IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, (PRETORIA)

26/3/15

CASE NO: 14166/07

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES:NO
(3)	REVISED

26 MARCH 2015 ....

In the matter between:

BUTSANA TEXTILE SERVICES CC **PLAINTIFF**

And

THE NATIONAL TREASURY **1ST DEFENDANT**

THE DEPARTMENT OF DEFENCE **2ND DEFENDANT**

JUDGMENT

MUDAU AJ,

[1] The plaintiff instituted an action against the defendants for specific performance alternatively, for damages with costs. The plaintiff's claim is based on a written contract entered into between the parties pursuant to a tender which the plaintiff was awarded. The matter initially served before this

court (per Zondo J) on 1 March 2011. On 23 September 2011 the plaintiff's claim was dismissed with costs. Subsequently, the plaintiff launched an appeal to the full bench of this court (per Legodi J and Ebersohn as well as Kruger AJJ). The appeal was heard on 28 August 2013 followed by a judgment on 17 September 2013. The appeal succeeded to the extent set out hereunder:

> *"21.1 .1 the order made by the court a quo dismissing the appellant's case with costs is amended to read as follows:*
>
> > *21.1 .1.1 "the matter is postponed sine die for trial on the issue stated in the document titled 'LIST OF AGREED FACTS AND ISSUES'.*
> >
> > *2 1.1.1.2 wasted costs occasioned by the postponement to be costs in the course".*
>
> *21.1 .2 each party to pay on costs of the appeal."*

The full bench essentially, declined to deal on appeal with the merits of the dispute between the parties for lack of compliance with Rule 33 (4).

THE PARTIES

[2] The plaintiff, Butsana Textile Services CC, is a close corporation registered in terms of the Close Corporation Act No 69 of 1984. The 1st defendant (the National Treasury) is represented by the Minister of Finance in an official capacity. The 2nd defendant (the Department of defence) is represented by the relevant Minister in an official capacity.

THE FACTS

[3] The following facts are neither contested nor complex. The plaintiff was awarded a tender by the 1st defendant for the supply of fabrics and textiles to

certain specified government departments, namely, the Department of Safety and Security (as it was then called), the Department of Correctional Services (as it was then) as well as the Department of Defence. As a consequence thereof, a written contract was concluded between the plaintiff and the 1st defendant on behalf and (or) for the benefit of the relevant departments for the period 1 August 2004 to 31 July 2005. The tender was to be performed in respect of five items referred to in the contract as: RT 160-02-06- 01T, RT160-02-09-03T, RT160-02-09-04T, RT 160-02-09-05T and RT 160-02-09-09T.

[4] It is common cause that the plaintiff received orders for and for its part, performed in fulfilment of its contractual obligations in respect of all the items except for the fifth item referred to as RT 160-02-09-05T above. It is in respect of this item that no order was issued by the 2nd defendant, which in turn, formed the basis of the current dispute between the parties and the resultant action by the plaintiff.

[5] The issue that falls for determination by this court primarily concerns the correct interpretation of the contract between the plaintiff and the defendants. This court, ultimately, is to decide whether the defendants were in terms of the relevant contract obliged to issue an order for the delivery of the item referred to in RT 160-02-09-05T during the period of the contract.

[6] The document *titled 'LIST OF AGREED FACTS AND ISSUES'* referred to by the full bench was, at the commencement of the trial before this court, and by agreement between the parties handed, presumably, in terms of Rule 33 (1) and 33 (2) of the Uniform Rules of Court, ("the Stated Case") for consideration of the dispute in adjudicating certain questions of law. The said document which was signed in my presence and in open court, by the attorneys of the parties reads as follows:

"1.1 In accordance with what was raised in paragraphs 3.2.7 and 3.6 of the Defendants' plea, the Defendants contend that the relevant tender contract, prepared by or on behalf of the Defendants, does not oblige the Defendants to order for a delivery of all the items covered by the tender contract. The Plaintiff, on the other hand, contends that it is in fact a term of the said contract that orders must be placed for all the items covered by the contract, and if orders are not so placed for all the items in the contract then, so contends the Plaintiff, there is a breach of the agreement by the Defendants. The Defendants deny, however, as indicated earlier herein, that failure to order for all the items covered by the contract constitutes a breach of the agreement.

