

SOUTH AFRICA / JUDGMENT

## Badger Industrial Services v Tailco Chrome (PTY) LTD and Others (M193/2017) [2018] ZANWHC 54 (22 February 2018) [2018] ZANWHC 54

COURT

North West High Court, Mafikeng

BEFORE

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CASE / FILE NUMBER

M193/2017

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*“IN THE HIGH COURT OF SOUTH AFRICA”*

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: M193/2017

In the matter between:-

BADGER INDUSTRIAL SERVICES

APPLICANT

And

TAILCO CHROME (PTY) LTD

FIRST RESPONDENT

VENTURE CAPITAL NORTH WEST(PTY)

SECOND RESPONDENT

JOHANNES WILLEM VAN WYK

THIRD RESPONDENT

STEPHEN WHYTE NANO MATABOGE

FOURTH RESPONDENT

GABRIËL JAKOBUS PETRUS VOSTER

FIFTH RESPONDENT

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CIVIL JUDGMENT

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GUTTA J.

A.

INTRODUCTION

- [1] Applicant applies for judgment against the respondents jointly and severally for an amount of R10 919 636.23 plus interest of 10.5% per annum from 26 April 2017 until date of payment. Applicant also applied for judgment against the respondents jointly and severally for an amount of R126 295.82 plus interest at 20% per annum from 25 April until date of payment. Applicant further seeks an order authorising perfection of a Notarial Bond.
- [2] Applicant's claim against first respondent is based upon monies due and payable for services rendered in terms of a written service agreement and loan agreement. Applicant's claim against second to fifth respondent is based upon a written suretyship agreement in terms of which second to the fifth respondents bound themselves as sureties and co-principal debtors for first respondent's debt.
- [3] The respondent filed a counterclaim against applicant for inter alia the following:
- a) Transfer of 8% shareholding held by applicant in the first respondent.
  - b) Confirmation that third and fifth respondents are released from the suretyship.
  - c) Cancellation of the notarial bond.
  - d) Applicant pay the costs of cancellation of the notarial bond.
- [4] At the hearing Counsel for the respondents, Mr Chaskalson abandoned their counter claim and placed on record that all issues in relation to the suretyship are not proceeding and the respondent opposition is only in respect of the principal debt.

B. HISTORY

- [5] On 4 December 2013, first respondent and applicant concluded two contracts relating to first respondents' operations at the Kroondal Xrata mine. The first contract was a loan agreement and the second was a service agreement.
- [6] In terms of clause 3 of the loan agreement:
- 6.1 First respondent has an operating plant at Xrata Kroondal and requires capital in the amount of R8 500 000 to erect a second plant on the site;
- 6.2 Applicant will advance first respondent the amount of R8 500 000 for this purpose; and

6.3 First respondent will provide applicant with a materials handling contract at the site of the Xrata Kroondal plant for all the yellow machine work required by Tailco at its plants.

- [7] The second contract concluded was a service agreement. It was the materials handling contract anticipated by the loan agreement. In terms of the service agreement, first respondent engaged applicant as contractor to perform certain services.
- [8] The respondents raised two points in limine which is considered hereinbelow:

#### C. POINTS IN LIMINE

##### CLAIM HAS NO LEGAL BASIS

- [9] The respondent alleged that in prayer 2 of the Notice of Motion applicant claimed payment of an amount of R126 295.82 arising from a loan agreement. The respondent alleged that the claim has no legal basis as the loan has been paid in full and settled by first respondent. The last instalment in the amount of R126 295.82 plus vat was paid on the 9 May 2017 after the application was launched.
- [10] Counsel for applicant, Mr Esterhyse conceded that the final payment due in terms of the loan agreement was made after first respondent was in mora and after the application was issued and accordingly did not persist with the order sought in prayer 2 of the Notice of Motion.

##### PREMATURE CLAIM

- [11] The respondents allege that first respondent has duly paid the instalment due in terms of the service agreement and in fact paid monthly more than it was required to pay. That even if first respondent defaulted on its obligations to pay the amounts timeously, the service agreement does not have an acceleration clause which entitles applicant to claim all amounts due and payable immediately in terms of the agreement up to the date of the end of agreement. The respondents allege that applicant's claim is accordingly premature.
- [12] Applicant alleged that the second point in limine is without any legal basis and stands to be dismissed with costs as applicant does not claim for payment of future amounts due in terms of the memorandum of agreement but claims for amounts already due and payable in terms of the service agreement.
- [13] As the second point in limine is intertwined and related to the merits of the application it is considered more fully hereinbelow.

