

SOUTH AFRICA / JUDGMENT

MCG Express (Pty) Ltd v Owenair (Pty) Ltd (2023/069178) [2024] ZAGPJHC 580 (19 June 2024) [2024] ZAGPJHC 580

COURT

South Gauteng High Court, Johannesburg

BEFORE

N.S. Krüger

CASE / FILE NUMBER

2023/069178

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
DIVISION, JOHANNESBURG

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: NO

CASE

NO: 2023 - 069178

In

the matter between:

MCG
EXPRESS (PTY) LTD
Applicant
and
OWENAIR
(PTY) LTD
Respondent

JUDGMENT

KRÜGER AJ:

Summary

Application claiming specific performance for payment due by the respondent for the lease of an aircraft for charter. The respondent's defence is that the provisions of sections 64 and 65 of the Value Added Tax Act has not been complied with in that the consideration for the use of the aircraft did not state if it was inclusive or exclusive of VAT and that, in consequence, the consideration recorded in the contract are deemed to be inclusive of VAT.

Order

[1] In this matter, for the reasons set out below, I make the following order:

Judgment

is granted against the respondent for:

- (1) Payment to the plaintiff in the sum of R 4 939 985.31 which is inclusive of VAT in the amount of R 644 345,91;
- (2) Payment of interest on the amount of R 4 295 639,40 at the prime rate of ABSA Bank Limited plus two per cent, calculated and compounded monthly in arrears from 27 April 2023 to date of payment
- (3) Costs of suit.

Introduction

- [2] The applicant's claim is for payment by the respondent of the amount of R 4 939 985.31 plus interest at the prime rate of ABSA Bank Limited plus two per cent, calculated and compounded monthly in arrears from 27 April 2023 to date of payment and costs of suit.
- [3] On 20 June 2022 the parties concluded an Aircraft Lease Agreement ("the contract") in terms of which the respondent from time to time would lease a Bombardier Global Express aircraft for a specific period of time at a minimum hourly rate of US\$ 7000. The applicant shall furnish the respondent with a tax invoice on the last day of each calendar month or as soon as practicable thereafter setting out the fees and charges payable by the respondent. Invoices rendered will be paid within 7 days from date of the invoice. It was signed by the parties' respective representatives on 20 June 2022 at Lanseria.
- [4] On 22 March 2023 and pursuant to the contract, a further written contract was concluded between the parties in terms of which the respondent would utilize the aircraft for the period 31 March 2023 to 11 April 2023 for charter, which it duly did. The latter contract was concluded via WhatsApp messages between Mr Wolpe, who as sole director acted on behalf

of the respondent, and Mr Bester acting on behalf of the applicant. In consequence of the utilization of the aircraft, the respondent became indebted to the applicant for payment of consideration for the use of the aircraft as provided for in the contract.

- [5] On 20 April 2023 the applicant sent its tax invoice for payment in the total amount of R 4 939 985.31 to the respondent. The amount is the sum of R 4 295 639,40 plus VAT in the amount of R 644 345,91 which is recorded accordingly in the tax invoice. Payment was due by 27 April 2023, or any time thereafter.
- [6] When the respondent failed to make any payment to the applicant, the latter's attorneys eventually addressed a letter dated 22 May 2023 to the respondent demanding payment in the amount of R 4 295 639.40 plus VAT in the amount of R 644 345,91 no later than 31 May 2023, failing which steps will be taken as the applicant may be advised. On 3 June 2023 during a telephonic

conversation Mr Wolpe informed Mr Coetzee, the applicant's General Manager of Aviation that he was awaiting proof of payment of one of the respondent's clients upon which the respondent would make payment to the applicant the following week. The telephonic conversation was confirmed in a WhatsApp message addressed by Mr Wolpe to the applicant. No payment was forthcoming. During a further telephonic conversation on 19 June 2023, Mr Wolpe advised that payment would be made within 48 hours despite which no payment was made.

- [7] It is common cause that to date no payment whatsoever has been made to the applicant. In consequence, this application was issued.

The respondent's case

- [8] Its case is that the respondent is not liable for payment of VAT in the amount of R 644 345,91 because the consideration and payment for the use of the aircraft in the contract disclosed an hourly rate that would apply, namely a minimum of US\$ 7000 without specifying if it was inclusive or exclusive of VAT.
- [9] According to the respondent, the applicant's claim for payment of VAT would offend against the provisions of Section 64 read section 65 of the Value Added Tax Act, 89 of 1991 ("the VAT Act"):

"64 Prices deemed to include tax

- (1) Any price charged by any vendor in respect of any taxable supply of goods or services shall for the purposes of this Act be deemed to include any tax payable in terms of section 7 (1) (a) in respect of such supply, whether or not the vendor has included tax in such price.
- (2) ...

