

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: A3066/2021

In the matter between:

DO IT ALL RENOVATORS CC

Appellant

and

KAPP, MARTHINUS JOHANNES

Respondent

Coram: Fisher J et Moultrie AJ

NEUTRAL CITATION: *Do it All Renovators v Kapp* (Case No: A3066/2022) [2023] ZAGP JHC 548 (23 May 2023)

JUDGMENT

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date for hand-down is deemed to be the 22 May 2023.*

MOULTRIE AJ

- [1] This is an appeal against a decision of the Regional Magistrate, Roodepoort absolving the respondent from the instance in an action instituted by the appellant for payment of the sum of R369,147.58 which the appellant claims to be owing for certain building work performed by it in terms of a contract concluded with the respondent. At the commencement of the trial, the merits of

the appellant's action were separated from the issue of quantum, as was the respondent's counterclaim.

- [2] It is common cause that the relationship between the parties arose after a house that the respondent had purchased and insured (but of which he had not yet taken transfer) in Noordheuwel, Krugersdorp was severely damaged in a hailstorm on 28 November 2013. In seeking a contractor to effect repairs, the respondent was introduced by a mutual acquaintance to Mr Engelbrecht, a representative of the appellant. On the day after the storm, Engelbrecht and the respondent met at the property to discuss the repair work. The meeting was also attended by Mr De Kock, an insurance assessor whom the parties both believed (albeit incorrectly as it turned out) had been mandated by the insurance company (by Zurich Insurance Company South Africa Ltd) to approve the appellant's appointment and authorise quotes to perform the repair work covered by the policy.
- [3] Despite the fact that both parties were aware that the appellant had not been appointed as an accredited service provider to Zurich, the appellant was engaged (by whom is a key issue in dispute) to perform emergency work that was immediately necessary at a cost of R34,770 and was further requested to prepare quotations for the remaining repairs to address the hail damage, the costs of which the parties both expected would in due course be covered by the Zurich insurance policy. In addition, it is common cause that the respondent engaged the appellant to perform certain 'personal' work which both parties understood fell outside the scope of the insurance policy, and which is irrelevant for the purposes of the appellant's claim.
- [4] Engelbrecht testified that he duly prepared quotes for the repair of the hail damage, both of which indicated that "*all work [is] to be re-measured after completion for correct invoicing*" and that the "*terms of payment*" would be "*Progress Payment*". According to Engelbrecht, he submitted the quotes to the respondent, who accepted them when he signed and returned them shortly after receiving them in December 2013, and the appellant commenced the work in January 2014. The appellant identifies this in its pleadings as the "*the first agreement*".

- [5] By March 2014, much of the work had been completed and the house was again habitable. The respondent was eager to move into the house, but the appellant was unwilling to hand over the keys without full payment for the work that had been completed pursuant to the first agreement. On the other hand, the respondent was unwilling to pay the full amount and Zurich was disputing the respondent's claim submitted by the broker (Trustco / Rodel), on the basis that De Kock had acted outside of his mandate in purporting to approve the appointment of the appellant and authorising the appellant's quotes.
- [6] In the context of this deadlock, the parties signed a written memorandum of agreement (MOA) in early April 2014. The MOA bears repetition in full:

MEMORANDUM VAN OOREENKOMS

aangegaan deur en tussen:

DO IT ALL RENOVATORS cc

Reg. No. 90/02482/23

(Die Kontrakteur)

en

MARTHINUS JOHANNES KAPP

(ID No.[...])

(Die Eienaar)

NADEMAAL die Eienaar skade gely het weens 'n haelstorm op 28 November 2013

en

NADEMAAL die Kontrakteur die aanstelling van die Assessor, Mike De Kock namens die versekeraar bona fide aanvaar het

en

NADEMAAL bevind is dat die assessor buite sy magte opgetree het in die aanstelling van die Kontrakteur

en

NADEMAAL die eis ten opsigte van die skade eers op 5 Maart 2014 deur Trustco / Rodel Insurance Administrators ingedien is by die versekeraar, Zurich,

KOM DIE PARTYE as volg ooreen ten opsigte van betaling aan die Kontrakteur:

