



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

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 14/3/2018

SIGNATURE: *[Signature]*

14/3/18

Case No. 10058/2017

In the matter between:

MAHLALERWA-KGABO-ERGO JV

APPLICANT

And

**COOPERATIVA MURATORI CEMENTISTI
 RAVENNA (PTY) LTD T/A C.M.C di RAVENNA
 (SOUTH AFRICA)**

RESPONDENT

JUDGMENT

MILLAR AJ

1. The applicant is the plaintiff in an action where the respondent is the defendant. After the entry of an appearance to defend, the respondent served a notice in terms of Rule 23(1) calling on the applicant to remove various causes of complaint which it contended rendered the particulars of claim excipiable.
2. The applicant responded by giving notice of intention to amend its particulars of claim to address the causes of complaint. The respondent objected to the proposed amendment.
3. Before me is an application to amend. The respondent persists in its objection to the proposed amendment on the following grounds:
 - 3.1 Firstly, that the applicant seeks by the amendment to introduce the allegation in paragraph 6.2 that there were implied alternatively tacit terms to the written agreement where the respondent contends that this would be in direct contradiction of the express terms of the agreement;
 - 3.2 Secondly, that the applicant seeks by the amendment to introduce a claim for restitution in respect of payment of its claim for work done; and
 - 3.3 Thirdly, that the alternative claim to paragraphs 6 to 9 of the amendment for unjustified enrichment is bad in law.
4. The applicant argued that by virtue of the references in the written agreement for the necessity to comply, that both the work undertaken for compliance with the Health and Safety Procedures as well as the Site Establishment costs were contemplated costs to

be borne by the respondent notwithstanding that the Bill of Quantities ("BOQ") did not specifically provide for, and was silent on these costs.

5. The respondent argued that absent a reference to the specific items in the BOQ, there was neither an agreement nor obligation on the respondent to pay for these items. They were to be regarded as part of the contract price. The respondent relied on *inter alia* Hudson's Building and Engineering Contracts,¹ a leading work on the type of agreement entered into between the parties, as authority for this view.
6. The proposed amendment to introduce the pleading of a tacit alternatively implied term of the agreement in question goes to one of the *essentialia* of the agreement – the contract price.
7. The contract price is referred to in three parts of the written agreement, in the preamble to the "Subcontractor's Offer" it reads:

*"Having examined the Conditions of Subcontract, the Subcontract Specification, the Subcontractor's Drawings, and the Subcontract Schedule of Quantities for the execution of the abovenamed Subcontract Works, we, the undersigned, offer to execute and complete such Works (my underlining) and remedy any defects therein in conformity with the Conditions of Subcontract, the Subcontract Specification, the Subcontract Drawings, the Subcontract Schedule of Quantities for the indicative total sum of **R1,950,353,51** (one nine five zero three five three million hundred thousand hundred Rand/51) plus **R273,049,49** (two seven three zero four nine hundred thousand hundred*

¹ 8th Edition, EJ Rimmer and IN Duncan Wallace, Sweet & Maxwell Ltd, 1959, see especially the references at pages 109 – 110 and to the 11th Ed. By IN Duncan Wallace QC, Sweet & Maxwell Ltd, 1995 at pages 497 – 498.

Rand/49) representing VAT (14%), for a total of **R2,223,403,00** (million hundred thousand hundred Rand/00) or such other sum as may be ascertained in accordance with the said Conditions. The above amounts are indicative only being the Subcontract Agreement between **MAHLALERWA-KGABO-ERGO JV** and CMC re-measurable"

And clause 16.1 of the "Conditions of Contract" which reads:

"The Subcontract Price **R1,950,353,51** (one nine five zero three five three million hundred thousand hundred Rand/51) plus **R 273,049,49** (two seven three zero four nine hundred thousand hundred Rand/49) representing VAT (14%), for a total of **R2,223,403,00** (million hundred thousand hundred Rand/00) or such other sum as may be ascertained in accordance with the said Conditions. The above mentioned amounts are indicative only being the Subcontract Agreement between BATCH 2 JV and CMC re-measurable in accordance to rates submitted by the Subcontractor, included into ANNEX E (my underlining)"

And clause 16.1 of the "General Conditions which reads:

"The Subcontract Price is the sum stated in the Schedule of Quantities (Annex E) as payable to the Subcontractor for the design (if any), performance, execution, completion and warranty of the Subcontract Works (my underlining) and the remedying of any defects therein in accordance with the provisions of the Subcontract and/or Main Contract.

All duties, fees, taxes and any further cost payable by the Subcontractor, including overheads and profit shall be deemed to be included in the Prices and Rates of the Schedule of Quantities (my bold and underlining).

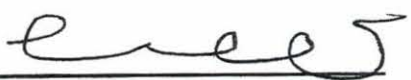
The Subcontractor shall be deemed to have satisfied himself as to the correctness and sufficiency of the rates and prices stated in the Schedule of Quantities, all of which shall, except insofar and as it is otherwise provided in the Subcontract, cover all his obligations under the Subcontract (including those in respect of the supply of goods, Materials, Plants or services) and all matters and things necessary for the proper execution and completion of the Subcontract Works and the remedying of any defects therein. If any item in the Schedule of Quantities is not priced by the Subcontractor, it will be deemed to have been priced at nil (my underlining)

8. The principle to be applied when having regard to whether or not an implied or tacit term is to be read into an agreement is stated in *SA Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D:

*"A term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. See *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454."*

9. The agreement is clear and unequivocal in regard to what is included in the contract price and as to the manner of the determination of that price. On a plain reading of the above clauses, and in particular those parts that I have underlined, there is express agreement as to the contract price and what is to be included and what is to be excluded. There is no basis upon which to impute the implied or tacit term which the applicant contends for.

10. Having found that the agreement provides expressly for payment for all the work that was done by the plaintiff, it is not necessary for me to deal in any detail with the alternative claims for restitution and unjustified enrichment that the applicant sought to introduce. In any event these do not seem to me to have been properly pleaded and had they been allowed, would have rendered the particulars of claim in any event excipiable.
11. The respondent argued that given the nature and importance of the matter, it was a wise and reasonable precaution for it to have briefed two counsel in this matter and that costs, irrespective of the order, should be awarded to the respondent on this basis. The applicant argued that given the nature of the matter, the briefing of two counsel was neither reasonable nor warranted. I agree with the submission of the applicant in this regard.
12. In the circumstances I make the following order:
 - 12.1 The application for amendment is refused.
 - 12.2 The applicant is to pay the costs of the application.



A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:
JUDGMENT DELIVERED ON:

6 MARCH 2018
14 MARCH 2018

COUNSEL FOR THE APPLICANT:

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INSTRUCTED BY:

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