65 Prices advertised or quoted to include tax

Any price advertised or quoted by any vendor in respect of any taxable supply of goods or services shall include tax and the vendor shall in his advertisement or quotation state that the price includes tax, unless the total amount of the tax chargeable under section 7 (1) (a), the price excluding tax and the price inclusive of tax for the supply are advertised or quoted by the vendor: Provided that-

- (i) where the price inclusive of tax and the price excluding tax for a supply are advertised or quoted, both prices shall be advertised or quoted with equal prominence and impact;
- (ii) price tickets on goods need not state that the prices include tax if this is stated by way of a notice prominently displayed at all entrances to the premises in which the enterprise is carried on and at all points in such premises where payments are effected;
- (iii) the Commissioner may in the case of any vendor or class of vendors approve any other method of displaying prices of goods or services by such vendor or class of vendors during a period approved by the Commissioner which commences before and ends after the commencement date or, where the rate of tax is increased or reduced, the date on which the increased or reduced rate of tax takes effect;
- (iv) a vendor may not state or imply that any form of trade, cash or any other form of discount or refund is in lieu of the tax chargeable in terms of section 7 (1) (a)."

[10] Mr Wolpe alleges that at the time of the conclusion of the contract he was under the mistaken assumption that the applicant was not a VAT vendor in South Africa and that the transaction was VAT exempt. Had he known that VAT was to be added, he would have either negotiated a better rate with the applicant, or would have amended the quote to the respondent's clients to provide for the addition of VAT.

The applicant's case in response

- [11] The applicant contends that the issue of compliance with the VAT Act arose only in the respondent's answering affidavit. It had never been raised before.
- [12] The contract was compiled by the respondent. According to the applicant, the respondent was aware from before the conclusion of the contract that it was a South African registered company, had a VAT number and was a VAT vendor. On the title page of the contract the respondent's South African company registration number as well as its VAT registration number is recorded. The applicant contends that the respondent's reliance on the quoted section in the VAT Act came as an afterthought. In an e-mail dated 17 April 2023 the respondent stated that, as the charter was an international flight, it would be zero rated for VAT. On 19 April 2023 the applicant responded in an e-mail recording that after an enquiry to SARS it was confirmed that, as the applicant leased equipment or provided a service to the respondent and both are South African entities as well as duly registered VAT vendors, VAT was payable. Then, on 9 May 2023 an e-mail was received from Mr Wolpe on the letterhead of United Charter Services suggesting that the invoice be submitted to a foreign company namely United Aviation Group Limited Mauritius to be paid in Mauritius. The applicant

refused to be party to what it contends constitutes an attempt to defraud the fiscus. It is after these events that respondent gave the undertakings during the telephonic conversation of 3 June 2023 and its WhatsApp confirming it, and its later undertaking to effect payment within 48 hours. The respondent in its answering affidavit does not deny that the undertakings were given.

[13] The respondent expressly does not deny that it is indebted to the applicant for payment in the amount of R 4 295 639.40 and the interest as agreed upon. Yet it has failed to make any payment of such amount. This, the applicant contends, is indicative of the respondent being mala fide.

[14] The applicant contends that it had, in any event, complied with the requirements of section 65ii of the VAT Act in that it has a notice prominently displayed at the sole entrance to its premises which reads:

“MGC EXPRESS (PTY) LTD

REGISTRATION NO. 2018/022703/07

VAT NO. 4560216071

NOTICE IN TERMS OF SECTION 65 OF THE VALUE ADDED TAX ACT 89 OF 1991 (AS AMENDED)

ALL PRICES QUOTED ON TRANSACTIONS CONDUCTED WITH THIS COMPANY SHALL BE EXCLUSIVE OF VALUE ADDED TAX (VAT)”

Analysis

and consideration

[15] The provisions of section 64(1) of the VAT Act apply for the purposes of the Act. In the result, the South African Receiver of Revenue is at liberty to recover VAT from a supplier, whether or not it has in fact charged VAT. In each case it is a factual issue whether the price agreed upon does actually include VAT. The sub section “...merely ensures that SARS would not be prevented from recovering VAT until the parties have come to an agreement about possible price

disputes.”[1]

