

SOUTH AFRICA / JUDGMENT

HVC Technologies (Pty) Ltd v Efkon SA (Pty) Ltd (40044/2015) [2017] ZAGPPHC 511 (15 August 2017) [2017] ZAGPPHC 511

COURT

North Gauteng High Court, Pretoria

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

40044/2015

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO: 40044/2015

DATE: 15 August 2017
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
REVISED
In
the matter between
HVC
TECHNOLOGIES (PTY)
LTD PLAINTIFF
and
EFKON
SA (PTY)
LTD DEFENDANT

JUDGMENT

VAN OOSTEN J:

Introduction

- [1] There are two applications before me: the first, an exception to the plaintiff's particulars of claim noted by the defendant and, secondly, an application by the defendant in terms of rule 30(1) for the setting aside of the plaintiff's particulars of claim as an irregular step for want of compliance with rules 18(4) and 18(6). The plaintiff opposes both applications and full sets of affidavits have been filed, resulting in voluminous bundles of documents serving before this court.

The plaintiff's cause of action

- [2] The plaintiff's cause of action is based on contract. By way of background the plaintiff pleads a written agreement, styled

Subcontract Agreement, concluded in November 2011, in terms of which the plaintiff was appointed by Teti Traffic (Pty) Ltd (Teti) as a sub-contractor for the performance of certain services forming part of the scope of works Teti was required to perform under the main contract between Teti and the South African National Roads Agency (SANRAL), dated 14 December 2010 (the Teti sub-contract). The services the plaintiff was to perform under the Teti sub-contract comprised the design build of a National Intelligence

Transport System (the DB sub-contract) and the operation and maintenance thereof (the OM sub-contract), which the plaintiff proceeded to perform until the end of January 2014 and May 2014 respectively.

- [3] The plaintiff has instituted 3 claims against the defendant. In claim 1 reliance is placed on an oral agreement, concluded in February 2014, between the plaintiff, Teti, and the defendant in terms of which, in essence, the defendant substituted the plaintiff as Teti's sub-contractor (the oral substitution agreement). The three parties to the oral substitution agreement specifically agreed to Teti's termination of the DB sub-contract with the plaintiff and Teti's appointment of the defendant in the plaintiff's stead, as the new sub-contractor to Teti. The defendant furthermore became liable to pay the plaintiff for all work done and services rendered to Teti until the end of January 2014, in accordance with the tariffs agreed upon between the plaintiff and Teti in the DB sub-contract, excluding variation orders not yet invoiced by the plaintiff as well as variation orders not paid in full by Teti, which, if paid by the defendant, it would be entitled to reclaim from Teti.

- [4] On 3 June 2014 the plaintiff, the defendant and Teti orally agreed that the outstanding invoice in the amount of R15 757 490.76, which had previously been rendered by the plaintiff in respect of its services performed under the erstwhile DB sub-contract, was due, owing and payable by the defendant. The plaintiff having received from the defendant only one payment in the amount of R672 365.31, claims payment from the defendant of the balance in the sum of R15 085 125.45.
- [5] This brings me to the plaintiff's claim 2 which is based on an oral agreement in terms of which further services were rendered by the plaintiff, pursuant to written quotations submitted to and accepted by the defendant, in the amounts of R2 621 393.84 and R1 569 082.32, respectively, which the defendant has failed to pay. Somewhat oddly, the plaintiff claims rectification of the terms of the written quotations to correspond with the terms orally agreed between the parties, but nothing turns on this.
- [6] Lastly, I turn to claim 3 which likewise is based on an oral agreement concluded between the plaintiff, Teti and the defendant in terms of which the OM sub-contract was terminated and the defendant appointed the sub-contractor to perform the required services in the plaintiff's stead from 1 June 2014. For practical reasons and to accommodate the takeover, it was agreed that the plaintiff would continue to pay on behalf of the defendant, certain expenses relating to the OM sub-contract. The defendant would pay the plaintiff for all work done, material supplied and services rendered to Teti until the end of May 2014, in accordance with tariffs agreed upon by the plaintiff and Teti in the Teti sub-contract.
- [7] In addition the defendant would take over and purchase six vehicles from the plaintiff, payable cash on delivery; the defendant would take over lease agreements in respect of vehicles and equipment; pending the takeover of the leases, the defendant would pay plaintiff the amounts payable by the plaintiff to the financier in terms of the lease agreements; the defendant would take over movable assets, including office furniture and equipment as well as stock; the defendant would use the leases premises rented by the plaintiff and the defendant would pay the rental payments in respect thereof as agreed and the defendant would take over the maintenance personnel employed by the plaintiff.
- [8] The plaintiff further pleads implementation of the agreement in that the plaintiff confirmed the agreement in writing; Teti confirmed the termination of the OM sub-contract in a letter dated 11 July 2014 and returned the guarantees that the plaintiff had initially delivered in terms of the OM sub-contract between plaintiff and Teti; the defendant arranged for the takeover of the maintenance personnel previously employed by the plaintiff in terms of the OM sub-contract; the defendant took over the movable assets utilised by the plaintiff in executing the OM sub-contract as well as the lease agreements in respect of the vehicles and equipment, and made arrangements for the cell phones in respect of the employees which were either transferred or cancelled. The parties further agreed that the defendant would make payment to some of the plaintiff's creditors directly and deduct such payments from the amounts payable for building and maintenance stock, all of which were implemented. The plaintiff accordingly claims from the defendant payment of the amount of R3 572 557.22

