IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: BHISHO

CASE NO: 165/12

Heard on: 20/05/13

Delivered on: 04/06/13

REPORTABLE

In the matter between:

THE INSTITUTE OF TRAINING AND

EDUCATION FOR CAPACITY BUILDING Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR EDUCATION OF THE PROVINCE OF THE

EASTERN CAPE Defendant

JUDGMENT

NHLANGULELA J:

[1] The plaintiff instituted summons against the defendant claiming for the payment of R1 710 054,89 as damages arising out of an alleged breach of a tender contract.

[2] The plaintiff's case is governed by the pleadings and documents discovered in terms of Rule 37 of the rules of this Court.

[3] I pause here to first deal with the background facts so that the issue(s) arising for the decision may be appreciated.

[4] During September 2007 the defendant advertised a bid, Bid No. SCMU6-07/08-0013 described as the: Evaluation Of The Accredited Training of Early Childhood Development (ECD) Practitioners Programme. The plaintiff submitted a bid strictly in terms of the bid rules and conditions with the result that, on proper assessment, it became a successful bidder out of many other contestants. Payment would be made for each completed year. A service level agreement, the contract, was duly signed between the parties binding themselves to the rights and obligations each party would have against the other as set out therein. In terms of the contract the implementation of the tender would be commenced with in January 2008,

and to endure for a period of 3 years ending in November 2010. Accordingly, the plaintiff commenced with the execution of the contract as it was obliged to do so. After successful completion of the first year of the contract it was paid a sum of R740 283,50. Having completed implementation of all tasks for the second year the defendant refused to pay. Protracted negotiations and requests for payment of R814 311,85 due for the second year culminated in a demand for payment. Notwithstanding all that payment was still not forthcoming. In the meantime the defendant took the stance that the plaintiff's demand for payment of R814 311,85 in respect of the second year was not consistent with the price agreed to in the contract. The attitude it adopted was that the plaintiff was entitled to only R74 028,35 (10% of R740 283,50).

[5] The disagreement between the parties resulted not only to a refusal to pay, but also to a unilateral repudiation of the contract by the defendant. This conduct rendered it impossible for the plaintiff to perform its further contractual obligations; hence the acceptance of repudiation and the claims made in these proceedings for payment of R895 743,85 (R814 311,85 plus 10% thereof) as damages in respect of the third year and the unpaid

R814 311,85 for services already rendered in the second year. These claims make a combined claim in the sum of R1 710 054,89.

[6] I now revert to the facts that are admitted by the defendant in the pleadings. They may be listed as follows:

(a) The contract price for the first year (2008) is the sum of R740 283,50, escalated by 10% for each of the subsequent years.

(b) The payment plan for the contract period of three years' duration is as reflected in annexure "B", in which the following appears:

Year 1 R740 283,50

Year 2 R814 311,85

Year 3 R895 743,04

(c) Payment made for the first year is R740 283,50.

(d) Plaintiff discharged its contractual obligation for the second year (2009).

(e) The contract was repudiated by the defendant, which resulted in the contract not being performed in the third year (2010).

[7] The defendant denied the following allegations in the particulars of claim:

(a) That it is liable to pay the sum of R814 311,85 claimed by the plaintiff for the second year (2009).

(b) That it is liable to pay for the third year (2010) that was not performed.

These denials are predicated on the amplification that the bid price for the second year is only 10% of R740 283,50 (R74 028,35) and 10% of R814 311,85 (R81 432,00) for the third year. It is averred in paragraph 10 of the defendant's plea that: "such repudiation was consequent upon the plaintiff's display of bad faith and/or greed in demanding an unwarranted payment of the sum of R814 311,85."

[8] Oral evidence was not adduced in this case in keeping with the agreement between the parties that the case may be disposed of on the bases of the pleadings and discovered documents. In a pre-trial meeting held on 17 May 2013 the parties identified the issues for decision as being the following:

(1) Whether the defendant was justified in repudiating the contract; and

(2) The interpretation of the term: “escalated by 10% per annum for the second and third years”.

[9] In my understanding of the respective cases of the parties as ventilated during arguments the decision of the case lies only on the interpretation of the contract with specific regard to the meaning of the words:

> “The first pricing option is R740 283,50 for the first year of the study, escalated by 10% per annum for the second and third years.
>
> Year 1 R740 283,50
>
> Year 2 R814 311,85
>
> Year 3 R895 743,04”

These words appear in annexure “B” to the papers, and they call for interpretation:

[10] The traditional approach, the golden rule, to interpreting a document is that in ascertaining the intention of the parties to a contract the words used in it must be given their ordinary grammatical meaning with application of the rules of grammar, dictionary meaning and meaning assigned to them in

previous judicial decisions unless such words lack clarity or are incapable of bearing more than one meaning; in which event the evidence of surrounding circumstances/background facts should be considered. In this case it became clear to me during argument that the interpretation given to the term: "escalated by 10% per annum" is neither clear nor capable to bear one meaning. The two interpretative scenarios each party gave to the contract price for the second and third years is evidence of this.

[11] *Mr Jozana*, counsel who appeared on behalf of the defendant, seems to me to have adopted a restrictive interpretation to the term "escalated by 10% per annum" in annexure "B" by relying on annexures "SJ 16" , "SJ 17" and "SJ 18" which were obtained only at the time when the service level agreement was signed, and by so doing ignoring the explanatory documents which were obtained after the signing of the contract and which documents reflect on the intention of the parties based on their conduct before, during and after the contract was signed.

