



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 778/2011

In the matter between:

TRANSMAN (PTY) LIMITED

APPELLANT

and

SOUTH AFRICAN POST OFFICE LIMITED

FIRST RESPONDENT

AUTENMAS PLACEMENTS CC

SECOND RESPONDENT

Neutral citation: *Transman (Pty) Ltd v South African Post Office Ltd and Another (778/11)* [2012] ZASCA 145 (28 September 2012)

Coram: BRAND, PONNAN, TSHIQI, PETSE JJA and SOUTHWOOD AJA

Heard: 31 AUGUST 2012

Delivered: 28 SEPTEMBER 2012

Summary: Contract to render a service – part of remuneration provision vague but sought to be enforced – whether can be implied that reasonable allowance payable – evidence not establishing that the claim was calculated according to an industry norm or method – or otherwise reasonable – procedure – parties re-defining (at the pre-trial conference

and elsewhere), the issues to be decided – acceptable procedure in the circumstances

ORDER

On appeal from : North Gauteng High Court, Pretoria (Makgoba J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

SOUTHWOOD AJA (BRAND, PONNAN, TSHIQI, PETSE JJA concurring)

[1] This appeal is concerned with the interpretation and implementation of a written agreement in terms of which the appellant (Transman) undertook to provide temporary workers to the first respondent (SAPO) in return for a ‘fee’ and an ‘allowance’ for benefits prescribed by the Basic Conditions of Employment Act 75 of 1997 (BCEA). The primary dispute relates to the meaning to be attached to the phrase ‘allowance for benefits as prescribed by the BCEA’. The court *a quo* (Makgoba J), found against Transman on that issue: it held that in the absence of agreement determining the allowance to be paid, Transman is not entitled to payment of such an allowance. It also held against Transman on the other agreed issues and pursuant to these findings issued declaratory orders. With the leave of the court *a quo*

Transman appeals against four of these orders and the exclusion from the costs order of the expert's qualifying fee.

[2] On 30 March 2000 Transman, Autenmas Placements CC, the second respondent, and SAPO entered into a written 'Temporary Assignments and Permanent Appointments Services Contract' ('the agreement¹') in terms of which:

- (1) the agreement would subsist for a period of two years from 1 April 2000 to 31 March 2002;
- (2) Transman would provide temporary workers for SAPO in accordance with SAPO's requirements and needs;
- (3) Transman would employ the workers and pay their salaries and employment benefits;
- (4) SAPO would pay to Transman, in respect of each temporary worker provided by Transman, a fee and an allowance in accordance with clause 3.8.1 of the agreement which reads as follows:

'It is hereby accepted by [SAPO] that should [Transman] have performed its mandate to locate staff member(s)/candidate(s) to be appointed by [SAPO], then [SAPO] shall pay [Transman] a fee per staff member per hour.

¹ When they entered into the agreement Transman and Autenmas Placements CC, the second respondent, were parties to a joint venture. The second respondent has not participated in this litigation. No point was made of this in the court a quo and it requires no further consideration.

The amount referred to is arrived at by means of calculating the hourly rate of an employee in the permanent employment of [SAPO] who is performing a similar task/job/service. In addition to the hourly rate an allowance for benefits as prescribed by the BCEA will be made';

- (5) all rates/fees payable in respect of temporary placements made would be subject to clause 5.8.3 the relevant part of which stipulates:

'... all rates/fees for temporary assignments will be subject to adjustment yearly not to exceed the consumer price index.'

[3] The parties agreed to extend the duration of the agreement and it remained in force until 31 March 2005: a total period of five years. During that period Transman provided temporary workers for SAPO and because SAPO failed to provide Transman with the hourly rates of the employees in its permanent employment (as it was obliged to do in terms of the agreement) Transman estimated these hourly rates and presented to SAPO, for its services, invoices which were based on these estimates. Eventually, in November 2004, Transman launched an application against SAPO in the North Gauteng High Court, Pretoria in which Transman sought inter alia an order that SAPO deliver details of the remuneration paid to the relevant categories of permanent employees. On 19 May 2005, the High Court (RD Claassen J) ordered SAPO to deliver forthwith, details of the relevant remuneration for the period April 2000 to 19 May 2005 and issued a declarator as to the method by which the fee payable by SAPO in respect of each temporary employee must be calculated. SAPO successfully appealed

against that order to the full court which ordered that the judgment and order of Claassen J be set aside and replaced with an order referring the matter to trial.

