

SOUTH AFRICA / JUDGMENT

Spatialize (Pty) Ltd v City of Mbombela Local Municipality (1936/2019) [2023] ZAMPMBHC 29 (15 May 2023)

[2023] ZAMPMBHC 29

COURT

Mbombela High Court, Mpumalanga

BEFORE

B A Mashile

CASE / FILE NUMBER

1936/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

CASE NO: 1936/2019

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED: YES

DATE: 15/05/2023

SIGNATURE:

In the matter between:

SPATIALIZE (PTY) LTD

Plaintiff

and

CITY OF MBOMBELA LOCAL MUNICIPALITY

Defendant

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] To avoid confusion, the Plaintiff and Defendant will be referred to as Spatialize and the Municipality respectively and parties will mean both. Following confirmation of the Municipality on 23 July 2015 that Bid No 2[...] submitted by Specialize on 6 May 2015 has been successful, the parties concluded a Service level agreement ("SLA").

The bid concerned the appointment of a multi-disciplinary professional team for the establishment of a Strategic Programmes and

Project Support Unit ("the SPPSU").

[2] It is common cause that the SLA comprises the following documents:

2.1 a copy of the bid document (2[...]);

2.2 a copy of the appointment letter;

2.3 a copy of the acceptance letter;

2.4 a copy of the Contract Form (MBD7.2);

2.5 a copy of the General Conditions of Contract ("GCC"); and

2.6 annexure A.

[3] These documents together with the SLA will henceforth be referred to as the main agreement to maintain consistency with the terminology adopted by the parties. Spatialize has instituted fourteen different claims for non-payment against the Municipality. When the parties presented arguments to Court to amplify their heads on 16 September 2022, seven of those claims had become settled while the balance of seven remained contested. As such, this case is about claims eight to fourteen. The parties agreed that claims nine to 14 are similar insofar as what ought to be alleged and established. Thus, they agreed, a finding on any of the six claims in favour or against one of them should apply to the rest of the claims.

TERSE BACKGROUND

[4] While the terms of the main agreement are essentially a matter of common cause between the parties, they are at variance in their interpretation of Clause 3 of the SLA and Clause 18 of the General Conditions of Contract ("GCC"). Generally, Clause 3 deals with commencement and duration of the main agreement. The subclauses that are relevant to this judgment are 3.1, 3.3 and 3.6. These clauses provide as follows:

"3.1 The contract period will be 36 months;

3.2

3.3 The Municipality may, at its sole discretion, extend the duration of this agreement for a further period as it may deem necessary and agreed upon from time to time including but not limited to extending the agreement on a month to month basis;

3.4 ...

3.5 ...

3.6 The extension of this agreement shall be on the same terms and conditions as set out in this agreement unless otherwise agreed by the parties and such agreed terms shall be reduced to writing and signed by the parties.”

[5] Dealing with variations, Clause 18.1 of the General Conditions of Contract (“GCC”) provides that:

“In cases where the estimated value of the envisaged changes in purchase does not vary more than 15% of the total value of the original contract, the contractor may be instructed to deliver the goods or render the services as such in cases of measurable quantities, the contractor

may be approached to reduce the unit price, and such offers may be accepted provided that there is no escalation in price.”

[6] Claim 8, does not turn on how the parties interpret the clauses that I have mentioned above but the Municipality argues that the problem lies in the manner in which it is pleaded in the particulars of claim. The Plaintiff’s approach, on the other hand, is that this was an agreement between the parties to do work on certain specified terms for payment. Spatialize delivered, it being irrelevant whether or not through the medium of a third party, and the Municipality has short paid by an amount of R158 909.20.

ISSUES

[7] The issues for determination are simple and straight forward. Has Spatialize demonstrated that the Municipality is indebted to it in the amounts claimed under Claims 8 to 14?