1. Die Eienaar bevestig dat hy die Kontrakteur opdrag gegee het om werk te verrig wat buite die bestek van die versekeringseis val ten bedrae van R 229 771.43 en dat die Kontrakteur faktuur 9014 gedateer 31 Maart 2014 aan die Eienaar oorhandig het.
 2. Die Kontrakteur bevestig hiermee dat die eienaar die bedrag van R 229 771.43 oor die verloop van tyd, maar spesifiek op 3 April 2014 ten volle vereffen het.
 3. Die Kontrakteur bevestig voorts dat die Assessor, Mike De Kock (De Kock), die balans van die werk direk aan verteenwoordigers van die Kontrakteur gemagtig het en dat kwotasies ten bedrae van:
 - 3.1 kwotasie 13181 vir 'n bedrag van R 386 073.78;
 - 3.2 kwotasie 13180B vir 'n bedrag van R 508 584.61
 - 3.3 noodwerk gedoen gedurende Desember 2013 teen 'n bedrag van R 34 770.00
- uitstaande deur die versekeraar Zurich.
4. Die partye bevestig dat die Eienaar en Kontrakteur op 1 April 2014 Zurich besoek het om die betaling van die Kontrakteur te bespreek.
 5. Die partye is eens dat Zurich skriftelik aanspreeklikheid ten opsigte van verskuldigheid teenoor die Eienaar aanvaar het as versekerde.
 6. Zurich het ter goeder trou en op skrif op 3 Maart 2014 'n interim betaling van R 200 000.00 aan die Eienaar getender, welke betaling in oorleg met die Kontrakteur aanvaar word.

7. Zurich het 'n gemagtigde assessor, Brian Wright (Wright) aangestel om die optrede van die assessor, Mike De Kock te ondersoek.
8. Een van die vereistes van die interim betaling aan die Eienaar [was dat] die Eienaar en die Kontrakteur die volle besonderhede van onderhandelinge met De Kock aan Wright sal openbaar.
9. Die Eienaar onderneem om:
 - 9.1 aanspreeklikheid teenoor die Kontrakteur te aanvaar en wel tot en met die vereffening van die uitstaande bedrag verskuldig deur Zurich;
 - 9.2 alles in sy vermoëns te doen om toe te sien dat die eis gefinaliseer word binne 'n tydperk van 3 maande met ingang vanaf 1 April 2014;
 - 9.3 onderneem om indien die eis nie teen 1 Julie 2014 afgehandel is nie en of Zurich nog nie die betaling aan die Eienaar / Kontrakteur gemaak het nie, rente aan die Kontrakteur te betaal op die uitstaande bedrag soos op daardie datum tot en met datum van finale vereffening teen 'n koers van 15.5% per jaar.
- 10 Die Kontrakteur onderneem om nie met Zurich 'n skikking aan te gaan ten opsigte van die uitstaande bedrag waar Zurich vir 'n verminderde bedrag wil skik tensy nie vooraf beraadslaag is met die Eienaar nie.
- 11 Die Eienaar onderneem om elke Vrydag voor sluit van besigheid 'n vorderingsverslag aan die Kontrakteur deur te gee oor vordering en afhandeling van die eis teen Zurich.
- 12 Die Eienaar onderneem om ook finansiering te bekom binne die tydperk van 3 maande, soos bo vermeld, ten einde die Kontrakteur skadeloos te stel ten opsigte van die bedrag verskuldig deur Zurich.
- 13 Die partye kom verder ooreen dat hulle alles in hul vermoë sal doen om die uitstaande bedrag verskuldig aan die Kontrakteur te vereffen

binne die vermelde tydperk van 3 maande.

- [7] The appellant then returned the keys to the respondent, who occupied the house. Although the parties continued to co-operate in an attempt to prevail upon Zurich to pay the “*bedrae ... uitstaande*” referred to in clause 3 of the MOA (which comprised the full amount of the quotations and the emergency work) in satisfaction of the respondent’s insurance claim, this attempt was unsuccessful. Engelbrecht conceded during his evidence that the respondent ultimately paid the lesser amount received from Zurich (amounting to approximately R500, 000) over to the appellant.

The Magistrate’s judgment granting absolution from the instance

- [8] The appellant alleges in paragraph 12 of its particulars of claim that in terms of the material express, tacit or implied terms of the MOA, alternatively in terms of the MOA properly construed, the respondent “*accepted liability*” to the appellant “*for inter alia payment of the aggregate amount*” of the quotations.
- [9] The issue for current determination arises from the Magistrate’s grant of absolution, which was based on her finding that the true effect of the MOA is that the respondent is not liable to pay any outstanding amount because “*objectively assessed, the clear terms of [the MOA] proves that the [respondent] did not contract to be personally liable to the [appellant] for the work falling within the scope of the insurance claim, more so not, if payment was made by Zurich*”.¹
- [10] After correctly identifying the test for absolution,² the Magistrate found that the appellant had not made out a *prima facie* case that the respondent is contractually liable for the work done by the appellant. In summary, the Magistrate’s reasoning was as follows:

- (a) Since the MOA is a written document, the parol evidence rule requires that its express content “*stands as the only evidence of the terms of the*

¹ Magistrate’s judgment, para 24.