[4] In the meantime Transman had instituted an action against SAPO in the North Gauteng High Court in which Transman, relying on the figures furnished by SAPO pursuant to the order made by Claassen J, claimed from SAPO payment of the sum of R34 870 137,36. After the full court's order Transman delivered a declaration and the parties exchanged pleadings in the application under case number 32873/2004. For purposes of trial the two actions were consolidated.

[5] The consolidated proceedings were set down for trial on 24 April 2010. On that day, by agreement between Transman and SAPO, Ledwaba J made the following order:

'1. It is declared that:

1.1 In terms of the original agreement (as defined in paragraph 3.1 of the declaration under case number 32873/2004) and the agreement (as defined in paragraph 3.11 of the said declaration) the first defendant [SAPO] is obliged (subject to the issues referred to in paragraph 3.1 and 3.2 below) for the period 1 April 2000 until 31 March 2005 to:

- 1.1.1 Pay to the plaintiff [Transman] for each temporary employee placed by the plaintiff with the first defendant an amount representing the total of:
 - 1.1.1.1 The hourly rate of a permanent employee employed by the first defendant in a similar task/job/service (subject to such adjustments as are provided for in the agreement); and
 - 1.1.1.2 An allowance for benefits prescribed by the Basic Conditions of Employment Act 75 of 1997;
2. The calculation of the amount to be paid in accordance with paragraph 1.1 is to be calculated by agreement between the parties within 40 court days of the granting of this order, failing which the parties are to refer the matter to arbitration, if agreed to by the parties within 5 court days of the lapsing of the aforementioned period, failing which, the calculation of the amount to be paid (including the issues referred to in paragraphs 3.1 and 3.2 below) shall be determined by this Court at a date and time to be arranged with the registrar of this court;
3. The calculation shall be subject to:
 - 3.1 such claims as may be proved by the first defendant or agreed to by the parties to have become prescribed;
 - 3.2 the question of whether increases in rates/fees are limited in terms of clause 5.8.3 of the original agreement and the agreement (as defined);
4. The first defendant shall be obliged to make payment to the plaintiff of such amount as calculated in terms of paragraphs 1, 2 and 3 above, within 5 days of such amount being determined, together with interest thereon calculated at the prescribed rate of 15,5 % per annum from 9 December 2004 to date of payment;
5. The first defendant is to pay the costs of the trial to date (excluding quantum but including the reserved costs of the interlocutory

applications set down on 19 April 2010) including the costs of two counsel;

6. The balance of the costs are reserved.'

[6] The order made on 24 April 2010 thus disposed of most of the pleaded liability issues and postponed the balance of these issues as well as the calculation of the quantum to be resolved by agreement, and failing such agreement, by arbitration or trial.

[7] The parties did not agree on the amount to be paid and did not agree to refer the matter to arbitration; they set it down for hearing in the High Court on 25 August 2011. At the pre-trial conference before that hearing the parties agreed on the method to be adopted to calculate the amount owing and the issues to be decided by the High Court. The agreed method differed from that raised in the pleadings and it was clear that the parties did not intend to lead evidence on this issue. The calculation would be done on the basis of the agreed facts subject to the resolution of the remaining issues and these would give rise to a number of permutations. As a result of the agreements reached at the pre-trial conference the following issues had to be decided by the High Court:

- (1) Whether any allowance was payable by SAPO to Transman for the benefits prescribed by the BCEA. (As a result of the order of Ledwaba J, it was not in dispute that in respect of each

employee placed by Transman with SAPO, SAPO was obliged to pay Transman an allowance for these benefits. This issue involved both the interpretation and implementation of clause 3.8.1, which are legal and factual questions.)