1.2 In essence therefore the parties will be requesting the above Honourable Court to interpret and pronounce upon which one of the two aforementioned contentions is the correct one.

1.3 If the Court finds in favour of the Defendants it should dismiss the Plaintiff's action with costs.

1.4 If the Court finds the Plaintiff's interpretation is correct, the Court should issue a declaratory order, declaring the Plaintiff is entitled to recover from the Defendants so much of its alleged damages which the Plaintiff is able to prove.

1.5 In essence, therefore, and in accordance with the provisions of Uniform Rule of Court 33(4) the parties will request a pronunciation on the merits and the latter issues, if still relevant, can be decided at a later stage."

I return to this aspect below in this judgment.

[7] In a letter of acceptance of the tender by the 1st defendant, which was directed to the Plaintiff (page 76 to 77 of the trial bundle), the following is stated:

> *"Your bid RT160-2004T dated 12 April 2004 has been accepted, subject to all the terms and conditions embodied therein, for the supply of the items indicated per attached circular.*
>
> *This letter of acceptance constitutes a binding contract <u>but no delivery should be affected until written official orders, which inter alia indicate delivery instructions, have been received. Orders will be placed by participating bodies listed in the document and on whose behalf the contract has been arranged as and when required during the contract period.</u>"* (Own emphasis added)...
>
> *The award of this tender is subject to the testing/inspection by any institution recognised by the South African National Accreditation System (SANAS). Pre-production samples must be submitted for testing and approval before mass production can commence. The Department of trade and industry (DTI) is currently conducting a review on the appropriateness of designating industries that produce textiles, clothing, footwear and leather products as strategic sectors for preferential treatment in terms of paragraph 12(1) of the regulations on the Preferential Procurement Policy Framework Act, No 5 of 2000.*
>
> *As an interim measure, while the review is underway, the DTI has decided to designate the textiles, clothing, footwear and leather products is set aside for local production and supply to the state.*
>
> *In view of the above, only locally manufactured products or products manufactured locally from imported fabrics or raw material will be considered. However, contract is advised to obtain written confirmation by the Department of Trade and Industry that the raw material of fabric could not be sourced locally before they could import raw material of fabric."*

[8] In addition to the "stated case", the plaintiff in its endeavour to discharge the onus that it has in proving its case presented the evidence by its sole member, Mr Julian Mohale Lehana ("Lehana"). In his evidence, Mr Lehana essentially confirmed the award of the tender to the plaintiff. He further testified that in addition to the letter of acceptance, he also received a circular dated 2 August 2004 (page 78 of the trial bundle) issued by one F Alexander addressed to all departments/administrations on behalf of the Chief Director: Contract Management from the office of the 1st defendant. Relying on this circular or memorandum, the plaintiff incurred expenses that form the basis of its claim against the defendants.

[9] Mr Alexander, a Deputy Director: Contract Management at the time in the office of the 1st defendant's tender board, testified on behalf of the defendants and confirmed that he was the author of the circular/memorandum relied upon by the plaintiff. The circular was an internal communication addressed to various departments and not to the plaintiff. It is his version that it is not customary or practice to send such an internal circular to bidders. If it was sent to the plaintiff in this case, it could only have been done so erroneously. In so far as it may be relevant, the relevant part of the circular reads as follows:

"*1.* *This contract circular consists of 4 pages and cover 23 items.*

2. *The requirements of the following departments/administrations are included in this contract:*