#### D. MERITS

[14] Mr Esterhyse on behalf of applicant submitted that applicant's claim is for services from November 2016 to February 2017. Applicant attached the invoices (FOU3(a) – (c)) for service rendered for that period. The respondents in the answering affidavit admitted that invoices FOU3(a) – (c) form part of the service agreement but deny that they were due as first respondent had exceeded its monthly repayment.

[15] Applicant in reply to first respondent allegation that it had paid monthly more than it was required to pay, said the following:

15.1 The written service agreement initially provided for a contract price of R1 250 000.00 plus VAT per month for the services specified in clause 7.1.1 – 7.1.6. This would entail applicant making use of three front-end loaders and an excavator. Shortly after signature of the agreement the dependant to the applicant's founding affidavit, Mr Lourens and third respondent on behalf of first respondent verbally agreed and implemented in terms of clause 9.1.5 of the agreement, that the rate will be varied to R1 450 000.00 per month plus VAT. Since early 2014 this rate was invoiced on invoices provided to first respondent as "Hire of Heavy Machinery" which included the agreed rate for services as defined in the agreement. These invoices were paid in full by first respondent.

15.2 During June 2014 Mr Lourens on behalf of applicant and third respondent acting on behalf of first respondent again agreed verbally and implemented in terms of clause 9.1.5 of the agreement, that the rate will be varied to R1 800 000.00 per month plus VAT. Since June 2014 this rate was invoiced on invoices provided to first respondent as "Hire of Heavy Machinery" which included the agreed rate of services as defined in the agreement. These invoices were paid in full by first respondent.

15.3 The relevant rate referred to above was again during 2016 varied in the same manner to be R1 820 000.00 per month plus VAT. Invoices from applicant to first respondent with the agreed rate were never disputed and some were paid in full.

15.4 During December 2016 a verbal agreement was concluded between applicant, represented by Mr Lourens and first respondent, represented by Mr Mulligan, that a fourth loader be used to effect the services referred to in clause 7.1.1 – 7.1.6 of the service agreement. Consequently the contract price for the services referred to in clause 7.1.1 – 7.1.6 of the service agreement, was confirmed to be R2 002 000.00 plus VAT. This was confirmed in writing upon delivery of the invoice (Annexure FOU3(d)).

15.5 Throughout the business relationship between the parties, first respondent requested additional services in terms of the provisions of clause 8 of the written agreement, which included the hire of a triple deck screen; hire of Articulated Dump Truck; hire of water truck and excess waste loaded. These additional services were duly performed by applicant; recorded in writing in invoices provided to first respondent and never disputed and paid for a long time until first respondent defaulted on payment of invoices as confirmed in the founding affidavit.

15.6 On 23 February 2015 first respondent, represented by Nelhari Grundlingh (“Grundlingh”), requested applicant via email to provide confirmation of the machines utilized by applicant on the relevant project with the agreed prices. Applicant confirmed in writing on 23 February 2015 the total amounts for services in terms of clauses 7.1.1 – 7.1.6 of the written agreement as well as additional services in terms of the written agreement. (Annexure “REP1(a) – REP1(b)).

15.7 On 1 November 2016, Grundlingh again requested confirmation of the updated monthly amounts due to applicant by first respondent in terms of the relevant project which was confirmed by applicant in writing on 1 November 2016. (Annexure “REP2”). At no stage did first respondent dispute the amounts confirmed by applicant in writing.

15.8 Mr Mulligan, on 21 April 2016 confirmed in writing that first respondent is in arrears with payment to applicant in the total amount of R8 969 816.65. On 19 October 2016 first respondent again in writing confirmed that it was in arrears with payment of its account to applicant in an amount of R3 691 558.68. ( Annexure “REP4”).

15.9 It is denied that first respondent has at any stage paid additional amounts to applicant than the amounts due to applicant based upon valid invoices provided to first respondent by applicant for services already rendered in terms of the memorandum of agreement between the parties.

15.10 First respondent has not raised a real genuine and bona fide dispute of fact. The version of first respondent that it overpaid applicant for amounts due in terms of the memorandum of agreement and is therefore not indebted in the amount claimed, was not raised seriously and unambiguously; raises a fictitious dispute of fact; is palpably implausible, far-fetched, fanciful or clearly untenable and stands to be rejected by the Court. No company would on average monthly pay an amount of approximately R800 000.00 more to a creditor of the company than is actually due to such a creditor;

15.11 First respondent in one month paid the exact amount appearing in an invoice. Therefore no overpayment as alleged could have been affected.