- (2) Whether, if an allowance was payable, the allowance should simply be based on the benefits prescribed by the BCEA or, whether, in addition, in respect of employees subject to the jurisdiction of the National Bargaining Council of the Road Freight Industry (NBCRFI), the allowance should be based on the benefits prescribed by the BCEA as amended by the NBCRFI collective agreements. (This issue depended upon the interpretation of clause 3.8.1 of the agreement.)
- (3) Whether, if an allowance was payable, it must include, in respect of all employees, all the benefits reflected in the benefit tables in terms of the BCEA and in respect of those employees subject to the NBCRFI, the benefits reflected in the benefit tables in respect of the NBCRFI, prepared for each year of the contract period. (This issue depended upon the interpretation of clause 3.8.1 and other clauses in the agreement.)
- (4) Whether, the amounts reflected in Transman's invoices issued prior to 9 November 2001 had prescribed. (This was a factual issue.)

- (5) Whether, as recorded in the order of Ledwaba J, the increases in rates/fees were not to exceed the consumer price index because of clause 5.8.3. (This issue depended upon the interpretation of clause 5.8.3 of the agreement.)

[8] It will be remembered that the resolution of these issues would determine the amount (if any) to be paid by SAPO to Transman and that the resolution of the issues would give rise to a number of permutations. No information was placed before the court a quo regarding the underlying facts in respect of each employee which Transman placed with SAPO: ie (1) the identity of the employee; (2) the gender of the employee; (3) the date on which Transman placed the employee with SAPO; (4) the period for which Transman placed the employee with SAPO – whether it was hours, days, weeks, months or years; (5) whether the employee was permanently employed by Transman, and, if so, for how long; (6) whether Transman employed the employee specifically for the purpose of placing him or her with SAPO; (7) whether Transman paid the employee any benefits prescribed by the BCEA and, if so, how much in respect of each benefit; (8) whether Transman paid the employee any benefit prescribed by any NBCRFI agreement, and if so, which agreement and how much in respect of each benefit prescribed by that agreement. Obviously all these facts are known to Transman and must have been agreed by the parties for the purpose of doing the calculations. The parties have also agreed on a series of calculated

amounts based on these permutations and these have been placed before the court.

[9] After hearing the evidence of Transman's witness, Mr Kevin Alexander Cowley, who was the only witness and who testified as an expert about the calculation of the fee and allowance payable in terms of clause 3.8.1 (the latter based on the benefits prescribed by the BCEA and the NBCRFI agreements) the court *a quo* found that (1) no amount is recoverable by Transman as an allowance for BCEA benefits in the absence of an agreement between the parties as to what such allowance should be (ie the interpretation and implementation of clause 3.8.1); (2)(i) the words 'an allowance for benefits as prescribed by the BCEA will be made' do not include benefits under the NBCRFI agreements and ordered that such benefits must be excluded in making the allowance; (ii) in making the allowance for benefits prescribed by the BCEA the following must be excluded: (a) annual leave, sick leave, family responsibility leave, items referred to in Transman's schedules as LNR (i.e. amounts for legitimate expectation of continued employment/ notice/ retrenchment/ legal costs/ industrial/ action/ CCMA/ interdicts), public holidays and night shift; (b) levies paid to statutory funds such as the Unemployment Insurance Fund, Skills Development Levy and the Workman Compensation Commissioner (ie interpretation of clause 3.8.1); (3) any increases in the hourly rate of employees placed by Transman with SAPO would be limited to the consumer price index and made an order accordingly (ie the interpretation of clause 5.8.3); (4) none of the amounts reflected in

invoices issued before 9 November 2001 had become prescribed and that the defence could not succeed (ie prescription). The court a quo also disallowed the expert fees of Mr Cowley.

[10] It is clear that if the first finding of the court a quo is upheld the calculations show that SAPO is not indebted to Transman in any amount. Transman's counsel acknowledged this to be so and it is therefore the crucial issue in this appeal.