² The test is “*not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff*” see *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G–H.

contract and a contracting party is not allowed to submit evidence in the form of agreements reached before or simultaneously with the conclusion of the integrated written agreement, which contradict, alter or add to the terms of the written agreement". As such the Magistrate held that Engelbrecht's evidence regarding the conclusion of the first agreement between the parties is "*of no consequence*".³

- (b) The terms of the MOA are "*clear and unambiguous*" to the effect that:⁴
- i. the appellant confirmed that De Kock authorised the work "*directly to the representative of the [appellant]*" (i.e. Engelbrecht);
 - ii. "*the amounts referred to in paragraph 3 of the [MOA are] outstanding by the insurer Zurich*";
 - iii. in terms of paragraph 5 of the MOA, "*the parties agreed that Zurich ... accepted liability for indebtedness to the [respondent] as the insured, i.e. his claim was in principle approved*";
 - iv. because the appellant was not an accredited service provider to Zurich, its "*payments towards the work done [were] to be made to the [respondent] and not the [appellant] directly albeit that ... De Kock representing Zurich instructed Engelbrecht directly to do the work within the scope of the insurance claim*"; and
 - v. in terms of paragraph 9 of the MOA, (which "*is resolute in nature*"), the respondent only "*accepted liability to the [appellant] up and until the outstanding amount owed by Zurich is paid and for him to pay interest on the outstanding amount in the event that it is not paid by 1 July 2014*".

[11] I disagree with the Magistrate's reasoning and the conclusion that she reached in relation to the respondent's application for absolution from the instance. This is for four separate and independent reasons.

³ Magistrate's judgment, paras 18, 19 and 21.

⁴ Magistrate's judgment, paras 20, 22 and 23.

There is no dispute on the pleadings that the respondent is liable under the MOA

[12] In the first place, the Magistrate's conclusion with regard to the effect of the MOA is in conflict with the respondent's own pleaded case. The case pleaded by the respondent is effectively one of confession and avoidance, namely that the MOA did indeed provide that the respondent "*will accept liability towards the [appellant] should Zurich repudiate the claim or refuses to make payment of the claim by the [appellant]*" but that "*Zurich appointed a Quantity Surveyor to assess the claim of the [appellant], which claim had been settled with the [appellant] ... [and the respondent] paid the [appellant] the amount settled with Zurich, as agreed with the [appellant] in full. The [appellant's] claim against the Defendant had been extinguished on payment of the amount settled with Zurich*".⁵

[13] In view of this plea, the relevant disputed issue between the parties is not whether or not the appellant can prove that the respondent is liable to the appellant under the MOA (this is common cause), but rather whether the respondent can prove that the appellant subsequently agreed to compromise its claim against the respondent by accepting the amount offered by Zurich

[14]

[15] h as full payment for the work performed. It is beyond comprehension that a defendant could be granted absolution from the instance on the basis that the plaintiff had failed to establish a fact that is admitted in its pleading.

A court could or might find the respondent liable on a proper interpretation of the MOA

[16] Secondly, the interpretative approach adopted by the Magistrate was incorrect. It is now clearly established by our highest courts that the proper interpretation of written contracts is a "*unitary exercise*" involving the simultaneous consideration of text, context and purpose and that "*one considers the context and the*

⁵ Respondent's plea, paras 33.1.5, 33.2 and 33.3. The respondent's heads of argument in the appeal advance different contention, namely that "*the liability of the [respondent] is limited to interest on the amount owing by Zurich in the event that final payment was not made by Zurich by 1 July 2014*". At the hearing of the appeal itself, the respondent's counsel sought to persuade us of yet another contention, namely that the effect of the MOA is to limit the respondent's liability to the amount received from Zurich.

language together, with neither predominating over the other”.⁶ As such, “[a] court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract”,⁷ albeit that “interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.”⁸