CLAIM 8

[8] The Municipality has pleaded this claim as follows:

“44. On 02 November 2015, the plaintiff and the defendant agreed to extend the Main Agreement and entered into a written agreement ("Addendum 1"), a copy of which is annexed marked "POC 9". A copy of both the letter of appointment and letter of acceptance in respect of Addendum 1, are also included as part of POC9 hereto.

45 In terms of Addendum 1, the plaintiff was appointed to conduct feasibility studies for the purpose of registration of certain projects on the Public-Private Partnership process of National Treasury and certain projects to assist on deciding service mechanisms. This appointment amounted to an amendment and constituted an extension to the Main Agreement in terms of clause 3.6 of the SLA.

46 On 30 August 2017, the plaintiff submitted to the defendant invoice number SPAT046-1 for the payment of the amount in terms of payment certificate 25. A copy of this invoice and payment certificate is previously annexed marked "POC 3.1" to "POC 3.2" respectively.

47 Invoice SPPSU104 as referred to invoice in number SPAT046-1 was submitted for payment and duly paid. A copy of invoice SPPSU104 is annexed marked "POC 10".

48 However, an error was discovered by the plaintiff in respect of invoice SPPSU104 in that it did not include the plaintiff's 5% management fee. This amount payable in respect of the management was R158,909.20.

49 Subsequently, invoice SPAT046-1 was issued to the defendant which includes a reconciliation amount of R158 909.20. This amount remains outstanding.

50 The plaintiff has fulfilled its obligations in terms of Addendum 1 and performed its services in respect of this appointment.

51 Notwithstanding this, the defendant has failed to pay the outstanding amounts due to the plaintiff in terms of the invoices.

52 The defendant has failed to pay the amount claimed under this appointment.

53 As a result of the aforementioned, the defendant is indebted to the plaintiff in an outstanding amount of R158,909.20 in respect of invoice SPPSU104."

[9] The Municipality is steadfast that the claim of the amount of R158 909.20 is not supported in Addendum 1 because Addendum 1 makes no reference to a 5% management fee. Moreover, the Addendum does not mention the agreement between a third party ("Lesela") and the Municipality nor does it make reference to payment of management fee.

[10] To the extent that the Municipality came to Court to meet a specific case of owing a particular amount of money to Spatialize, the basis of which is as described in Addendum 1, it is now surprised by the introduction of Lesela and the fact that the management fee pleaded is not shored up by the Addendum.

[11] Spatialize characterises Addendum 1 as being an extension of the main agreement as contemplated in Clause 3.6 of the SLA. This is incorrect because Clause 3.6 deals with extension of time only and not scope of work. As such, it cannot be relied upon to support the extension to the scope of work agreed upon by the parties. On the basis of what Spatialize has pleaded therefore, claim 8 has no merit and is dismissed.

