from the client) the doctrine of fictional fulfilment should be applied justifying the respondent receiving payment which it had earlier become entitled to.

12. For the sake of completeness and even if I am wrong on the interpretation of clause 1.3 then in any event this is precisely the kind of matter where the *contra proferentum* rule would apply in favour of the respondent. The appellant, being the author of the contract, could have constructed the contract

to create conditional liability on its part and having not done so the rule must operate against it and the general situation, namely that a contractor who appoints a sub-contractor must pay for the services rendered, should apply.

ORDER

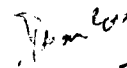
13. In the result I would propose the following order:

That the appeal be dismissed with costs, such costs to include the opposed application for summary judgment, as well as the first application for leave to appeal against summary judgment.



N KOLLAPEN
JUDGE OF THE HIGH COURT

I AGREE,



W R C PRINSLOO
JUDGE OF THE HIGH COURT

I AGREE,



S P MOTHLE
JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

A374/2015

HEARD ON: 09 November 2016

FOR THE APPELLANT: Adv. A Liversage

INSTRUCTED BY: Prinsloo Bekker Attorneys (ref.: PC Prinsloo/S30/11)

FOR THE RESPONDENT: Adv. J P van den Berg

INSTRUCTED BY: VHI Attorneys (ref.: W O'Reilly/RP/RG0002)