15.12 First respondent received the written demand from applicant’s attorney claiming payment of arrears and failed to reply thereto and to deny any liability for payment at any stage.

15.13 Notwithstanding first respondent delivering a further affidavit to inter alia deal with the aforesaid allegations, first respondent failed to dispute or deal with the aforesaid allegations.

[16] Counsel for the respondents, Mr Chaskalson submitted that the Court must consider the following:

16.1 The service agreement provides for only one adjustment of price in terms of clause 9.1.5. The alleged subsequent adjustments would have amounted to variations and would have had to be in writing and signed by or on behalf of both parties in terms of clause 20 of the agreement.

16.2 Applicant in the heads of argument state that first respondent paid an aggregate amount of R90 328 622.90 under the service

agreement. Hence the outstanding amount has reduced from R10 919 636.23 to R2 499 429.61.

16.3 Even on the reduced amount, applicant does not have a claim because applicant basis its claim on additional services and increased the amount to be paid in circumstances where there was no such agreement.

16.4 Even if there was such agreement, it was a verbal agreement and hence a verbal variation which is in contradiction to the non-variation clause.

16.5 First respondent denies agreeing to and effecting the variation of the terms of the service agreement. The variation effected were

unilateral and in contravention of clause 20.1 of the Agreement.

16.6 The amounts claimed by applicant include amounts allegedly due in respect of “additional services”. Even on applicant’s

version, the basic services including the alleged oral price variations could not account for more than an aggregate amount of

R75 269 640.00.

16.7 Applicant is unable to produce any written agreement in respect of these “additional services” as required by clause 8.1 of the services agreement.

16.8 Applicant cannot show that the services for which it claims additional amounts over and above the regular monthly payment, should not form part of the basic services under the service agreement and thus services for which no additional amounts can be claimed. In this respect, applicant appears to confuse the nature of the contract entered into with first respondent. The agreement between the parties is for services, not for the rental of equipment as appears to be contended by applicant. Applicant’s obligation under the services agreement is to provide the services listed in clause 7, whatever that takes. So if more equipment than was originally provided is needed to provide these services listed in clauses 7.1.1 to 7.1.6 of the agreement that is a risk carried by applicant, not by first respondent.

16.9 In particular charges claimed for screen and excavators as “additional services” are not claimable because the provision of screens and excavators form part of the basic services covered by the agreement. On the invoices before Court there are already the following amount impermissibly claimed as “additional services” in respect of screens:

- a) R350 000.00
- b) R385 000.00
- c) R298 064.51
- d) R288 750.00

e) R282 258.00

16.10 On the invoices before Court there is also an amount of R265 650.00 impermissibly claimed as “additional services” in respect of excavators. The aggregate of these impermissible additional charges for excavators and screens on invoices that appear in the papers is R1 869 723 plus VAT R2 131 484.00. But the invoices that appear on the papers cover only the months of June 2016 and December 2016 to March 2017. These are 55 of the 37 months in which applicant has been purporting to invoice first respondent. So the probabilities are overwhelming that the aggregate amounts claim impermissibly for “additional services” over the whole period of the services contract are considerably higher than R2 131 484.00.

#### E. EVALUATION

- [17] The crux of this matter is whether first respondent is indebted to applicant in terms of the agreement or whether applicant paid all amounts due in terms of the service agreement and whether the verbal agreements relied upon by applicant in its replying affidavits is legally binding and enforceable.
- [18] Applicant and first respondent entered into the service agreement on the 4 December 2013 in terms of which first respondent engaged applicant to render certain services subject to the terms and conditions of the agreement. The relevant terms of the service agreement are set out hereinbelow:

##### *“7 SERVICES*

7.1 Pursuant to clause 4.4 above, the SERVICES to be provided to the CLIENT by THE CONTRACTOR shall be:-

7.1.1 Mine at least 280 000 tons per month from the Dump;

7.1.2 Feed spiral Plant Feeding mechanism at the required rate;

7.1.3 Manage all waste stockpiles on site to within acceptable levels;

7.1.4 Load all waste stockpiles on vehicles for removal from site in order to prevent any excessive waste build-up;

7.1.5 Manage concentrate Stockpiles produced to prevent contamination;

7.1.6 Load produced concentrate on trucks supplied by Xstrada;

7.1.7 Housekeeping of the site”.

#### 8 ADDITIONAL SERVICES

8.1 In the event that the CLIENT may require the CONTRACTOR to perform additional services other than the Services as are set out in clause 7, then the CLIENT will notify the CONTRACTOR of such requirement, whereupon the CLIENT and the CONTRACTOR will discuss and negotiate the additional services to be rendered by the CONTRACTOR the contract price, payment details and all other terms and conditions pursuant to the additional services, which details shall be recorded in writing.