[16] The respondent’s contention in its answering affidavit that the applicant was tardy “...in the manner in which they framed the terms of the lease agreement...” by not explicitly excluding VAT from the hourly fee charged for the use of the aircraft in consequence of which it cannot be held to the disadvantage of the respondent, is plainly incorrect. In the replying affidavit the applicant comprehensively debunks laying blame for the absence of expressly having excluded VAT at the applicant’s door because the contract was not compiled by the applicant, but by the respondent’s representative. This is clear from the contents of an exchange of e-mails between the parties’ respective representatives prior to the conclusion

of the contract. On 18 May 2022 the respondent's Mr Fourie sent an e-mail to the applicant's Mr Martin Bester wherein he declares that he is in the process of drafting (the Afrikaans words used in the e-mail is "...op te stel...") the contract. To that purpose he requires the applicant's registration number, physical address, the commencement date of the contract as well as a "...insurance met Owenair op die versekering..." In an e-mail on the same day the applicant provides its registration and VAT numbers as well as undertaking to arrange for the respondent to be put in contact with the applicant's insurance broker. Upon an e-mail request from the respondent, the applicant remedies the omission of the applicant's address in a further e-mail to the respondent, also on 18 May 2022.

- [17] In consequence, it cannot be correct that the respondent was unaware of the fact, at the time of the conclusion of the contract, that the applicant was a VAT vendor in South Africa. This is also evidenced by the title page of the contract which records not only the applicant's South African company registration number, but also its VAT number.
- [18] Under the heading "Invoices", clause 3.7.4.1 of the contract stipulates that the applicant shall furnish the respondent "...with a tax invoice on the last day of each calendar month (or as soon as practicable thereafter) during which the applicability of these Terms extends setting out the fees and charges payable by [...the respondent...] in terms hereof for all Agreements during each such calendar month". The reference to a tax invoice is significant. Section 20 of the VAT Act obliges a supplier making a taxable supply to a recipient to issue a tax invoice to the recipient. The form and content of the tax invoice is prescribed. It must be in South African currency and contain, amongst others, the words "tax invoice", "VAT invoice" or "invoice", the name, address and VAT registration number of the supplier as well as of the recipient, the value of the supply, the amount of tax charged and the consideration for the supply, an individual

serialized number and the date upon which the tax invoice is issued as well as the value of the supply, the amount of tax charged and the consideration for the supply.[2] It follows that the respondent, whose representative was the author of the contract, knew that the contract was subject to payment of VAT.

- [19] In the founding affidavit the applicant alleges that despite demands made for payment, the respondent failed to make payment in the amount claimed namely R 4 939 985,31. This is the total amount which includes VAT claimed in the tax invoice. It continues to allege such amount is due, owing and payable. These allegations were not disputed by the respondent in its answering affidavit.
- [20] Taking the above into consideration, I am not persuaded of the respondent's version of events and in particular the allegation that it was of the view the transaction was VAT exempt. To the contrary, it lends credence to the applicant's contention that the respondent's reliance on non-compliance with section 64 read with section 65 of the VAT Act came as an afterthought. It seems to me, on a balance of probability, that the parties had been in agreement that VAT would be payable, hence the inclusion of clause 3.7.4.1 of the contract

which provides for the applicant to furnish the respondent with a tax invoice.

- [21] Tellingly, Mr Wolpe on behalf of the respondent telephonically gave an unequivocal undertaking to the applicant's Mr Coetzee that the account would be paid. This was confirmed in writing by Mr Wolpe in a WhatsApp message dated 3 June 2023 addressed to and received by the respondent's Mr Coetzee. It reads as follows:

"Hi Peter, as discussed, I'm awaiting a proof of payment which I expect any day i.e. Monday as per correspondence with one of our clients for a substantial amount and should be able to clear the account during the week"

It is not disputed by the respondent that during a further telephonic discussion between Mr Coetzee and Mr Wolpe, the latter advised that payment would be made within 48 hours from the date of the conversation. In neither case did Mr Wolpe qualify the undertaking to make payment of the claimed amount minus VAT. Nor is there any indication by Mr Wolpe that any VAT payable must be for the account

of the applicant.

- [22] The fact that Mr Wolpe on behalf of the respondent gave the undertaking to make payment as he did cogently indicates that it was an actual term of the contract for the respondent to pay VAT. Nowhere in the respondent's answering affidavit is it expressly alleged that the payment of VAT was for the applicant's account. Instead the respondent alleges that had it known the transaction is subject to VAT, it would have either negotiated a better rate or would have amended its quotes to its clients "...to cater for the increase in VAT." Clearly the thought had not occurred to the respondent's representatives at the conclusion of the contract that payment of any VAT would ever be for the account of the applicant. It follows it was a tacit term, whether actual or imputed,[3] that VAT on the transaction would be for the respondent's account.[4] Importing such a term into the contract will not offend against any of its express terms. The nature and extent of the express terms of the contract leaves room for the inclusion of such a tacit term.[5] Had the question been asked at the time of the conclusion of the contract as to which of the parties would pay VAT, objectively and on a balance of probability, the answer of an officious bystander would have been that it was for the respondent's account.[6] From the conduct of the parties after the conclusion of the contract, as set out herein before, it is evident that it was the intention of the parties that VAT would not only be payable, but that it was for the respondent's account.[7]