South African Police Service

South African National Defence Force

Correctional Services

3. *The acceptance of all goods ordered in terms of this contract will be subject to inspection/testing by any institution recognised by SANAS for compliance with the specifications prior to dispatch from the factory. A copy of the inspection certificate must accompany each consignment. The cost of inspections would be for the department's/administration's account. However if it does not comply with the specifications, the cost will be for the account of the supplier.*

4. *Quantities shown in this circular are subject to evaluation of 10%. All quantities <u>must</u> be taken up during the contract period. (Own emphasis)*

5. ***Orders must be placed as soon as possible but not later than 3 months after commencement of the contract**.*

6. *Prices are inclusive of 14% VAT."*

[10] It is to Rule 33 referred to above that I now return. For convenience, Rule 33 in so far as relevant reads:

"33 Special Cases and Adjudication upon Points of Law

(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.

(2)*(a)* Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.

(b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.

(c) If a minor or person of unsound mind is a party to such proceedings the court may, before determining the questions of law in dispute, require proof that the statements in such special case so far as concerns the minor or person of unsound mind are true.

(3) At the hearing thereof the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference of fact or of law from the facts and documents as if proved at a trial.

(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 questions cannot conveniently be decided separately.

(5) When giving its decision upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceeding which may be necessary for the final disposal thereof.

(6) If the question in dispute is one of law and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing any evidence."

[11] Rule 33 (1) and Rule 33 (2) provide a mechanism of disposing of a case without the necessity of leading evidence (*Sibeka v Minister of Police* 1984 (1) SA 792 *(W)*). Importantly, there must be an actual agreement between the parties on the stated facts, at least for the purposes of the special case (*Bane v D'Ambrosi* 2010 (2) SA 539 *(SCA)*) .In terms of Rule 33 (1) it is trite that the parties may proceed under this sub- rule as of right and the court is obliged to hear the special case as formulated by the parties in terms thereof. In contrast however, Rule 33(4) is invoked so that a factual issue can be determined which can give direction to the rest of the case, to obviate the leading of unnecessary evidence, to avoid delays as well as the cost implications.

[12] Writing for the full bench, Legodi J, stated at Para (10) regarding this matter that:

> "Request for a pronunciation on merits under Rule 33(4) in my view, was misplaced. I say so, because in terms of Rule 33(4) the court acts *mero motu* if it appears to it 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. Secondly, in as much as the parties sought to resolve the issues as quoted in paragraph (7) of this judgement, they could not have done so without leading of evidence, as the issue or issues aforesaid appeared to have been contested and could not be resolved as a point of law which require evidence".

The quotation in paragraph (7) referred to by Legodi J is for all intents and purposes, the same as what has been quoted in paragraph [6] of this judgment, repeated for convenience.

[13] In this matter, there was, in my respectful view, no proper compliance with Rule 33(2) in that the document relied upon was also not signed by the advocates representing the parties as the rule provides but, by the attorneys only. In addition, the process followed, was, in my respectful view, a hybrid between the procedures envisaged in Rule 33(1) and (2) as well as Rule 33(4). The only difference being that in addition to the stated case as referred to above; each party also presented evidence alluded to above. However, given the advanced stage of the matter when it came before me for determination and delays already incurred, I considered it to be inappropriate to let such procedural issues obstruct or delay the determination of the matter in the interests of the parties and the ends of justice.

[14] In defending the plaintiff's claim, the defendants pleaded that:

3.1 ...

3.2. It was a special condition of this tender that:

3.2.1 The products offered should bear the SABS mark or a test report issued by any testing agent recognised by a South African National Accreditation Systems (**SANAS)** not older than one year that proves that the offered product does comply with the specifications;

3.2.2 Alternatively, a report from any testing organisation accredited by **SANAS** that proves that tenderer can deliver the offered items according to the specifications.