[12] Annexure "SJ 16" is a letter which reads: "Your Bid dated 04 October 2007 has been accepted subject to all bid conditions embodied in the bid document at a contract price of R740 283,50 inclusive of VAT and all other

expenses". Annexure "SJ 17" is the document entitled: Invitation To Bid which reads: "Total Bid Price R740 283,50" Annexure "SJ 18" is an internal document of the Joint Bid Award Committee of the defendant in which the following resolution was made: "The Committee unanimously agreed to award the tender to ITEC as per recommendation by the Joint Bid Evaluation Committee at a total cost of R740 283,50 exclusive of VAT."

[13] There cannot be merit in the argument advanced on behalf of the defendant that it was intended by the parties that the total costs of the contract is R740 283,50. On the defendant's own documents the costs are inclusive of VAT or not so inclusive. If regard is had to *Mr Jozana's* argument in Court on the 10% component payable in 2009 and 2010, which increases the sum of R740 283,50, the interpretation that the total costs is R740 283,50 is defeated. In annexure "B" R740 283,50 is not stated as being the total costs, but it is a payment for services rendered in the first year. For the total costs to remain R740 283,50 there would be no price for services rendered in the second and third years, which is untenable as the contract period is three years.

[14] *Mr De La Harpe's* submission was that the defendant's restrictive interpretation of the contract price does not take into account the meaning of surrounding circumstances as given by the Supreme Court of Appeal in the case of *KPMG Chartered Accountants (SA) v Securefin Ltd & Another* 2009 (4) SA 399 (SCA) at 409, para. [39] read with the cases of *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at paras. [22]; and [23] and *Masstores (Pty) Ltd and Another* 2008 (6) SA 654 (SCA) at para. [7]. See also the *Annual Survey of S.A. Law* 1996 at pp 213 – 216 in which the cases of *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) and *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 184A-E, the precursors to the judgment of Lewis JA in the *Masstores, supra,* case. Harms DP, as he was then, said the following in the case of *KPMG, supra,* at 409J – 410A:

> "The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or factual matrix' ought to suffice."

[15] The correct approach to interpreting a document, now applied by the courts, is well articulated in the case of *Van der Westhuizen, supra*, at 464 para. [23] as follows:

> "On the other hand, it is trite law that even where the wording of a provision is such that its meaning seems plain to a court, evidence of 'background circumstances' is admissible for the purpose of construing its meaning. In *Coopers & Lybrand v Bryant*1995 (3) SA 761 (A) Joubert JA said (at 768A-E):
>
> > 'The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking to have regard:
> >
> > (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract,
> >
> > …
> >
> > (2) to the background circumstances which explain the genesis and purpose of the contract, i.e *to*

matters probably present to the minds of the parties when they contracted. Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 454G-H; *van Rensburg en Andere v Taute en Andere 1975 (1) SA 279 (A) at 305C-E…(my emphasis).*

(3) to apply extrinsic evidence regarding the surrounding circumstances where the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.…'

It is not apparent to me quite where to draw the line between background and surrounding circumstances. Perhaps it is a distinction without a difference. But it is clear that in

> construing the ambit of the exemption clause between the parties in this matter regard should be had at least to the 'matters probably present to the minds of the parties when they contracted'– the 'background circumstances'.

[16] The interpretation which is given to annexure "B" by *Mr Jozana* has already been discarded by the Supreme Court of Appeal. It, therefore, cannot find application in this case. I adopt, as I have to, the approach as contended for on behalf of the plaintiff.

[17] It is not disputed that the parties agreed that the contract price for the second and third years shall be R814 311,85 and R895 743,04 respectively. The interpretation that the contract price (compensation) for work done in each of the three years was intended to escalate (increase) at the rate of 10% per annum is neither vague nor ambiguous. It is reasonable. This agreement held good all the way through until the defendant repudiated the contract, *albeit* unilaterally, in 2010 by reasons that, firstly, funds to finance work for 2009 and 2010 will not be made available because an order number cannot be generated; and, secondly, because it was never agreed that the contract price is as outlined in annexure "B". In fact the second reason surfaced for the first time after the dispute had been referred to court in May 2012.

[18] The bundle of discovered documents is replete with documentary evidence of surrounding circumstances which support the version of the plaintiff. The evidence comprises correspondence exchanged between the parties between July 2009 and August 2011. *Mr De La Harpe* brought all the documents to the attention of the Court. I do not intend to deal with each of those documents in this judgment. I am satisfied that such evidence supports the interpretation that the parties intended to escalate payments at 10% in the manner as is set out in annexure "B".

[19] In all the circumstances of this case the repudiation of the contract on account of a disagreement about the meaning of annexure "B" was unlawful.

[20] There is general acceptance between the parties that the plaintiff as the service provider, had a right to sue the government for damages arising from a contractual breach. See: *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 (SCA). The position of the defendant is similar to that of an employer and the plaintiff, as the employee, had no other choice when confronted with repudiation of the contract but to accept it. The remedy open to the plaintiff was then to sue for the unperformed third year less any sum it actually earned or could reasonably have earned

during the third year in similar employment. The case of *Myers v Abrahamson* 1952 (3) SA 121 (C) at 127C-G is authority for that proposition. In the absence of evidence of earnings during 2010 the plaintiff is, in my view, entitled to be paid the sum of R895 743,85 due to it under the contract.

[21] It is my finding that the plaintiff has proved its claims together with default interest going back to the end of 2009 and 2010 when payment of the contract price fell due.

[22] In the result judgment is granted in favour of the plaintiff against the defendant in the following terms:

(a) Payment of the sum of R814 311,85 with interest thereon calculated from 01 January 2010 to date of final payment; and

(b) Payment of the sum of R895 743,04 with interest thereon calculated from 01 January 2010 to date of final payment;

(c) Costs of suit.

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Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

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