- [23] The attempt by a representative of the respondent to induce to applicant to be part of a scheme whereby the payment of VAT might have been avoided is detrimental to the respondent's case. On 9 May 2023 it was suggested to the applicant in an e-mail that it raise an invoice addressed to foreign based entity known as United Aviation Group Limited Mauritius. In consequence no VAT would have been payable on the transaction whereby an aircraft was leased. This entity would then pay the amount claimed less VAT in Mauritius. The applicant refused to be part of such a scheme. Such a scheme would have been a fraud upon the fiscus. It should not be countenanced by a Court. The fact that it was suggested to

the applicant weighs against the credibility of the respondent's version.

- [24] By reason of the view I take of the matter, the provisions of section 64 and 65 of the VAT Act does not apply. If I am wrong in doing so and in so far as the provisions of section 65 of the VAT Act in any event may apply, the applicant has complied with sub-section 65ii by having a notice referred to herein before at its sole entrance. The nature of the applicant's business is such that it does not have payment points as it is not a retailer such as a supermarket and the like with various payment points and tills where payment is effected by a customer in cash or by presenting a credit or debit card. Payment would have been done by Electronic Transfer into the bank account of the applicant.

Conclusion

- [25] The applicant does not pursue its claim for interest to be calculated on the total amount of R 4 939 985.31. It now seeks an order for interest calculated on the amount of R 4 295 639.40.
- [26] For the reasons set out above, I make an order as in paragraph [1].

N.S. KRÜGER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 19 June 2024.

COUNSEL FOR THE APPLICANT: Adv. N. Riley INSTRUCTED BY: Darryl Furman & Associates

COUNSEL FOR THE RESPONDENT: Adv. I Mwanawina Attorney INSTRUCTED BY: Tracey Lomax

Attorney DATE OF ARGUMENT: 17 May 2024 DATE OF JUDGMENT: 19 June 2024

- [1] Juta's Value Added Tax Revision Service 19 at 64-1
- [2] Section 20(4) of the VAT Act. Section 20(5) provides for transactions where the supply does not exceed R 5000,00.
- [3] Wilkins v Voges 1994 (3) SA 130 (A) at 136I: "A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one."
- [4] Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531ff

- [5] *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd*: 1965 (3) SA 150 (A) at 175C: “When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term.”
- [6] *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) 236–7: “That does not mean, in my view, that the parties must consciously have visualised the situation in which the term would come into

operation. In *Broome and Another v Pardess Co-operative Society* [1940] 1 All ER 603 MacKinnon LJ, applying the test I have quoted, referred to the hypothetical asker of the question as “a more imaginative friend”. It does not matter, therefore, if the negotiating parties fail to think of the situation in which the term would be required, provided that their common intention was such that a reference to such a possible situation would have evoked from them a prompt and unanimous assertion of the term which was to govern it.” See also *Richard Ellis South Africa (Pty) Ltd v Miller*: “Ex hypothesi neither the respondent nor anyone on behalf of the appellant could have given any cogent evidence regarding a term to which they

had not consciously directed their mind. At best they could have attempted, ex post facto and with the point at issue clouding their objectivity, to furnish information which can more readily be deduced from the surrounding

circumstances.”

- [7] *De Lange v ABSA Makelaars (Edms) Bpk* [2010] 3 All SA 403 (SCA) [20]: “In deciding whether the suggested term can be inferred, the court will have regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into. It has also been recognised in some cases, however, that the subsequent conduct of the parties can be indicative of the presence or absence of the proposed tacit term” See *Wilkins v Voges* 1994 (3) SA 130 (A) at 143B-D: “Another consideration, which has a bearing on the probabilities, is the defendant's failure to mention the alleged warranty at the first appropriate opportunity. Nowhere in the correspondence or in the affidavits filed during the application which preceded the trial is there even a hint of reliance on a tacit term. What was raised was the plaintiff's alleged fraud. Mention of the alleged tacit term was first made in the plea. The very fact that a term, supposedly so obvious as to speak for itself, escaped the attention of the defendant at the earlier stages of the proceedings is an indication, in my view a strong one, that it was nothing more than an afterthought when it was eventually mooted during the later stages of the proceedings.”

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