CLAIM 9

ASSERTIONS ADVANCE BY THE PARTIES

- [12] Here the argument of the Municipality is that the amount claimed is not due and payable as it undermines the provisions of Clause 18 of the GCC. The purpose of Clause 18 of the GCC, asserts the Municipality, is to ascertain that the original tender amount does not balloon too far from the initial tender amount for which the tender was advertised. Clause 18 of the GCC seeks to cure this mischief by limiting the expansion of the original total tender amount to 15%. Thus, if the proposed expansion would exceed the overall original amount by 15%, it will not be approved because of the limit imposed by Clause 18.
- [13] Another argument advanced by the Municipality is that it is not in possession of copies of those variations. In any event and since they have not been signed by it, they are in contravention of the main agreement, which requires that they be signed by both parties. The Municipality was very firm that the evidence of Mr Mabuza, the erstwhile employee of the Municipality, could not assist Spatialize insofar as he could not point to identifiable signed documents from Spatialize that were forwarded to the Municipality. All that Mr Mabuza could say was that following signature of the SLA, a fair number of documents were generated and those documents were in the office of the accounting officer without any specificity.
- [14] The above is compounded, asserts the Municipality, by the failure of Spatialize to discover the variations. It is improper for Spatialize, a party that has accepted that the onus of establishing indebtedness to it by the Municipality rests on it, should turn around and say that the required documents are in any event in the possession of the Municipality. Spatialize could not have instituted this action hoping that the Municipality would make discovery of the documents needed by its adversary to prove its case. Besides, argues the Municipality, Spatialize has failed to employ other measures at its disposal to find out if indeed the Municipality was in possession of the documents that it required for purposes of this action. Those include, among others, the mechanisms set out in Rules 35 and 21.
- [15] The variations or extensions in Claims 9 to 14 were at the instigation of the Municipality. They were subsequently forwarded to Spatialize for consideration and acceptance, which it did by appending a signature thereon and forwarding them back to the Municipality. As I have already mentioned above, the Municipality claims that notwithstanding the evidence of Mr Mabuza, which could not pinpoint specific documents, it is not in possession of copies of those variations. To the extent that some of those variations were signed by Spatialize alone, the Municipality asserts that they are invalid as they are in contravention of the provisions of Clause 17.2 of the SLA. Furthermore, there is no proof of their existence anyway.
- [16] Arguing against the 15% limit on the overall tender amount, Spatialize asserts that the 15% cap referred to in Clause 18.1 is not meant to be levied on the entire amount of the original tender. This, Spatialize argued, sounded academic because in any event the Municipality has already paid far in excess of the 15%. If one were to adopt the approach suggested by the

Municipality, the overall amount of the original tender has long been exceeded. For this reason, Spatialize proposes that a proper manner of interpreting Clause 18 is that the 15% ought to be imposed on each variation.

- [17] With regard to the question whether or not the addenda and/or variations were signed, Spatialize argues that the Municipality by forwarding the variations by electronic mail with its name at the bottom of the document intended them to be signed. As such, the court should regard them as duly signed. To this end, Spatialize referred this court to Section 13(1) and (3) of the Electronic Communications and Transactions, Act 25 of 2002 (“ECTA”) and The Case of Spring Forest Trading Cc v Wilberry (Pty) Ltd T/A Ecowash and another (“Spring Forest Trading”)[1].
- [18] The last argument of Spatialize pertains to estoppel. The Municipality’s acceptance of the work, invoices and its approval of the invoices for payment, the Municipality is estopped from relying on the non-variation clause to avoid performance of its obligation. The conduct of the Municipality in making the various offers and / or appointments to Spatialize extending the scope of work under the main agreement led Spatialize to believe that the offers and appointments, on the one hand, and acceptance letters and the consequent addenda, in some instances, on the other, were proper variations in terms of clause 17.2 of the main agreement and clause 18 of the GCC. Spatialize acted on the conduct of the Municipality to its detriment and the Municipality must be estopped.

LEGAL FRAMEWORK

- [19] Since this case turns on the provisions of the main agreement and the Electronic Communications and Transactions, Act 25 of 2002 (“ECTA”), it will be useful to cite some of the relevant clauses and Sections respectively here. Clause 17 of the SLA provides that no variation of the agreement shall be of any force and effect unless reduced to writing and signed by both parties. Section 13(1), (2) and (3) of ECTA deals with electronic signatures and it prescribes that:

“(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.

- (2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.
- (3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if—
- (a) a method is used to identify the person and to indicate the person’s approval of the information communicated: and

- (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.”

[20] Dealing with the question of electronic signatures, the court in the matter of Spring Forest Trading CC supra said the following at paras 17 and 18:

“Commonly understood, as signature is a person’s name written in a distinctive way as a form of identification... But this is not the only way the law requires a document to be signed. In the days before electronic communication, the courts were willing to accept any mark made by a person for the purpose of a testing a document, or identifying it as his act, to be a valid signature. They went even further and accepted a mark made by a magistrate for a witness, whose participation went only as far as symbolically touching the magistrates pen.