- [17] What is more, the Magistrate erred in purporting to apply the parol evidence rule so as to exclude extrinsic evidence for the purposes of interpreting the MOA. In *University of Johannesburg* the Constitutional Court decisively limited the operation of the parol evidence rule to its “*integration facet*”⁹ and roundly rejected the “*interpretation facet*” of the rule.¹⁰
- [18] The text of the MOA is not “*clear and ambiguous*” that the respondent is not liable to the appellant for the work done. It contains no such express stipulation. As noted above, even the respondent did not contend for this interpretation in its plea.
- [19] On the contrary, there are a number of textual indications in the MOA that the parties’ agreement was that the respondent is indeed liable to the appellant:
- (a) The fifth recordal of the MOA identifies the scope of the agreement as relating simply to the issue of “*betaling aan die kontrakteur*” (i.e. payment to the appellant), and not to the issue of whether or not the

⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 19, approved in *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) para 65.

⁷ *University of Johannesburg* (above) para 66.

⁸ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 51.

⁹ *University of Johannesburg* (above) para 92. The integration rule excludes extrinsic evidence that “seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement”. In *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para 39, the court equated the parol evidence rule solely with the integration rule. Even in *Johnstone v Leal* 1980 (3) SA 927 (A) at 938E and 942-3, when Corbett JA posited that the parol evidence rule “branches into two independent rules, or sets of rules”, he was careful to indicate that he referred to the interpretation “rule” only for convenience, and made no clear statement that it was a rule of our law.

¹⁰ *University of Johannesburg* (above) paras 67 – 69.

respondent is liable to the appellant.

- (b) The appellant's confirmation in clause 3 of the MOA that De Kock had authorised the work covered by the insurance policy directly to the appellant cannot reasonably be read as constituting an agreement that the respondent is not contractually liable to pay for the work done, let alone constitute definitive proof (i.e. incapable of rebuttal by evidence of the true facts) that the appellant had concluded the first agreement with Zurich, as the Magistrate appears to have found. This is especially the case in view of the content of the third recordal, which expressly stated that De Kock had acted beyond his authority in authorising the work. Given that Zurich was not a party to the MOA, it would be absurd to suggest that the parties' conclusion of the MOA could have created a contractual relationship between the appellant and Zurich that had not previously existed.
- (c) While the MOA clearly indicates that the parties believed – and ineffectually purported to 'agree' on Zurich's behalf – that the "*bedrae ... uitstaande*" referred to in clause 3 (i.e. the full amount of the quotations and the emergency work) were due by Zurich, clause 5 expressly states that Zurich had acknowledged its "*aanspreeklikheid ten opsigte van verskuldigheid teenoor die Eienaar ... as versekerde*", i.e. Zurich's liability was to the respondent. This is confirmed by the content of clause 6, which records that it was the respondent himself (and not the appellant, who was merely consulted) who accepted an interim payment of R200,000. In other words, the MOA contemplated not only that Zurich was liable to the respondent but that it was liable for the full amount. This militates against the conclusion that the plain text of the MOA indicates an agreement between the parties that the respondent would not be liable to the appellant – it would be absurd to suggest that the parties agreed that the respondent could profit from the work performed by the appellant.
- (d) At best for the respondent, clause 9 of the MOA is ambiguous. Apart from the fact that clause 9.1 expressly states that the respondent (at

least initially) accepted “*aanspreeklikheid teenoor die kontrakteur*”, its effect depends on whether the phrase “*die uitstaande bedrag verskuldig deur Zurich*” refers (i) to the same “*bedrae ... uitstaande*” referred to in clauses 3 and 5 for which (the MOA records) the parties’ considered Zurich to have acknowledged liability to the respondent; or (ii) to the amount for which Zurich might actually be liable to the respondent. In my view, the former interpretation is to be preferred in light of the context in which the agreement was concluded, as it appears to have been the parties’ common understanding that Zurich would pay the full amount.

- (e) Similarly, clause 9.3 simply contemplates that Zurich might make payment either to the respondent or the appellant. This in no way affects the question whether the respondent is liable to the appellant and is equally consistent with the meaning contended for by the appellant as that contended for by the respondent. Furthermore, it would make little sense for the phrase “*die uitstaande bedrag*” in clause 9.3 (or indeed the phrase “*die bedrag verskuldig deur Zurich*” in clause 12) to refer to the amount for which Zurich might ultimately actually be liable. The amount of the interest due with effect from 1 July 2014 (as also the amount in respect of which the respondent would be required to obtain financing) would on that interpretation not be ascertainable until such time as Zurich’s liability was ultimately determined, which would *ex hypothesi* only be after 1 July 2014.
- (f) The Magistrates’ reading of clause 9 as being “*resolutive*” in nature can hardly be described as one which is “*businesslike*”,¹¹ as it gives rise to potentially absurd results, with one party effectively being able to avoid its own acknowledged liability by the simple expedient of delay. On the other hand, the phrase “*en wel tot en met die vereffening van die uitstaande bedrag verskuldig deur Zurich*” gives rise to no ambiguity at all if the “*uitstaande bedrag*” is understood as referring to the same “*bedrae ... uitstaande*” in clause 3.

