THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 126/04
REPORTABLE

In the matter between

PRIVEST EMPLOYEE SOLUTIONS (PTY) LTD APPELLANT

and

VITAL DISTRIBUTION SOLUTIONS (PTY) LTD RESPONDENT

Before: Mpati DP, Zulman, Lewis, Jafta et Mlambo JJA

Heard: 12 May 2005

Delivered: 30 May 2005

Summary: Contract – interpretation of – effect of terms in addendum on terms in main contract – object of rule 33(4) and duty of trial court in regard thereto restated.

JUDGMENT

MLAMBO JA

[1] The interpretation of an agreement is the issue in this case. The appellant is a labour broker specialising in the outsourcing of labour and related services. The respondent conducts a warehousing and road freight business.

[2] The parties concluded a written agreement, on 1 September 1999, in terms of which the appellant undertook to provide temporary labour, in the form of drivers and their assistants to the respondent as required by the latter from time to time in the running of its business. The written agreement consisted of what was referred to in this Court as the main agreement and an addendum. It is common cause, however, that though both documents were signed on the same day neither refers to the other.

[3] From September 1999 to April 2000 the appellant provided temporary labour to the respondent, and issued invoices totalling an amount of R1 384 111, 00 to the latter for the services rendered. The respondent, in turn, paid the appellant an amount of R994 452, 44 leaving a balance of R389 658, 56. The respondent's failure to pay the balance is based on its view that the time sheets relating to hours, alleged by the appellant to have been worked by

its temporary employees totalling that amount, were not authorised in terms of and in accordance with the agreement.

[4] The appellant instituted action in the Johannesburg High Court seeking to recover the balance. At the commencement of the trial the parties agreed, in terms of rule 33(4) of the Uniform Rules of Court, that the issues be separated and that the trial court first determine what was essentially a stated case couched in the following terms:

'1. Whether in terms of the agreement between the parties it was the plaintiff's or the defendant's obligation to prepare the weekly time sheets.

2. Whether the time sheets for the period of the contract were in fact authorised in terms of and in accordance with the provisions of the agreement.'

[5] The trial court (Coetzee J) sanctioned the request in terms of rule 33(4) and issued an order to that effect. I will return to this aspect of the case later in the judgment. The first question set out in the stated case has become resolved.

[6] The picture emerging from the evidence adduced in the trial court is that two types of time sheets were used. One type was the spreadsheet (also referred to as a clock card) which was used by

individual drivers to record hours of work performed by each one of them and their assistants while rendering service to the respondent. The information contained in the spreadsheets was used to compile the other time sheet, the so-called weekly time sheet. It is this time sheet that was used by the appellant to invoice the respondent.

[7] The evidence adduced also showed that in the period from the commencement of the contract up to the week ending 3 October 1999, Johan Abraham Van Huysteen and Willem Botha, who were employees of the respondent, were responsible for collating the spreadsheets. They thereafter handed them over to Louis Albrecht Janse van Rensburg and Mark Richard Bryant, employees of the appellant, to compile the weekly time sheets. These time sheets, with spreadsheets attached thereto, were given to Jeane Botha, an employee of the respondent, to check and, presumably, to authorise. Thereafter Jeane Botha returned the time sheets to the appellant's employees to fax to their office in Cape Town for invoice purposes.

[8] For the period commencing the week ending 9 October 1999 and ending 17 October 1999 Jeane Botha prepared the weekly time sheets and then handed them to Van Rensburg and/or Bryant to fax

to Cape Town. In that month Jeane Botha complained that the compilation of weekly time sheets was too much for her. The parties, represented by Van Rensburg (appellant) and Van Huysteen and Brown (respondent), agreed that Lee Ann Heuer, who was initially employed by the respondent, would compile the weekly time sheets. Subsequently she was, for convenience sake, transferred to the payroll of the appellant. It was also agreed that Van Rensburg would collect the time sheets from her to send to Cape Town.

[9] Van Huysteen was Heuer's supervisor, and was also responsible for checking her work. He trained her to collate spreadsheets and to prepare time sheets. In terms of this arrangement Heuer prepared time sheets from the week-ending 24 October 1999 up to the week-ending 2 January 2000.

[10] Van Huysteen testified that he was satisfied with Heuer's work and did not always check it as he also had other responsibilities and was certain that she did her work correctly. He was aware that Van Rensburg and/or Bryant collected time sheets from Heuer every Monday morning. Heuer always brought her own time sheet to him to verify her hours. He never signed any of the time sheets and

would have done so had he been requested to do so.