[11] It is well-established that parties to litigation are free to re-define, by agreement (usually at the pre-trial conference), the issues which they wish the court to decide, and that, in the absence of special circumstances, they will be held to such an agreement.² In the present case the parties, by their agreements, particularly at the pre-trial conferences, have radically re-defined the issues in the pleadings, agreed on the method for calculating the amount claimed and agreed on the relevant facts for the purpose of the calculations. There is no reason not to decide this case in accordance with these agreements. However practitioners should always bear in mind that if they wish to have issues decided separately at different hearings it is essential that they utilise Rule 33(4) to ensure that the orders made in respect of the

² *Price NO v Allied-JBG Building Society* 1980 (3) 874 (A) at 882D-H; *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614B-D; *F&I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suid-Afrika Beperk* 1999 (1) SA 515 (SCA) at 524 F-G.

separated issues are appealable³ and to avoid the possibility of absolution from the instance if all the necessary evidence has not been led.

[12] The primary issue relates to the meaning and effect to be given to the sentence in clause 3.8.1: 'In addition to the hourly rate an allowance for benefits as prescribed by the BCEA will be made.' The sentence as it stands is vague (and for that reason is probably not enforceable)⁴ but Transman's counsel contends that, despite this not having been pleaded⁵ or even raised at the second pre-trial conference, it must necessarily be implied that the allowance in respect of the benefits must be reasonable. The sentence would then be read to say: 'In addition to the hourly rate a reasonable allowance for benefits as prescribed by the BCEA will be made'. In support of this contention Transman's counsel relies on authorities dealing with claims for remuneration based on contracts of *locatio conductio operis* or *operarum* where the remuneration for the work to be done had not been agreed and the court nevertheless found that a reasonable remuneration was recoverable.⁶ Transman's counsel argues that where the parties had not agreed on the remuneration 'the remuneration will be that usually paid in the particular business or trade'⁷ and that 'others in the same line of business should be

³ *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 790G-792H.

⁴ See *Levenstein v Levenstein* 1955 (3) SA 615 (SR) at 619D-E ('the vague and uncertain language justifies the implication that the parties were never *ad idem*').

⁵ The last sentence in clause 3.8.1 is not even referred to in the particulars of claim and declaration and was not dealt with in the pleas.

⁶ *Compagnie Interafricaine de Trauvaux v South African Transport Services and Others* 1991 (4) SA 217 (A) at 236C-H; *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A) at 648G-649E; and *N Goodwin Design (Pty) Ltd v Moscak* 1992 (1) SA 154 (C) at 166F-G and 166J-167B.

⁷ Reference was made to *Dreyer & Sons Transport v General Services* 1976 (4) SA 922 (C) at 923D-F.

able to state at what price they themselves would be prepared to undertake a particular obligation⁸ and that 'difficulty in determining what that sum should be should not tempt the Court into granting an order of absolution unless the difficulty is absolutely insurmountable'.⁹

[13] This argument seeks to equate the agreement with an agreement to carry out work or an agreement to carry out work and supply materials where there is no agreement on the remuneration to be paid.¹⁰ It seems to be well-settled that where there is an agreement to do work for remuneration and the remuneration is not stipulated (either expressly or tacitly) it is accepted that the law provides that it should be reasonable.¹¹ In such cases before an amount of money can be awarded the court must be satisfied not only that an agreement to remunerate reasonably is to be implied but also that the amount of reasonable remuneration can be sufficiently certainly fixed on the evidence.¹² Transman's counsel contends that Cowley's evidence established what a reasonable allowance was. On the other hand, while pointing out that a vague provision in a contract cannot be enforced, SAPO's counsel expressly disavows any reliance on the relevant sentence being void for

⁸ Reference was made to *N Goodwin Design (Pty) Ltd v Moscak* supra at 166E-G.

⁹ Reference was made to *N Goodwin Design (Pty) Ltd v Moscak* supra at 167A.

¹⁰ Eg building and engineering contracts and contracts for the repair of the employer's property – see *Sifris en 'n Ander NNO v Vermeulen Broers* 1974 (2) SA 218 (T) at 221F-223A; *Toerien v Stellenbosch University* 1996 (1) SA 197 (C) at 201A-H.