¹¹ *Endumeni* (above), para 50, confirmed in *University of Johannesburg* (above) para 64.

- (g) Clause 10 of the MOA favours the appellant's interpretation. Not only does it differentiate the "*uitstaande bedrag*" from a "*verminderde bedrag*" that may be agreed with Zurich (which would suggest that the term is used throughout the MOA to denote the amounts set out in clause 3), if the respondent is indeed not liable to the appellant (or is only liable up to the amount actually paid by Zurich), the respondent would have no interest in the "*verminderde*" amount, and there would be no reason for the MOA to preserve his rights to be consulted on the issue at all.
- (h) Clause 12 of the MOA also militates against the respondent's contentions that he is not liable to the appellant (or is only liable up to the amount actually paid by Zurich). If this were the case, there would be no reason for him to have to obtain financing to indemnify the appellant for any amount at all.

[20] The Supreme Court of Appeal has held that the contextual setting for interpretation also includes evidence of subsequent conduct of the parties which indicates a common understanding of the terms of the agreement provided that it does not alter the meaning of the words used and is used as conservatively as possible.¹²

[21] Of significance in this regard are the emails that the appellant's second witness (Scharper) testified he exchanged with the respondent during October 2014,¹³ while the parties were still seeking to prevail upon Zurich to pay the full amount of the insurance claim. On 27 October 2014, Scharper raised concerns about delays in finalising the insurance claim, an outstanding report from a quantity surveyor, and discussions that were being held with the bondholder, ABSA Bank. He concluded his email as follows "*[v]olgens ons getekende ooreenkoms het jy onderneem om die uitstaande bedrag aan ons te betaal en is daar nie genome van enige verslae en Absa nie. Ons het jou ook op verskeie kere gevra vir die lys van items wat jy nie meer tevrede is nie en elke keer het jy gesê jy stuur dit die*

¹² *Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd* 2020 JDR 0911 (SCA) para 7; *Urban Hip Hotels (Pty) Ltd v Kcarrim Commercial Properties (Pty) Ltd* 2016 JDR 2213 (SCA) para 21.

¹³ Transcript, 19 February 2021, p95 line 20 to p97, line 13; Caselines, 030-40 to 030-41.

volgende dag. Ons het nag niks gekry nie en neem ons dus aan dat alles reg is. Kan ons asseblief vergader om die uitstaande betaling te kan bespreek[?].” Tellingly, the respondent did not dispute the statement regarding his liability for the “*uitstaande bedrag*”, and instead responded as follows: “*Julle verwag tog nie betaling vir wat nie billik en regverdig is nie. Aanvaarding van verskuldigheid is een ding en moet die bedrag verskuldig tog aanvaar word van wat gedoen is. Omrede Zurich se verslag nie gekry was nie is die QS versoek on sy verslag te bespoedig. Julle moet tog net betaal word wat reg en billik is vir wat julle gedoen het. Ek gaan net betaal vir wat regverdig en billik verskuldig is”.*

- [22] This evidence suggests that, even as late as October 2014 (i.e. after 1 July 2014), both parties considered the respondent to be liable to the appellant in terms of the MOA related to “*what was done*”, even if the respondent only conceded liability for “*wat regverdig en billik verskuldig is*”. It is evidence upon which a court could or might find in the appellant’s favour on the question of liability.
- [23] On the other hand, the evidence sought to be relied upon by the respondent in argument in the appeal to the effect that:
- (a) the appellant independently sought to prevail upon Zurich to make payment of the respondent’s insurance claim in full, and sought to encourage the respondent to do likewise because it was facing difficulties with its creditors;
 - (b) the respondent assisted the appellant in seeking to obtain payment from Zurich;
 - (c) the “*uitstaande bedrag*” referred to in the MOA was not yet finalized by Zurich at the time of signature and a costing still needed to be done;¹⁴
 - (d) if the appellant had received a document indicating that Zurich’s quantity surveyor assessed the value of the work to be lower than the amount it had quoted and charged, it would have disputed that