3.2.3 The tenderer was still expected to submit the pre-production samples when requested to do so to the relevant testing agent recognised by SANAS;

3.2.4 The tenderer was still expected to submit 3 pairs of pre-production samples to the relevant testing agent or any testing agent recognised by SANAS;

3.2.5 Mass production shall only commence after the Department and the contractor concerned have been notified by the relevant testing institution that the pre-production samples have been approved;

3.2.6 In the event the pre-production samples are not approved by the relevant testing institution a second set of pre-production samples incorporating corrections/ improvements are required, the corrected samples must reach the relevant testing institution within 21 days after the relevant testing institution had notified the tenderer of its findings;

3.2.7 Deliveries must commence as soon as possible after receipt of an official order;

3.2.8 If the tenderer is only a supplier and not an actual manufacturer of the product and will be sourcing the product from another company, an original letter from that company/supplier confirming firm supply arrangement in this regard had to accompany the tender;

3.2.9 The said supplier must confirm that it has familiarised itself with the item description/ specification and tender conditions;

3.3 On or about 12th April 2004 the Plaintiff submitted a tender. The Plaintiff has furnished South African Fine

Worsteds as their manufacturer and supplier of the fabrics as required in terms of the tender.

3.4 In its tender the Plaintiff specified that the delivery period will be 60 days after the receipt of an order;

3.5 ...

3.6 It was a condition of this tender, alternatively an agreement between the parties that no delivery should be effected until written orders have been received. Orders will be placed by participating bodies listed in the bid document on whose behalf the contract has been arranged as and when required during the contract period..."

[15] The rules pertaining to the interpretation of documents were set out in *Natal Joint Municipal Fund v Endumeni Municipality* 2012 (4) SA 593 *(SCA)* as follows at Para [18] by Wallis JA:

"The present state of the law can be expressed as follows:

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent *purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

See also *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: in re Hyundai Motor Distributors (Pty) Ltd v Smith NO & Others* 2001 (1) 545 *(CC)* Para 23 – 24, 26]

[16] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 *(SCA)* Wallis JA, with reference to Para [18] of the *Endumeni* judgment said the following:

"[11] That statement reflected developments in regard to contractual interpretation in Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd [2008 (6) SA 654 (SCA) para 7); KPMG Chartered Accountants (SA) v Securefin Ltd & Another [2009 (4) SA 399 (SCA) para 39) and Ekurhuleni Municipality v Germiston Municipal Retirement Fund [2010 (2) SA 498 (SCA) paras 12–14]. I return to it and to those cases only because we had cited to us the well-known and much cited summary of the earlier approach to the interpretation of contracts by Joubert JA in Coopers & Lybrand & Others v Bryant [1995 (3) SA 761 (A) at 768A–E], that:

'The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal

meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract ...

(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted ...

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

[12] That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding

circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'."

EVALUATION

[17] Against this background, it is to the facts, which as indicated above, are on the main, common cause that I now revert to in my evaluation of the relevant documents that formed the basis of the contract and the evidence. By way of summary and for convenience purposes the common cause facts are:-

17.1 The plaintiff was awarded the tender by the 1st defendant for the supply of fabrics and textiles to certain government departments for a specified period.

17.2 A contract was concluded between the plaintiff and the 1st defendant to give effect to the tender.

17.3 The contract was entered in respect of the order and delivery of five specified items.

17.4 The contract between the parties was however subject to certain terms and conditions stipulated in the contract.

17.5 The 2nd defendant issued orders only in respect of 4 of the 5 items, and the plaintiff for its part, supplied and delivered the said items in honour of its contractual obligations. The 2nd defendant paid for the delivered items in full.

17.6 When the 2nd defendant failed or refused to order the 5th item, the plaintiff considered this conduct as constituting a repudiation of the agreement between the parties, hence the current claim for specific performance or damages disputed by the defendants.

[18] It has been contended by counsel on behalf of the plaintiff in his written heads of argument that:

> "The statements, in the contract circular, to the effect that all quantities *must* and not merely *may* be taken up during the contract period, and also the directive in paragraph 5 to the effect that orders must be placed as soon as possible but not later than 3 months after the commencement of the contract period, are clear indications that in the minds of the Defendants, in particular the First Defendant, the intention was that all quantities must be taken up".