for work done, material supplied and services rendered in respect of the OM sub-contract for the period February 2014 to May 2014; the amount of R89 522.68 in respect of rental for the vehicles

which were initially purchased by the defendant from plaintiff and utilised for the period from June 2014 until August 2014 and the amount of R6 852 404.80, being the agreed amount in respect of the movable assets and stock taken over by the defendant. The defendant paid the total amount of R1m towards its indebtedness, leaving a balance due of R8 514 484.79.

The exception

- [9] The defendant's exception to the plaintiff's claims 1 and 3 is based on the grounds that they lack averments necessary to sustain a cause of action and are vague and embarrassing.
- [10] The true and decisive issue having crystallised in argument before me, concerns the interplay between, on the one hand, the Teti sub-contract, which it will be remembered was in writing and, on the other, the oral agreements concluded between Teti, the plaintiff and the defendant, which are relied on by the plaintiff in claims 1 and 3.
- [11] The defendant's contention is this: clause 12.2 of the Teti sub-contract provides for non-variation of its terms unless in

writing. The relevant part of the clause reads as follows:

'Any amendments to this sub-contract agreement, including but not limited to variation and/or change orders must be in writing in order to be effective. This requirement of the written form itself also can be waived only in writing.'

- [12] Clause 4 of the Teti sub-contract deals with the term and termination of the agreement. As for the term of the agreement, clause 4.1 relied upon by the defendant, provides as follows:

'Once this agreement has come into force as envisaged above, it shall remain valid until all obligations of the sub-contractor have been duly fulfilled as required by the main contract or any extension thereof.'

The remainder of clause 4 deals with specific instances of termination induced by the employer or the sub-contractor or the contractor.

- [13] Clause 4.1 read with clause 12.2, counsel for the defendant submitted, precluded any oral amendment of the Teti sub-contract and, accordingly, renders the oral agreements relied upon by the plaintiff, of no force and effect. In the alternative it was argued

that the plaintiff's particulars of claim are vague and embarrassing in the absence of a pleaded basis for the oral agreements being valid and enforceable and the admissibility of evidence in regard thereto, in the face of the provisions of the Teti sub-contract to which I have referred.

[14] Counsel for the defendant was at pains to highlight each and every 'amendment' of the Teti sub-contract that is to be found in the oral agreements, in support of the argument that those amendments are specifically ruled out and of no force and effect. The Teti sub-contract, so the argument went, was to remain valid and binding until fulfilment of the sub-contractor's obligations by implication, providing that no prior termination thereof would have been effective unless in writing. In support of the argument counsel referred me to the seminal judgment on non-variation clauses in contracts: *Shifren and Others v SA Sentrale Ko-Op Graanmaatskappy* 1964 (4) SA 760 (A) and furthermore placed heavy reliance on the judgment of the Full Court in *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T). I will revert to these cases in due course.