¹⁴ As noted above, if this is indeed a reference to the amount for which Zurich would ultimately be liable (as opposed to the full amount of the “*bedrae ... uitstaande*” referred to in clause 3 of the MOA), then the provision made in the agreement for both interest and finance would make little sense.

assessment;

- (e) the MOA provides that the respondent is liable for interest at 15,5% on the outstanding amount should it not be paid by 1 July 2014;
- (f) the appellant's quotes were subject to remeasurement;
- (g) the respondent was required to, and did, pay the appellant the full amount received from Zurich (an amount of approximately R500,011, although the relevant witness did not know the precise figure) to the appellant after the signature of the MOA; and
- (h) the respondent received no money from Zurich over and above what he paid to the appellant;

is not inconsistent with the appellant's contention regarding the respondent's liability.

[24] It is furthermore not correct (as the respondent submits on appeal) that Engelbrecht testified that without an assessment from Zurich's quantity surveyor there is no claim against the respondent and that the amount assessed by Zurich would constitute the amount owed to the appellant. It is apparent from the relevant portion of his cross examination relied upon¹⁵ that Engelbrecht did not understand the legal proposition that was put to him. In his very next answer, he clarified his evidence as follows "*Sir, according to the quotations the amount was owed from Mr Kapp and not Zurich to me*". It is also not correct that Engelbrecht conceded that the MOA provides that if the insurance claim was not finalized or if Zurich did not make payment, the respondent's liability towards the appellant is limited to interest and not the capital amount. The relevant portion of the transcript indicates that Engelbrecht merely conceded that clause 9.3 of the MOA (unlike clause 9.1) does not expressly stipulate that the respondent is liable for the capital amount.¹⁶ This is a far cry from the concession contended for. In any event "*interpretation is a matter for the court and not for witnesses*",¹⁷ and neither

¹⁵ Transcript, 18 Feb 2021, p37 line 21 to p41 line 15.

¹⁶ Transcript, 18 Feb 2021, p31 lines 10 to 21.

¹⁷ *University of Johannesburg* (above) para 68.

Engelbrecht's nor any other witness's view of the meaning of the contract is admissible evidence.

- [25] Finally, even if the evidence of Scharper relating to a meeting at which he was not present, and which was allegedly held between Engelbrecht and the respondent in mid-July 2014, was not hearsay and could be accepted (it can't), the proposition actually put to Scharper and which he did not dispute was simply that the respondent would testify at the trial that Zurich had offered the respondent a further R2000 000 to settle his insurance claim, and that Engelbrecht had said "*we need the money*" and suggested that the respondent should "*take it*".¹⁸ Scharper did not concede that it was Engelbrecht who accepted this offer, nor could his response have effectively compromised the respondent's claim against the respondent as the respondent seems to argue on appeal.
- [26] To conclude on this aspect, I am of the view that a court undertaking a proper interpretation of the MOA following the unitary approach and applying its mind reasonably to the evidence before the Magistrate could or might find that the respondent is indeed contractually liable to the appellant for the balance owing in respect of the work that it had contracted to do.

A court could or might find the respondent liable on basis of the pleaded tacit term

- [27] Thirdly, the Magistrate appears to have overlooked the fact that the appellant does not rely only on an interpretation of the express provisions of the MOA, but also alleges the existence of a tacit term to the effect that the respondent accepted liability to the appellant for payment.
- [28] Although the respondent contends in paragraph 26.2 of its plea that the first agreement had not been with him but with the broker (alternatively Zurich), Engelbrecht's evidence was that the appellant's quotes were submitted to and accepted by the respondent when he signed them in December 2013.¹⁹ In her judgment, the Magistrate did not reject this evidence as untrue, but instead

¹⁸ Transcript, 18 Feb 2021, p155 line 25 to p157 line 9.