[11] I now return to the remaining question in the stated case. Central to the resolution of this question is the meaning of clauses 7 of the main agreement and 3 of the addendum. Clause 7 provides:

'7 TIMEKEEPING

7.1 A weekly time sheet system that records and assigns, names and hours worked by the Employees will be used.

7.2 The time sheet system shall be authorised weekly by the person at the Client charged with the responsibility to do so.

7.3 The authorised person shall fax the recorded time sheet to the Contractor's office no later than the Monday following any particular week in which Employees were provided to the Client by the Contractor.'

In turn clause 3 provides:

'All contractors will be supplied with time sheets, all hours worked will be signed by an authorised person stating that all hours that have been signed for will be taken as true and correct and invoiced accordingly.'

[12] The appellant contended before Coetzee J that the time sheets complied with the terms of the agreement in that they had been prepared reflecting all the hours worked by its employees, and

that the time sheets were thereafter properly authorised in terms of the agreement. On the other hand the respondent contended that it was an express, alternatively implied term of the agreement, that the appellant would prepare and use the time sheets to record and assign the names and hours worked by each employee, and that the time sheets would then be authorised in writing by its (respondent) representative charged with the responsibility to do so.

[13] After hearing evidence the trial court found that the parties intended in clause 7 that the appellant would prepare the time sheets and submit them to the respondent for its approval. The learned judge essentially reasoned that the time sheet contemplated in clause 3 was the spreadsheet issued to and completed by individual drivers, and that though it had to be signed by an authorised person, this had nothing to do with the authorisation of time sheets as contemplated by clause 7. The learned judge further found that clause 7 did not require approval of the time sheets to be in writing. He found that oral authorisation was sufficient and consequently granted an order to the effect that the time sheets for the entire period of the agreement were authorised in terms of and in accordance with the agreement.

[14] The respondent applied for and was granted leave to appeal to the Full Court. In granting leave Coetzee J considered that another court might find that he had erred, inter alia, by not finding that the agreement, addendum and certain time sheets, viewed together, showed that the intention of the parties was that authorisation had to be by way of a signature.

[15] The Full Court (Robinson AJ, Blieden and Schwartzman JJ concurring) found that the main agreement was of general application and regulated the relationship between the parties by requiring that a time sheet system be utilised and be authorised, whereas the addendum was more specific and dictated how the parties would implement the general terms of the main agreement. In this regard the court found that the addendum prescribed how the authorisation was to take place. It held that the trial court should have found that authorisation as contemplated in the agreement would have constituted authorisation in writing by a person in the employ of the respondent who bore the responsibility to do so.

[16] In this regard the Full Court stated:

'23. The purpose of a signed authorisation is clear. The respondent would only be entitled to charge for hours actually worked (clause 8) and once

appellant had authorised the time sheets, by signing same, it would be bound thereby.

In my view, it is clear that the parties in the addendum gave stricter attention to the detail of the contract than in the main agreement, as such, the addendum prescribes how the authorisation contemplated in clause 7 is to take place.

This interpretation is underscored by the reference to invoicing in clause 3 of the addendum. The signed time sheets form the basis upon which the respondent had to invoice appellant as appears from clause 4 thereof.'

[17] The Full Court then analysed the evidence and concluded that the time sheets from the inception of the contract up to the week ending 2 January 2000 were not authorised in terms of and in accordance with the provisions of the agreement and that the time sheets for the period commencing the week ending 9 January 2000 up to the termination of the contract in April 2000 were properly authorised.

[18] The appellant, who is before us with leave of this Court, seeks the reversal of the ruling of the court *a quo* to the effect that the time sheets for the period from the inception of the contract up to and including the week ending 2 January 2000 were not authorised in terms of the agreement. The issue therefore, simply put, is the

determination of the meaning intended by the parties when they required the authorisation of time sheets in the agreement.

[19] Mr Heher, for the appellant, advanced a number of submissions, the essence of which was that the provisions of the main agreement took precedence over the terms of the addendum. He submitted that the absence of any specific form of authorisation in clause 7 meant that authorisation was intended to take different forms including, but not limited to, signing.

[20] Mr Heher also submitted that clauses 7 and 3 deal with different documents, as found by the trial court, in that clause 7 refers to weekly time sheets while clause 3 refers to employee spreadsheets. He submitted further that even if it were found that the two clauses deal with the same subject matter, clause 3 provides for the signature of a time sheet as but one of a number of ways in which a time sheet was to be authorised, and that nothing in the wording of this clause indicates that signature was intended by the parties to be a particular form of authorisation, to the exclusion of others.