8.2 If, due to time constraints, the CLIENT and the CONTRACTOR are not able to finalise their negotiations regarding the additional services to be rendered, and the CONTRACTOR elects to perform such additional services notwithstanding then, it is specifically recorded and agreed that such negotiations are to be finalised within 5(five) days of the COMMENCEMENT DATE of the additional services by the CONTRACTOR, failing which, the CONTRACTOR, at its sole election, may cease to perform such additional services after having provided the CLIENT with 1(One)day's written notice of its intention to cease such additional services.

8.3 It is specifically recorded and agreed that the Contractor shall not be obliged to render any additional services requested by the Client, and such refusal by the Contractor shall not affect the validity and continuation of this agreement.

## 9 PRICES AND PAYMENTS

9.1 The contract price for the SERVICES to be rendered by the CONTRACTOR to the client, and the terms and conditions of the payment of the contract price shall be:

9.1.1 R1 250 000 plus VAT per month in respect of clauses 7.1.1 to 7.1.6;

9.1.2 A rate in respect of clauses 7.1.7 will be supplied to the CLIENT upon request;

9.1.4 The above contract price shall be subject to the provisions of clause 10 below;

9.1.5 A comprehensive time and motion study will be conducted by the parties to confirm the principles of this agreement and any variation will be agreed and implemented.

## 10 INCREASE IN CONTRACT PRICE

10.1 The parties will negotiate and agree any fluctuations to the service fee, as stipulated in clause 9, on an annual basis, with the exclusion of fuel, which is recorded to be R12.58 as at 3 December 2013, with the fuel price component being adjusted on a monthly basis in advance.

## 20 NON VARIATION

20.1 This AGREEMENT constitutes the entire agreement between the parties and no representation by either of the parties or their agents whether made prior or subsequent to the signing of this AGREEMENT shall be binding on either of the parties unless done in writing and signed by both the parties hereto.

20.2 No variation, alterations or consensual cancellation of this AGREEMENT or any of the terms thereof, shall be of any force or effect, unless done in writing and signed by the parties hereto.

20.3 No waiver or abandonment by either party of any of its rights in terms of this AGREEMENT shall be binding on that party, unless such waiver or abandonment is in writing and signed by the waiving party.

20.4 No indulgence, extension of time, relaxation or latitude which any party may show, grant or allow to another shall constitute a waiver by a party of any of such party's rights and such party shall not thereby be prejudiced or stopped from exercising any of its rights against any party which may have arisen in the past or which

might arise in the future. Prior drafts of this AGREEMENT shall not be admissible in any proceedings as evidence of any matter relating to any negotiations preceding the signature of this AGREEMENT".

[19] Applicant relies on clause 9.1.5 of the agreement in support of the verbal agreements in respect of the price change and clause 8.1 to support the additional charges for the additional services, namely the supply of the triple deck screen, articulated dump truck and the water truck. Hence there are two separate issues for consideration namely:

19.1 In relation to price; and

19.2 In relation to additional services.

[20] Applicant alleges that the verbal agreements concluded in relation to price was done under clause 9.15 of the agreement which 'reads "a comprehensive time and motion study will be concluded by the parties to confirm the principles of this agreement and any variation will be agreed and implemented". Applicant alleges that the aforesaid clause does not say that the variation must be in writing. Hence the verbal variations were not in contravention of the non-variation clause.

[21] Applicant also relies on the invoices submitted to first respondent and the emails sent by first respondent acknowledging liability to submit that the verbal agreements were reduced to writing. Applicant submitted that on the 23 February 2015 and 1 November 2016 first respondent requested applicant via email to provide confirmation of the machines utilized by applicant on the projects with the agreed prices. Applicant confirmed in writing on the 23 February 2015 and 1 November 2016 the total relevant amounts for services in terms of clause 7.1.1 and 7.1.6 of the written agreement as well as the additional services in terms of the written agreement. The amounts were not disputed and this was also not dealt with by first respondent in its supplementary affidavit. First respondent also on the 21 April 2016 confirmed in writing that it was in arrears with payment to applicant in the amount of R8 969 816.65 and on the 19 October 2016, first respondent confirmed in writing its indebtedness to applicant in the amount of R3 691 558.68.