¹⁹ Transcript, 17 Feb 2021, p36 line 23 to p37 line 4; p39 lines 6 – 10; Transcript 19 Feb 2021, p66 line 19 to p67 line 19.

disregarded it on the basis of the parol evidence rule. This was incorrect: even assuming that the appellant relies upon the MOA as the sole memorial of the contractual relationship between the parties (as to which, see below), evidence in support of an alleged tacit term is a recognised exception to the operation of the integration rule.²⁰

- [29] The portions of the cross-examination relied upon by the respondent in this regard cannot realistically be characterised as a concession by the appellant's witnesses that the first agreement was concluded with Zurich, as the respondent pleads. Engelbrecht did not concede under cross examination (as the respondent argued on appeal) that the quotations were generated at the same time as the meeting with Zurich. It is clear from the relevant portion of Engelbrecht's evidence that he resolutely disputed this.²¹ At best for the respondent, Engelbrecht conceded that De Kock (who was not authorised by Zurich) "*gave instructions*" to the appellant in the presence of the respondent with regard to nature of the work to be done²² and Scharper stated that his understanding (seemingly on the basis of hearsay) was that De Kock "*gave an instruction to proceed with the quotations*" listed in clause 3 of the MOA,²³ but he did not state to whom that instruction was given (i.e. to the appellant or the respondent).
- [30] In addition, I note that the passages of the transcript relied upon by the respondent in this regard show that the questioning of the appellant's witnesses was unfair. For example, both the respondent's counsel and the Magistrate put to Engelbrecht the patently incorrect statement that the second recordal in the agreement expressly stipulates "*that the kontrakteur ... accepted appointment through Mr Mike de Kok and accepted that appointment bona fides*". The true content of the second recordal in the MOA is set out above, and my reading thereof is that the appellant had in good faith accepted that De Kock had been appointed on behalf of the insurer. Engelbrecht's responses ("*Yes, through Mr*

²⁰ *Wilkins NO v Voges* 1994 (3) SA 130 (SCA) at 144C-D.

²¹ Transcript, 18 Feb 2021, p50, line 18 to p52, line 20.

²² Transcript, 18 Feb 2021, p53 lines 1 – 16.

²³ Transcript, 19 Feb 2021, p86 lines 16 – 20.

Kapp” and “*Yes ma’am... That is why I signed there*”)²⁴ indicate that he resisted the suggestion that the first agreement had been concluded with De Kock or Zurich. All Engelbrecht was prepared to concede was the words contained in the MOA and his signature thereof.

- [31] In the circumstances, I am of the view that there is indeed evidence upon which a Court could or might find that that the MOA contained the tacit term contended for by the appellant.

A court could or might find that the respondent’s liability under the first agreement was not amended by the MOA

- [32] Fourthly, it appears that the Magistrate failed to recognise that the appellant’s pleaded case does not limit the contractual relationship between the parties to the content of the MOA.

- [33] Although the appellant places significant emphasis on the MOA (this was clear from its counsel’s opening statement in the court *a quo*), my reading of the appellant’s claim as pleaded is that it is based on both the first agreement and the MOA, which it alleges “*amended the terms of the first agreement*”. This is confirmed by the quantification of the claim in paragraph 15 of the particulars of claim, which is based on the outstanding amount due in terms of the pleaded first agreement, reduced by (i) the value of certain quoted work that the respondent asked the appellant not to undertake; (ii) a partial payment of R465,241.20 received from the respondent; (iii) and the reasonable costs to complete certain quoted work that the appellant tendered to perform, but which the respondent prevented it from performing.

- [34] In other words, it is not the appellant’s pleaded contention that the MOA is the sole memorial of the contractual relationship between the parties.²⁵

- [35] I am of the view that a court could or might well find on the basis of the

²⁴ Transcript 19 Feb 2021, p12 line 14 to p13 line 22.

²⁵ In *Union Government v Vianini Ferro-Concrete Pipes* 1941 AD 43, the Appellate Division described the parol evidence rule at 47 as being “*when a contract has been reduced to writing, the writing is, in general, regarded as the sole memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence*”.

appellant's evidence that the respondent is liable to the appellant in terms of the first agreement and that the MOA only purports to address the question of payment (and interest) but does not unambiguously amend the first agreement in relation to the question of the respondent's liability. Indeed, clause 9.1 of the MOA appears to confirm the first agreement. At best for the respondent, the MOA is ambiguous as to whether it amended the first agreement with regard to the question of the respondent's liability.

- [36] In those circumstances, the evidence led by the appellant was more than sufficient to overcome the respondent's application for absolution from the instance.

Condonation applications, costs and order

- [37] Before concluding, there are two further matters that require our attention.