The approach of the courts to signatures has therefore been pragmatic, not for formalistic. They look to whether the method of the signature used fulfils the function of a signature-to authenticate the identity of the signatory-rather than insist on the form of the signature used. Put simply, so long as the data in an email is intended by the user to serve as a signature and is logically connected with other data in the email, the requirement for an electronic signature is satisfied. This description accords with the practical and non-formalistic way the courts have treated the signature requirement at common law.”

[21] The approach of Spatialize towards some of the clauses of the main agreement and/or the SLA notwithstanding, the clauses ought to be construed such that they ascribes meaning to the words used in the document. One must endeavour to give context when reading the provisions concerned as a whole and the circumstances attendant upon its coming into existence. The current position of the law in this regard has been stated in Natal Joint Municipal Pension Fund v Endumeni Municipality[2]:

“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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

ANALYSIS

- [22] Turning to Clause 3.6 to which Spatialize has throughout maintained that it, together with Clause 18.1 of the GCC, were utilised for purposes of extending the scope of the work. It is manifest that Clause 3 of the SLA deals exclusively with the extension of the duration of the agreement, the wishes of Spatialize to the contrary aside. The language used, context and purpose of the clause is apparent – the duration of the agreement shall be for a period of 36 months. Moreover, Spatialize has admitted that the agreement terminated by effluxion of time at the end of the 36 months. Spatialize's persistence that Clause 3.6 was used for the extension of the work when the converse is plain is aberrant. Accordingly, reliance on Clause 3.6 for the extension of the scope of work is misguided.
- [23] The failure of Spatialize to demonstrate that the duration of the agreement went beyond the prescribed period of 36 months lead this Court to turn, as it must, its attention to the letters of appointment memoranda and addendum on which Spatialize relies for claiming the sums mentioned under Claims 9 to 14. Following the advice of the parties that Claims 9 to 14 can be considered as generally similar, I intend to deal with only one of them and that will be Claim 9. My finding therefore on Claim 9, whether for or against one of the parties, will apply to the balance of the claims.
- [24] The claim of Spatialize under Claim 9 is for payment of an amount of R151 783,27 for which it presented invoice SPAT006. entitlement to the amount claimed derives from a letter of appointment dated 27 January 2016 and an acceptance together with an addendum signed by Spatialize alone. It follows that Spatialize's argument that there was a variation in terms of Clause 18 of the GCC or an extension under clause 3.6 of the SLA, is not only inappropriate but is also untenable.
- [25] Spatialize has sought to argue that insofar as those documents that required its signature prior to a valid variation are concerned, the Court should regard them as signed. The basis of its motivation in this regard is the evidence of Mr Mashaba who testified that signed addenda, memoranda and letters of acceptance should have been among many other documents that were in the office of the accounting officer. This evidence cannot be treated any differently from that of Mr Mabuza who also did not point out to the existence of documents referred to in this matter. The testimony of these two witnesses is insufficient for this Court to conclude that the documents were present.
- [26] Still on the question of unsigned documents, Spatialize has contended that the Municipality, by its preparation of the addenda, memoranda and letters of appointment and their subsequent transmission to Spatialize with its name thereon, had intended them to be signed. As such, the Court should regard the Municipality's conduct of transmitting those documents electronically as signature. In this regard, Spatialize referred to Section 13 of ECTA and what case law makes of its provisions. The Court was referred to the matter of Spring Forest Trading CC to which I have made mention above where the

Court emphasised the question of intention of the user in transmitting the documents. The Court stated:

“Put simply, so long as the data in an email is intended by the user to serve as a signature and is logically connected with other data in the email, the requirement for an electronic signature is satisfied. This description accords with the practical and non-formalistic way the courts have treated the signature requirement at common law.”