[22] Applicant submitted further that, it is an opportunistic and far fetched argument that because first respondent knows applicant really well that he paid far in excess of the amounts due and payable and that amounts paid varied according to what he had available. That what is clear is that the increased payments made are consistent with the varied terms. The monthly payments were made on invoices that were delivered, for example,

22.1 The payment made by first respondent on 8 June 2016 (Annexure BP38) in the amount of R2 984 437.57.

22.2 On 2 June 2016 applicant delivered five invoices to first respondent for the services set out in clauses 7.1.1 – 7.1.6 of the written agreement (defined as “hire to heavy machinery”) as well as additional services and diesel. (Annexure “REP5(a) – REP5(e)). The total balance of all five invoices is an amount of R2 984 437.57, which amount was paid by first respondent on 8 June 2016.

[23] Clause 9.1.5 of the agreement refers to “A comprehensive time and motion study”. (own emphasis). What is envisioned is that a single, time and motion study will be concluded. Hence it is apparent that, the parties contemplated that the

price may be varied by agreement on the basis of a single time and motion study performed in relation to these services. The parties also recorded in clause 10.1 that the parties will annually negotiate and agree on fluctuations to the basic service fee. The agreement also had a standard no variation or alteration clause, that “no variation alteration, or consensual cancellation of this agreement or any of the terms thereof, should be of any force or effect, unless done in writing and signed by the parties”. The agreement also has a “no waiver or indulgence” clause and a Supremacy clause in clause 3.7 which reads:

*“Should there be any conflict or inconsistency between this Agreement and any other Agreement/s concluded between the parties, then the terms and conditions of this Agreement shall prevail”.*

[24] Although the agreement contemplated a price change in terms of clause 9.1.5 and the agreement also contemplated that the parties would annually negotiate and agree on fluctuation of the basic service fee it did not contemplate several price changes or variations as alleged by applicant. Hence all subsequent variations to price had to comply with clause 20 of the agreement which had to be reduced to writing and signed by both parties. There is no evidence that the verbal agreement were reduced to writing and signed by the parties. Thus the price increases are not consistent with the non-variation clause. Case law referred to infra provides guidance and lend support to the aforesaid.

[25] In terms of Clause 8, additional services and prices had to be negotiated by the parties. What was required in term of clause 8.1 was for the parties to discuss and negotiate the additional service to be rendered, the contract price payment details and all other terms and conditions which had to be recorded in writing. Furthermore in terms of clause 8.2, if agreement could not be reached within 5 days of the commencement date of the additional service, applicant was entitled to terminate the provision of those additional services on one

day's written notice.

- [26] Applicant submitted that clause 8.1 of the agreement foresaw that additional services may be required and does not state that notification must be in writing. Applicant submitted further that further additional services was not in contravention of the non-variation clause because it did not constitute a variation of the agreement and it was effected in terms of the agreement. Although I agree that additional services was contemplated in the agreement, it was necessary for the agreement regarding the additional services to be in writing which agreement had to be concluded within 5 days of commencement of the additional service. Applicant failed to provide any written document in support of the additional services as provided in clause 8.1.
- [27] Applicant's claim is for services from November 2016 to February 2017. Applicant alleges that during 2016 the parties verbally agreed in terms of clause 9.1.5 to vary the rate to R1 820 000.00 and again during December 2016 the parties verbally agreed that a fourth loader be used to effect the services referred to in clause 7.1.1 – 7.1.6 of the written agreement and the contract price for the services referred to in clause 7.1.1 – 7.1.6 of the written agreement, was confirmed to be R2 002 000.00 plus VAT. Applicant alleges that this was confirmed in writing upon delivery of invoice number IO100124 (Annexure FOU3(d)).
- [28] The emails relied upon by applicant dated 23 February 2015, 21 April 2016 and 19 October 2016 do not retate to applicant's claim for services from November 2016 to February 2017. The only email which is relevant is the email of the 1 November 2016, from applicant to respondent which reads:

*“Ek sal vir jou Tailco Chrome in meer besonderhede more kan deurgee, net by Lafras seker maak, ek kry net die total vir faktureering*

Machinery

:

R1 820 000.00

Triple Deck Screen :

@R350 000.00 R350 000.00

ADT

: @R180 000.00

R180 000.00

R2 350 000.00”

- [29] As stated supra, the amendment to price constitutes a variation under clause 20 of the agreement which is of no force of effect unless reduced in writing and signed by the parties. Furthermore the additional services, referred to in the email of the 1 November 2016, supra

namely Triple Deck Screen and ADT fails to comply with clause 8.1 of the agreement, in that there is no proof that the additional service were discussed and negotiated upon and that the contract price and payment details were agreed upon within 5 days from the commencement of the additional service. Furthermore there is no written proof of any agreement regarding additional services for the period December 2016 to February 2017.