- [38] I am satisfied that the appellant has demonstrated good cause for the grant of condonation for various non-compliances with the Magistrates Court rules, the Uniform Rules of Court and the rules of this Division, and for the reinstatement of the appeal which had technically lapsed. Apart from the appellant's prospects of success which are apparent from the findings above, the delays and extent of non-compliance in each instance were not unduly extensive, and there has been little prejudice to the respondent. However, given that the appellant only sought an order of costs in the event of opposition and since the respondent did not file any answering papers, it would be inappropriate to award the appellant its costs in relation thereto.

- [39] On a previous occasion when matter was set down for hearing, the respondent was ordered to apply for condonation and file heads of argument and a practice note within 15 days. This was despite the fact that the appeal should not have been set down on that occasion by the appellant in view of the absence of an application to compel the respondent to deliver his heads of argument. Furthermore, since the respondent's heads of argument were delivered more than 10 days before the hearing of the appeal (as required by High Court Rule 50(9)), I am of the view that they were not delivered late, and that it is thus not necessary for us to make an order condoning their late delivery. Unfortunately,

however, that is not the end of the matter. The condonation application was “*reluctantly*” opposed by the appellant on the narrow basis that the founding affidavit of the respondent (who is an admitted and practising attorney), allegedly contains false statements under oath in relation to the reasons for his non-compliance with the time period provided for in this court’s practice directive. In particular, Mr Muyambi (the appellant’s attorney) alleges in the answering affidavit that the respondent improperly laid the blame for the late delivery of his heads of argument at the feet of his erstwhile attorney, Mr Badenhorst. Despite the fact that the answering affidavit (which is supported by an affidavit deposed to by Badenhorst) contains cogent evidence in support of this allegation, and seeks an order that the papers in the respondent’s condonation application “*be referred to the Legal Practice Council for consideration and possible further action*”, the respondent has not seen fit to deliver a replying affidavit seeking to rebut the evidence of impropriety or oppose the referral to the Legal Practice Council. In addition, the respondent’s counsel declined our invitation to address the court on the issue at the hearing of the appeal. I am therefore satisfied that the respondent has been given an opportunity to state his case in relation to the allegations against him.²⁶

[40] While I do not consider that either party should be awarded their costs in relation to the respondent’s condonation application (particularly since Muyambi observes – correctly in my view – that he only delivered the answering affidavit because he was duty bound as a legal practitioner and officer of the court to do so), I am of the view that it would be appropriate to refer the matter to the Legal Practice Council as prayed for by the appellant. I note in this regard that Article 16(1) of the Code of Judicial Conduct²⁷ obliges a judge with clear and reliable evidence of serious professional misconduct on the part of a legal practitioner to inform the relevant professional body of such misconduct. The appellant’s attorneys will be ordered to deliver this judgment and the relevant documents to the Legal Practice Council.

[41] The usual rule is that the successful party should be awarded their costs. The

²⁶ *Road Accident Fund v Taylor and other matters* [2023] ZASCA 64 (8 May 2023) paras 33 and 34.

²⁷ Code of Judicial Conduct adopted in terms of Section 12 of the Judicial Service Commission Act, 9 of 1994 (GNR865 published in *Government Gazette* 35802 of 18 October 2012).

appellant has been substantially successful, and I see no reason to depart from that approach, both in relation to the appeal (excluding the two condonation applications) and the costs of the application for absolution from the instance in the court *a quo*.

[42] In the circumstances, the following order is made:

1. The appellant's non-compliance with rule 51(4) of the Magistrates' Courts Rules, as well as its non-compliance with rule 50 of the Uniform Rules of Court read together with rules of this Division is condoned, and the appeal is reinstated.
2. The appeal is upheld with costs, excluding the costs of the parties' respective applications for condonation, in relation to which no orders are made as to costs.
3. The order of the Court *a quo* granting absolution from the instance is set aside and the following is substituted in its place:

“The application for absolution from the instance is dismissed with costs including the costs of counsel.”
4. The alleged misconduct of Mr MJ Kapp (as described in the appellant's answering affidavit to the respondent's condonation application) is hereby referred to the Legal Practice Council, Gauteng for consideration and possible further action. The appellant's attorneys are ordered to furnish a copy of this judgment to the Legal Practice Council, Gauteng, together with a copy of the affidavits delivered by both parties in the said condonation application which may be found at pages 045-1 to 046-89 of the Caselines bundle herein.

Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

I agree.

Fisher J

Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD: 23 February 2023

JUDGMENT: 23 May 2023

APPEARANCES

For the Appellant: RS Willis, instructed by Wynand du Plessis Attorneys

For the Respondent: FDW Keet, instructed by JJ Badenhorst & Associates