[21] The language used in the agreement is the first port of call in ascertaining the common intention of the parties. In this regard the

language must be given its ordinary and grammatical meaning unless this results in absurdity, repugnancy or inconsistency with the rest of the agreement: *Sassoon Confirming And Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646B and *Coopers and Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-F.

[22] The main agreement and the addendum clearly form one contract and must be construed together to determine the intention of the parties. Cf *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 (1) SA 7 (A). In that case the court was called upon to construe the meaning and effect of a deed of sale and correspondence exchanged between the parties. Trollip AJA stated (at 14H):

'The question that immediately arises is whether or not the deed of sale and the correspondence just mentioned, read together, constituted a valid and enforceable contract between Friedhelm and Trever . . .'

And at 18C-D:

'That does not mean that the writing and the parties' signatures must necessarily be embodied in one and the same document. Thus an offer in writing in one document signed by the seller can be accepted in writing in

another document signed by the purchaser.'

See also *Hirschowitz v Moolman and others* 1985 (3) SA 739 (A) at 758B-C where Corbett JA said 'This does not mean that the terms of the contract and the signatures of the parties must necessarily be embodied in one document.'

[23] As a matter of logic, when construing an agreement comprising more than one document one must consider all the terms used by the parties in all the documents to determine the meaning thereof. It follows too that terms in a subsidiary document can prescribe how the terms in the main document are to be construed. Clearly therefore the Full Court was correct when it found that in the addendum the parties gave stricter attention to the general detail of the main agreement by prescribing how the authorisation contemplated in clause 7 was to take place. This conclusion is fortified by the reference in clause 3 to the 'authorised person' and to 'invoicing'. Clearly this clause means that the responsibility of the authorised person was to approve, as true and correct, the names of and hours worked by the appellant's employees recorded in the time sheet. This approval was necessary as it paved the way for the appellant to invoice the respondent

accordingly. Presented with a time sheet authorised in this manner, the respondent can have no excuse for not paying. The converse is also true that without a signed time sheet the appellant has no claim for payment (although the appellant might not necessarily be barred from adducing evidence to prove otherwise).

[24] Mr Heher's submission asserting multiple forms of authorisation cannot prevail over the clear language of clause 3. That a signature was the only form of authorisation intended is borne out by the format of the time sheet which makes provision for the name of the client; the applicable order number; a signature, the name of the signatory and a certificate to the effect that 'the signature above certifies that the hours worked are true and correct and may be invoiced accordingly'. In my view this certificate was placed in the time sheets to facilitate the authorisation process. The spreadsheet on the other hand does not have this certificate.

[25] Turning to the evidence, it is correct that the only persons in the respondent's employ who had the responsibility to authorise time sheets were Van Huysteen and Jeane Botha. No evidence was led that they authorised any time sheets in writing prior to 9 January 2000. Lee Ann Heuer, Bryant and Van Rensburg were all

appellant's employees and clearly did not have the authority to authorise time sheets. Therefore in all the circumstances of the case the appeal must fail.

[26] I return to the separation of issues sanctioned by the trial court. It is correct that the objective of rule 33(4) is to facilitate the convenient and expeditious disposal of litigation. This rule provides:

'33(4) If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the question cannot conveniently be decided separately.'

A court approached to sanction this course has a duty to satisfy itself that the separation will serve the desired purpose: *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 485A-B.

[27] In the present case, in spite of the separation of the issues as sanctioned by the trial court in terms of rule 33(4), almost all causes of action and defences are still open to the parties. The underlying

dispute (between the parties) has yet to be determined. For example, the defence of estoppel raised by the appellant, and which was foreshadowed in the particulars of claim, still awaits its day in court. Neither counsel could deny that all the litigation thus far has not resulted in the expeditious disposal thereof despite the fact that it has now gone through three courts at monumental cost, no doubt, to the litigants. I refer to this scenario simply to voice our disquiet at yet another manifestation of a failure to ensure that a separation of issues in terms of rule 33(4) has the potential to curtail litigation expeditiously. Courts should not shirk their duty to ensure that at all times, when approached to separate issues, there is a realistic prospect that the separation will result in the curtailment and expeditious disposal of litigation.

[28] In the circumstances the following order is made:

1. The appeal is dismissed with costs.

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D MLAMBO JA

CONCUR:

MPATI DP

ZULMAN JA

LEWIS JA

JAFTA JA

In this clause reference to client is to the respondent and contractor to the appellant.