- [27] Intention is obviously hard to establish. It is trite that it can either be express or implied or a conduct of a party could be such as to constitute an intention. So, it is clear that the provisions of Section 13 of ECTA as referred to by Spatialize need to be shored up by the intention of the user. There is nothing in the conduct of preparing and transmitting the documents electronically to Spatialize by the Municipality that suggests intention of signature. Spatialize did not even put forward any testimony that could persuade this Court to consider the conduct to amount to signature. The proposition is rejected as bereft of any merit.
- [28] Spatialize has also contended that the facts in this matter are idyllic for the application of the doctrine of estoppel. The Municipality, it argued, by accepting the documents and the work performed led Spatialize to objectively believe that the documents were adequate for compliance with the main agreement. In consequence, Spatialize acted thereon to its detriment.
- [29] A party will be estopped from denying the truth of a representation previously made by him to another if the latter, believing in the truth of the representation, acted thereon to his prejudice. See, *University of Johannesburg v Auckland Park Theological Seminary and Another*[3]. At Para 118 the Court explains that ‘...a party may only rely on estoppel if the reasonable person on the street would also have been misled by the conduct on which the estoppel is founded’.
- [30] I agree with the Municipality that contrary to what Spatialize would have this Court believe, estoppel cannot find application in circumstances where Spatialize was conscious of the requirements that had to be observed for entering into a valid addendum. Spatialize should be assumed to have read, understood and signed the main agreement after it has engaged with the contents thereof. It is indeed disingenuous for Spatialize to turn around and claim that it had been misinformed by the Municipality into believing that all the requirements had been complied with when it knew that they had not.
- [31] Finally, it is worth remarking on the provisions of Clause 18 of the GCC, specifically on the 15% cap on the overall amount of the agreement. Clearly, the language of the clause is straight forward and the purpose and context unmistakable. The context is that agreements emanating from tenders are normally concluded with a certain contract price but the contract price usually becomes very elastic. In some instances, such as in *casu*, the original amount has more than doubled. Clause 18 of the GCC was introduced to ascertain that

contract prices do not balloon beyond a certain level of the original tender amount and without authorisation.

[32] The purpose and context of Clause 18 as set out above intimate that a proper interpretation of the clause should be 15% of the original tender amount. An interpretation that seeks to apply 15% to the amount of individual sub-projects will not serve to curb the amount of the initial tender spiraling out of control. To the extent that both parties have infringed the provisions of Clause 18 of the GCC, they are both to blame. Everything said on this point, all of it has become academic because the parties have already settled Claims 1 to 7. Accordingly, the least said about it the better.

[33] Going back to the agreement of the parties that if the court finds against or in favour of one of the parties on Claims 9 to 14, the outcome thereof will apply to the rest of the remaining claims. The outcome in Claim 9 is in favour of the Municipality. This means that the balance of the claims will follow this finding without the Court having to scrutinise each and every claim.

COSTS

[32] This leaves the question of costs still open. Both parties have asked for costs if successful. Spatialize has contended that considering the entire matter, the portion that was finally settled with the Municipality makes it triumphant overall. That contention is unassailable because the portion contested and won by the Municipality is small leaving Spatialize as the victorious party. In the circumstances, I do not deem it necessary to depart from the general principle that costs follow results.

ORDER

[33] Having considered all of the above, I make the following order:

The Municipality is directed to pay an amount of R13 780 194.71 being for claims 1 to 7;

Claims 8 to 14 are dismissed;

The Municipality is to pay the costs of Spatialize.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 15 May 2023 at 10:00.

APPEARANCES:

Counsel for the Plaintiff: Adv K Pillay SC Adv A Dipa Instructed by: Webber Wentzel Counsel for the Defendant: Adv A Bester SC Adv M Msomi Instructed by: Ncube Incorporated Attorneys Date of Judgment: 15 May 2023

[1] 2015

(2) SA 118 (SCA) paras 17-18

[2] 2012

(4) SA 593 (SCA) at para 18

[3] 2021

(6) SA 1 (CC) 2021 (6) SA 1 (CC) at Para 117

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Prepared on 11 October 2026 · Esheria