[30] In *Telcordia Technologies Inc v Telkom SA*[1] said:

*“[11] One of the principal complaints of Telkom was that the arbitrator did not understand and did not apply our law dealing with variations of written contracts. The Integrated Agreement contained a non-variation clause – the contract could only have been amended by means of a written agreement signed by certain duly authorised persons – as well as a provision preventing either party from relying on waiver or estoppel. The exact terms of the non-variation clause are of little consequence because it is common cause that the Integrated Agreement was not amended according to its terms.*

[12] The effect of a non-variation clause has been the subject of two judgments of this Court, namely *Shifren* 1964(4) SA 760 CA and, latterly, *Brisley v Drotsky*.2002(4) SA 1 For the sake of convenience I intend to refer to the principles as the *Shifren* doctrine. The arbitrator, although not formally schooled in South African law, understood the principles perfectly well and he

summarised them in these terms: A non-variation clause is in principle valid; it takes effect so as effectively to entrench both itself and all the other provisions of the contract against oral variation; courts do not have a general discretion to ignore it in favour of an oral amendment on the ground of some over-arching notion of bona fides; and the principle does not create an unreasonable straitjacket because the general principles of the law of contract still apply, and these may release a party from its workings. One of these would, for instance, be the rule that a party may not approbate and reprobate. This would mean, as Telkom correctly

accepted during argument, that a party may not rely on a non-compliant variation (for instance, in its pleadings) and subsequently invoke the non-variation term in order to avoid the effect of the amendment. (Own Emphasis)

[31] In casu, there is no evidence that the first respondent approbated and reprobated. The first respondent from the outset raised a point in limine that the applicant's claim was premature as it paid monthly more than was required. First respondent denied that any verbal agreement were concluded.

[32] The case of *Affirmative Portfolios VV v Transnet Ltd t/a Metrorail*[2] provides further guidance in this matter.

*“The apellant in a High Court action claimed payment of the amount by which it had allegedly been underpaid by the respondent for services rendered. The respondent counterclaimed payment of the amount by which it had allegedly over paid the appellant for the same services. In proof of its claim the appellant relied on an oral agreement allegedly concluded by the parties prior to the conclusion of the written agreement in terms of the which the services were to be rendered and had the effect of varying*

*the written agreement by increasing the rate at which the appellant was entitled to charge the respondent for its services. The written agreement contained clauses prohibiting the variation of, inter alia, the 'pricing stipulated in the agreement. The respondent denied the oral agreement. The respondent's counterclaim was brought on the basis of unjust enrichment and related to payments made in error by the respondent's officials against invoices submitted by the appellant at the higher rate allegedly agreed to in the oral agreement. In making the payments the respondent's officials failed to check the rates stipulated in the invoices against the written agreement. The High Court dismissed the appellant's claim and upheld the counterclaim. The appellant appealed against that decision to the Supreme Court of Appeal".*

The SCA said the following:

*"[13] The appellant is precluded from relying on the alleged oral agreement by virtue of the so-called 'parol' evidence or 'integration' rule. The oral agreement for which it contends would have been entered into before the signing of the written agreement and also contains terms which are at variance therewith. It is a well-established principle that where the parties decide to embody their final agreement in written form the execution of the document deprives all previous statements of their legal effect. See National Board (Pretoria) (Pty) Ltd v Estate Swanepoel 1975(3) SA 16 (A) and cases there cited. As was stated by Watermeyer JA in Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD43*

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

[14] Not all oral or collateral agreements are necessarily deprived of legal effect. The parol evidence rule applies only where the written agreement is or was intended to be the exclusive memorial of the agreement between the parties.

[15] A court may look to surrounding circumstances, including the relevant negotiations of the parties, in order to determine whether the parties intended a written contract to be an integration of their whole transaction or merely a partial integration. See *Johnston v Leal* 1980(3) SA 927 (A) at 945D-E.

[16] The question of prices and the pricing structure is a matter that was specifically dealt with in the written agreement.

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

[18] Reliance cannot be placed on the allegation in para 6 of the particulars of claim to the effect that the agreement was varied

tacitly or by conduct in the light of the foregoing. Furthermore clause 10.1, which is in effect a non-variation clause, entrenches

the pricing provisions against oral or tacit variation. The binding nature of such a provision was emphasised in *SA Sentrale Ko-Op Graanmaatskappy Bpk v Shifren en andere* 1964(4) SA 760 (A) and affirmed more recently in the case of *Brisley v Drotsky* [2002] ZASCA

35. Clause 10.1 may be varied otherwise than in writing (as to which see *Clemans v Russon Brothers (Pty) Ltd*, 1970(3) SA 686 (E)). However there is no evidence that the parties agreed or even applied their minds to the question of deleting the clause. It accordingly remains of force and effect.