In this regard, counsel was relying upon a circular alluded to above at Para [8] and [9] which, the 1st defendant denies formed part of the original contract. It was also contended on behalf of the plaintiff that:

> "When consideration is had to the language used by the Defendants in the acceptance letter and the contract circular, it is evident that in terms of ordinary rules of grammar and syntax, the contract circular is an attachment to the letter of acceptance and the Defendants were obliged to take up all the items within a period of three months after the award of the tender."

[19] However, from the common cause documents the following (which the parties agreed to in their contract) needs to be highlighted; this was also alluded to by counsel for the defendant which:

19.1 *"... no delivery should be effected until written official orders, which, inter alia, indicate delivery instructions have been received."*

19.2 *"Pre-production samples must be submitted for testing and approval before mass production can commence."*

19.3 *"It is a condition that deliveries must commence as soon as possible after receipt of an official order..."*

19.4 *"The delivery period of the material is 60 days after receipt of an order and not before receipt of an order". (Own emphasis)*

19.5 *"Orders will be placed by participating bodies listed in the bid document on whose behalf the contract has been arranged as and when required during the contract period'.*

[20] A proper reading of the contract in my respectful view clearly shows that for the plaintiff to effect delivery of the specified items, the following had to happen:

20.1 first, an official order from the defendant had to be received.

20.2 the plaintiff was then obliged to effect delivery 60 days after receipt of the official order and;

20.3 as and when required during the contract period.

To my mind, "as and when required", could only mean under the circumstances that, it was subject to the defendant exercising an option whether a need arose, at any given time during the contract period, to place an order with the plaintiff. Any suggestion that the 2nd defendant was obliged to place an order irrespective of whether any need arose is not only absurd, but is certainly not supported by the terms of the contract which are common cause.

[21] Reliance by the plaintiff upon the disputed document, a circular which, undisputedly has been addressed to government institutions (Departments/administrations), particularly paragraph 4 thereof, the relevant part of which, reads: "... *All quantities must be taken up during the contract period"* does not avail the plaintiff and is therefore misplaced. In any event, the circular cannot be read in isolation from the other general and specific terms of the contract in this matter. Read in this context therefore, and with particular regard to the whole contract (with its terms and conditions), the word must is in my view, only in respect of items that the defendant would have identified a need to place an order and not more. I am fortified in this view primarily because the 1st defendant contracted with the plaintiff for and on behalf of the relevant government departments which, ordinarily would firstly identify a need for as well as make use of the items subject to the contract.

[22] There is no justification to read into the circular that the 1st defendant had issued an instruction that the relevant government departments/administrations must place orders for an item in respect of which, there was no need. If that was the case, the result would be wasted expenditure of public funds, which inevitably would put strain on the national treasury. Secondly, the other terms of the contract alluded to above would as a result be rendered nugatory.

[23] For all these considerations, the submission by the plaintiff that the defendants were obliged to issue an order in respect of the remaining 5th item in their contract is without any merit and falls to be rejected.

[24] I turn now to consider the costs in this matter. The defendants as the successful parties will generally be entitled to costs (see, for example, *Union Government (Minister of Railways & Harbours) v Heiberg 1919 AD 477* at 484). I see no reason in the present matter to depart from the general rule.

[25] In the premises the plaintiff's action is dismissed with costs.

MUDAU TP
Acting Judge of the High Court

Date of hearing:	10 – 11 February 2015
Counsel for the Plaintiff:	M P VAN DER MERWE
Instructed by:	TIM DU TOIT & CO INCORPORATED, PRETORIA
Counsel for the defendant:	MR M MOJAPELO
Instructed by:	THE STATE ATTORNEY, PRETORIA
Date of judgment:	26 March 2015