¹¹ *Middleton v Carr* 1949 (2) SA 374 (A) at 385-386; *Inkin v Borehole Drillers* 1949 (2) SA 366 (A) at 373; *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A) at 648H-649F; *Dave v Birrell* 1936 TPD 192 at 195-197.

¹² *Middleton v Carr* 1949 (2) SA 374 (A) at 386.

vagueness.¹³ He simply argues that Cowley's evidence did not establish what a reasonable allowance for the benefits prescribed by the BCEA would be.

[14] In my view, it is by no means clear that it must be implied that the allowance for the benefits prescribed by the BCEA must be reasonable. This is not a case where the parties failed to agree on the remuneration to be paid. They did so expressly in clause 3.8.1 of the agreement. SAPO was to pay Transman in respect of each Transman employee placed by Transman with SAPO a 'fee per staff member per hour' which would be arrived at 'by calculating the hourly rate of an employee in the permanent employment of [SAPO] who is performing a similar task/job/service'. In addition to this hourly rate 'an allowance for benefits as prescribed by the BCEA will be made.' Nothing else was said about this allowance. There is no indication of any standard that could be applied to determine what the extent of the allowance should be. Transman's counsel contends that it must necessarily be implied that the allowance must be reasonable but it is not clear that this is remuneration. However, because of the approach adopted by SAPO's counsel, these issues were not debated and it will be accepted, but not decided, that Transman can recover an allowance for the prescribed benefits which is shown to be reasonable: ie one which can be 'sufficiently certainly fixed on the evidence'.

¹³ This was not pleaded or put in issue at either pre-trial conference.

[15] It will have become apparent that the main difficulty arising from the sentence is the meaning to be given to the word 'allowance'. It is clear that the parties did not agree that SAPO was obliged to 'reimburse' Transman for the benefits which Transman was in terms of the BCEA obliged to pay to its employees: ie that SAPO was obliged to pay to Transman all the benefits which Transman was obliged to pay to each employee placed by Transman with SAPO. This would have been straightforward and easy to say and to calculate. Transman's counsel concedes that, in context, the word 'allowance' means something less than the full amount. This means that Transman cannot simply establish the total value of the benefits prescribed by the BCEA and claim those as the allowance. The second difficulty which arises from the sentence is that the allowance should be based on the benefits prescribed by the BCEA and actually paid by Transman to its employees. The allowance was not to be a theoretical exercise because the benefits paid by Transman were known.

[16] Transman's counsel contends that Mr Cowley's evidence establishes what a reasonable allowance for the BCEA (and other) benefits would be and emphasises that his evidence is not disputed by any evidence presented by SAPO and should therefore be accepted. It is trite that even on a question of fact the mere fact that a witness's evidence is uncontradicted does not mean that it must be accepted. It may be so improbable (or defective for other reasons) that it cannot be accepted in proof of the matters testified about.¹⁴ And where that witness is testifying as an expert the acceptability of his

¹⁴ *Siffman v Kriel* 1909 TS 538; *Shenker Bros v Bester* 1952 (3) SA 664 (A) at 670E-G; *Nelson v Marich* 1952 (3) SA 140 (A) at 149A-C.

opinions will depend upon the quality of the reasoning. Obviously if the expert addresses the wrong question or his reasoning is not logical or borne out by the facts his evidence will not be acceptable.¹⁵

[17] With regard to the allowance for the benefits prescribed by the BCEA, Mr Cowley testified with reference to the schedules he prepared to assist him to calculate the value of the benefits prescribed by the BCEA and the NBCRFI agreements. With regard to the benefits prescribed by the BCEA, he calculated the hourly value of each benefit. He did a similar exercise with regard to the benefits prescribed by the collective agreements. His point of departure was to calculate the value of each benefit on the assumption the benefit would be paid. He did not take into account the amounts actually paid by Transman in respect of each benefit and the exercise was therefore a completely theoretical one. No allowance was made for the multitude of variables which would affect the question of whether the benefit was or would be paid or not. These factors would include the gender of the worker, how long the worker would have to work before becoming entitled to each benefit and the likelihood of the worker taking the benefit when it was optional. There is no evidence about these matters but, as appears from the examples used, Transman did not keep a large number of workers in its permanent employment and would employ workers only when they were needed by clients such as SAPO. This makes the methodology employed by Mr Cowley questionable to say the least. It seems that Transman would place workers