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

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

[33] Although the facts in the Affirmative Portfolio's case *supra* are distinguishable from the facts in *casu.*, the principle that where the parties embody their agreement in a written form, a party is deprived from relying on a verbal agreement

as the written document is the exclusive memorial of the transaction applies. In *casu*, the question of pricing was specifically dealt in the written agreement and the parties expressly agreed on the terms in which to vary the price. The variation to price had to comply with clause 20 of the agreement.

[34] In *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd*[3]:

*"[24]The respondent's contention that it has discharged this onus, turns on the oral agreement of 13 February 2004. Though the conclusion of this agreement is not in dispute, the conflicting versions regarding its terms cannot be resolved. If the respondent's version is to be accepted, it is clear that some rental was owing at the cancellation date. This is even more so if no regard is had to the oral agreement at all, because even on the respondent's version the appellant was entitled to some increased penalty. The respondent's argument that the oral agreement should indeed be disregarded, is based on a non-variation clause in the agreement of lease. It essentially provides that no variation of the agreement shall be of any force and effect unless it is recorded in writing and signed by both parties. This type of*

*clause has become known in our law as a Shifren clause. The name derives from SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren 1964*

- (4) SA 760 (A) in which this court held that, as a matter of policy, a non-variation clause should in principle be recognised as enforceable and that it effectively entrenches both itself and all the other provisions of the contract against oral amendment (see also eg *Brisley v Drotsky* [2002] ZASCA 35; 2002
- (4) SA 1 (SCA) paras 6-9; *Telcordia Technologies Inc v Telkom SA Ltd* [2006] SCA 139 (RSA) para 11).

[25] Alive to the problem created by the Shifren clause, the appellant attempted to construct a written amendment from the correspondence

between it and Broll. This attempt must, in my view, be marked unsuccessful. What the correspondence shows is that while the existence of an oral agreement was common cause, the terms of this agreement were never confirmed. On the contrary, from the very first letter they were in dispute. Other attempts by the appellant to circumvent the effect of the Shifren clause – by relying on waiver, estoppel etc – fell foul of other clauses in the lease precluding reliance on these defences.

[35] From the foregoing, it is clear that the SCA have held that a non-variation clause should be recognised as enforceable and protects a party from verbal amendments that were not reduced to writing in terms of the agreement.

[36] When conducting an objective analysis of the dispute, first respondent denied the verbal variation and alleged that he was unaware that the price had been varied. Although first respondent had an opportunity to deal with the “over payment of R800 000.00” in his supplementary affidavit, and to explain why he had not previously disputed the amount reflected on the invoices or emails and why in one instance he paid the exact amount reflected in the invoice this Court cannot disregard the Shifren clause supra as well as the Supremacy clause in the agreement. The applicant failed to vary the terms of the agreement in accordance with the

non-variation clause. Hence the verbal agreements relied upon for the period November 2016 to March 2017 are of no force or effect as it was not recorded in writing and signed by both parties.

[37] In addition to the non-compliance with the terms of the agreement referred to supra, applicant’s case also falls short in respect of the amount claimed. There are inconsistencies in the amounts reflected in

applicant’s payment schedule to the amounts reflected in the correspondence between applicant and first respondent. For example,

- a) Annexure REP 3 is a letter from first respondent addressed to applicant. First respondent alleges that it is an agreement to compromise liability and is irreconcilable with applicant's case which is R1.3 million more than what first respondent reflects as the arrears as at April 2016, in that first respondent alleges that the arrears is R8 969 816.65 while the applicant's statement reflects R10 255 819.19
- b) In Annexure REP 4, first respondent states that R3 691 558.68 is in arrears as at October 2016. While the applicants opening

balance in October 2016 is R9 483 979.

- c) The aggregate amount claimed by applicant in terms of these disputed oral "amendments" since June 2014 far exceeds the R2 499 429.61 remaining balance of the amount claimed by applicant.

[38] Mr Chaskalson correctly submitted that on price sometimes the amounts tally and other times they don't. It is not correct that all amount claimed by applicant in respect of price were paid. The contract provided for no waiver and no variation. Even if applicant paid invoices at inflated prices, this did not amount to a waiver of his rights. First respondent attached proof of payment since inception of the agreement, (Annexure RMF5). First respondent alleges that it paid a total sum of R90 328 622.90.