Discussion

[15] The approach adopted by the defendant is flawed in its premise: the plaintiff seemingly does not rely on variations of a written

agreement. On the contrary, an oral consensual termination of the Teti sub-contract is pleaded followed by the conclusion of the oral agreements. The question arising accordingly is not as counsel for the defendant would have it, in what respects the Teti sub-contract was amended but rather whether the oral consensual cancellation thereof by all contracting parties was permissible and therefore valid. This is the issue to which I now turn.

[16] As a point of departure it is of significance that the Teti sub-contract does not in specific terms require a termination thereof

to be in writing. And this provides the fundamental basis for distinguishing *Impala Distributors* from the present matter. In that matter the Full Court, per Hiemstra J, in the opening sentence of the judgment puts it beyond doubt that the court was dealing with "n ou omstrede vraag [wat] opnuut na vore kom, nl. in hoeverre partye gebonde is aan voorskrifte in 'n kontrak wat vereis dat ontbinding of wysiging skriftelik moet wees' (see also p 274E and p 278A-B of the judgment) [Underling added] Counsel for the defendant's reliance on *Impala Distributors* accordingly, is misplaced.

[17] *Shifren*, likewise, does not lend support to the contention relied on by the defendant, for the simple reason once again, that writing is not a pre-requisite for a valid consensual cancellation of the Teti sub-contract. The oral consensual cancellation relied on by

the plaintiff does not contradict, alter or vary any of the terms of the Teti sub-contract, with result that clause 12.2 read with clause 4.1 accordingly is not of application (see *Le Grange v Pretorius* 1943 TPD 223 at 224-225; *Gouws NO and Another v Montesse Township and Investment Corporation (Pty) Ltd and Another; Montesse Township and Investment Corporation (Pty) Ltd v Standard Bank of South Africa Ltd and Another* 1964 (3) SA 221 (T); *LAWSA Vol 9 para 748*).

[18] The subsequent conduct of the parties, as pleaded by the plaintiff and referred to above, unequivocally proves implementation of the oral agreements relied on by the plaintiff.

[19] For all these reasons there is no merit in the exception and it accordingly falls to be dismissed.

The Rule 30(1) application

[20] Altogether 11 grounds of objection are raised in the rule 30(1) application. Of those the defendant, wisely I hasten to add, pursued only 6 in argument before me.

[21] The complaint raised by the defendant relying on the provisions of rules 18(4) and 18(6), can be summarised as an alleged failure by the plaintiff to

- attach 'the full conspectus of the sub-contract and documents relied on or to provide an adequate explanation for failing to attach each and every document relied upon' (ground 1);
- plead sufficient particularity in regard to the work executed in terms of the Teti sub-contract (ground 2);
- clearly and concisely set out the material facts relied on in regard to the oral agreement (ground 3);
- plead sufficient particularity in regard to the term of the oral agreement that the defendant would pay the plaintiff for DB work executed until January 2014 (ground 4);
- plead sufficient particularity in regard to the written quotations relied upon in claim 2 (ground 5); and, lastly,
- clearly and concisely set out the material facts in regard to the payment obligations of the plaintiff and the defendant referred to in claim 3 (ground 7).

[22] All the objections are without merit. The defendant has, as rightly pointed out by counsel for the plaintiff, adopted an over-technical approach thereby overlooking the purpose of pleadings. The defendant's misconception regarding the oral consensual cancellation of the Teti sub-contact moreover has permeated into the objections raised.

[23] I have carefully read and considered the plaintiff's particulars of claim. I am satisfied that no sustainable objection can be raised in regard thereto. Sufficient information and particularity have been pleaded to enable the defendant to plead. No prejudice has either been alleged by the defendant nor does any prejudice exist.

[24] No sustainable grounds for the setting aside of the plaintiff's particulars of claim exist and it follows that the defendant's

application in terms of rule 30(1) must fail.

Costs

[25] No reason has been advanced for not applying the general rule of costs following the event.

Order

[26] In the result the following order is made:

1. The exception is dismissed.
2. The defendant's application in terms of rule 30(1) is dismissed.
3. The defendant shall pay the costs of both the exception and the defendant's application in terms of rule 30(1).

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

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MALAN MOHALE ATT

DATE OF HEARING

8 AUGUST 2017

DATE OF JUDGMENT

15 AUGUST 2017

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