¹⁵ *Michael & Another v Linksfeld Park Clinic (Pty) Ltd & Another* 2001 (3) SA 1188 (SCA) para 34-40.

with SAPO for periods ranging from hours, to days, to weeks or months and even years. Mr Cowley was unable to say that there is a uniform approach or standard in the industry for the calculation of the benefits and he readily conceded that the allowance to be made for the benefits prescribed by the BCEA or the collective agreements would have to be agreed between the parties. There is clearly no objective method whereby a reasonable allowance for the benefits can be determined. It is obviously not reasonable to make an allowance for payment in full of each benefit in respect of each employee irrespective of whether the employee is entitled to or paid the benefit. In any event it is the extent of the allowance which must be reasonable and Mr Cowley's evidence does not show that any proportion or percentage of the figures calculated would be reasonable. In view of Mr Cowley's clear evidence that the parties would have to agree on the allowance to be made, the court a quo was correct in finding that no allowance could be made for the benefits unless the parties agreed on what that allowance should be.

[18] A further problem is that Mr Cowley prepared his schedules without reference to the whole agreement which is clearly essential in order to properly construe the contentious sentence. There are a number of clauses which clearly exclude liability on the part of SAPO for most, if not all, of the benefits prescribed by the BCEA. The court a quo pertinently found that these clauses exclude SAPO's liability and the argument does not persuade me that this finding was wrong. Transman's counsel contends that the other clauses cannot exclude SAPO's liability as that would result in an absurdity – on the

one hand the agreement would provide for SAPO's liability and on the other hand it would exclude this liability – and these other clauses should therefore be ignored. He did not refer to any authority or principle of the law of contract in support of this submission. This may be a badly-worded and inelegantly drawn agreement but there is no justification for ignoring a number of clauses pertinently excluding liability for benefits prescribed by the BCEA and giving preference to one vague clause providing for such liability. It seems to me that the vague clause should yield to the specific clauses and the meaning of the vague clause should be modified to avoid the absurdity or inconsistency.¹⁶ The clause could only refer to those benefits prescribed by the BCEA which are not excluded by the agreement.

[19] I am therefore not persuaded that the finding of the court a quo that other clauses exclude liability for the benefits prescribed by the BCEA is wrong. I am also not persuaded that clause 3.8.1 refers to benefits stipulated in the NBCRFI collective agreements. The words 'as prescribed by the BCEA' in the clause simply cannot be interpreted to refer to benefits stipulated in the collective agreements. The fact that section 49 of the BCEA provides for a collective agreement to increase the BCEA benefits and provide for additional benefits does not affect the interpretation of the clause. Benefits provided for in the NBCFRI agreements are not benefits prescribed by the BCEA.

¹⁶ *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465-466.

[20] Finally, I am not persuaded that the finding of the court a quo that clause 5.8.3 limits increases to the consumer price index is wrong. The clause is a general clause which governs, inter alia, the rates/fees for temporary assignments and specifically provides that these rates/fees will be subject to adjustment each year but subject to the consumer price index. There is no reason why effect should not be given to the ordinary grammatical meaning of the words.

[21] Transman has advanced no reasons why the court a quo's refusal to allow the qualifying fees of Cowley was wrong. In the light of the court's findings it must be accepted that the court did not find Cowley's evidence of assistance and therefore did not allow the fees. Since there has been no attack on this order there is no reason to interfere with it.¹⁷

[22] The calculation of the amount allegedly owing, taking into account the findings of the court a quo, showed that SAPO was not indebted to Transman at all. The parties agreed that unless Transman achieves substantial success in the appeal the position would not change. Since Transman has not achieved substantial success no amount is owed by SAPO to Transman.

[23] The following order is made:

¹⁷ *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) para 7.

The appeal is dismissed with costs such costs to include the costs of two counsel, where employed.

B.R. SOUTHWOOD
ACTING JUDGE OF APPEAL

APPEARANCES

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