[39] I also agree with Mr Chaskalson that applicant appears to confuse price with additional service. In terms of the service agreement the price is for the service provided in clause 7.1.1 to 7.1.6. Any other service would classify as an additional service which requires the agreement to be in writing under clause 8.1. A further defence raised by first respondent that, the services for which applicant claims additional amounts should form part of the basic services under the agreement and for which no additional amount can be claimed, is not considered in this judgment because of my aforesaid finding.

[40] Another issue that the Court needs to comment on is the fact that the applicant changed its case in its replying affidavit. In the founding affidavit, applicant relied on the service agreement. On the face of service agreement, the monthly amount owed by first respondent to applicant was R1 425 000 being R1 250 000 plus 14% VAT. 37 months invoiced at R1 425 000 would yield an aggregate amount of R52 725 000 or some R29 million less than the admitted payments of first respondent in the amount of R81 902 416.28.

[41] When first respondent made this point in its answering affidavit, applicant changed the nature of its case in reply. Whereas previously it had relied on the written services agreement, now it alleged:

- a) a series of verbal variations to the price for the basic services under the service agreement; and
- b) a series of verbal agreements ostensibly for the provision of additional services that may or may not be capable of being charged for separately in terms of the service agreement.

[42] Generally, an applicant is prohibited from setting out its case in reply. A distinction is drawn between a case in which new material is first brought to light by applicant who knew of it at the time when he prepared his founding affidavit and the case in which facts alleged in the respondents' answering affidavit reveal the existence or possible existence of a further ground for relief. In casu, applicant falls in the former category as it knew when it prepared its founding affidavit of the verbal agreements concluded between

itself and first respondent as its claim for payment rests largely on the verbal agreements concluded. Courts will generally not allow the introduction of new matter if the new matter amounts to an abandonment of the existing claim and the substitution of a fresh and different cause of action[4]. Nor will Courts permit a applicant to make a case in reply when no case at all was made into original application[5].

[43] Although applicant still relies on the written agreement, applicant sought to rely in reply on several verbal agreements. There was in my view no proper or satisfactory explanation proffered by applicant why applicant failed to raise the verbal agreement in its founding affidavit. The new set of facts relied upon by applicant were in any event denied by first respondent. Applicant could not in the circumstances make out its case based on the verbal variations in its replying affidavit, notwithstanding the fact that first respondent had an opportunity of filing a supplementary affidavit.

[44] It is trite that an applicant in motion proceedings carries the risk of a dispute of facts[6]. An applicant who persists in the face of material disputes of facts must suffer the consequences of the application being decided on the basis that disputed facts will be resolved in favour of the respondent. First respondent in its answering affidavit raised a point in limine and a dispute of fact that it had duly paid applicant and in fact paid applicant more than was due and payable. This defence was in the light of applicant's case in its founding affidavit, and the allegations made by first respondent in the answering affidavit neither bald nor uncrediworthy nor raised fictitious disputes of fact nor was it palpably implausible, far fetched or untenable[7].

[45] The onus ultimately rests on the applicant to prove first respondent's indebtedness. I am of the view when considering the totality of the facts and evidence as stated supra, that applicant failed to discharge the onus to prove that it is entitled to the relief sought in the Notice of Motion.

#### F. ORDER

[46] In the result, respondents point in limine of a premature claim is upheld and applicant's claim is dismissed with costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 14 DECEMBER 2017

DATE OF JUDGMENT

: 22 FEBRUARY 2018

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: ADV NJ ESTERHUYSE

ADVOCATE FOR DEFENDANT : ADV CHASKALSON

ADV LEKOKOTLA

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ATTORNEYS FOR RESPONDENT

: SMIT STANTON INC. ATTORNEYS

(Instructed by: Malepe Attorneys)

[1]

[2006] ZASCA 112; 2007

[3] SA 266 (SCA) at para [11] and [12] at page 281 and 282

[2] 2009(1) SA 196 SCA

[3] 2007(2) SA 570 (SCA) at para [24] and [25]

[4] Triomf Kunsmus (EDMS) BPK v AE and CI BPK 1984(2) SA 261 (W) at 270

[5] Poseidon Ships Agencies (Pty) Ltd v African Loading and Exporting Co (Durban) (Pty) Ltd 1980(1) SA 313 (D) at 316A

[6] Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A)

[7] National Director of Public Prosecutions v Zuma 2009(2) SA 277 (SCA) 290 [26]; Buffalo Freight Systems v Crestleigh Trading 2011(1) SA 8 (SCA) p14C

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