**IN THE HIGH COURT OF SOUTH AFRICA**
**FREE STATE DIVISION, BLOEMFONTEIN**

**Case No.: 873/2013**

In the matter between:

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| **MPS CONSULTING ENGINEERS AND TOWN PLANNERS (PTY) LTD** (Registration number: 2004/000413/07) | Appellant |
| and | |
| **ARCHI-M ARCHITECTS CC** (Registration number: CK94/39446/23) | Respondent |

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**CORAM:** EBRAHIM, C J MUSI *et* VAN ZYL, JJJ

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**HEARD ON:** 10 FEBRUARY 2014

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**JUDGMENT BY:** C.J. MUSI, J

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**DELIVERED ON:** 20 MARCH 2014

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[1] This appeal, which is brought with the leave of the court a *quo*, is against the judgment of a single judge of this division. The court a *quo* granted summary judgment against the appellant in the following terms:

> "1.1 Payment in the amount of R2 415 291.06
>
> 1.2 Interest thereon at 15,5% per annum *a tempora morae* to date of final payment

1.3 Costs of suit."

I shall refer to the appellant as the defendant and to the respondent as the plaintiff.

[2] The claim arose pursuant to a written agreement entered into on 28 January 2008 by the plaintiff and defendant. In terms of the agreement, the defendant engaged the plaintiff to act as consultants for structural, civil and related engineering work to be performed during the construction of new offices for the Free State Government.

[3] Although the plaintiff rendered the services as part of a joint venture with Siphelele Consulting and Skosana Technical Consulting, the agreement between the defendant and the joint venture clearly stipulated the term "consultant" shall in all cases include the separate consulting firms comprising the joint venture.

[4] In terms of the agreement:

4.1 The plaintiff was responsible for:

> "design, preparation of all drawings, documentation and supervision of the earthworks and the concrete retaining walls of the complete project. In addition, for the design, preparation of drawings, documentation and supervision of the foundations, columns and all of the floors for the six storey structure on area C. including the sub soil drainage and storm water reticulation for this area."

4.2 The defendant would remunerate the plaintiff for services rendered, as well as for any additional services, at the rates and prices determined in the Government Gazette for the plaintiff's discipline.

[5] The plaintiff duly performed and fulfilled its obligations in terms of the agreement and submitted its invoice on 2 May 2012 for the amount of R2 754 383.40. Despite proper and lawful demand the defendant failed to pay.

[6] The plaintiff issued summons against the defendant for payment of R2 754 383.40 plus 15,5% per annum interest. The summons was served on 6 March 2013. On 18 March 2013, the defendant delivered a notice of intention to defend. On 28 March 2013, the plaintiff brought an application for summary judgment. The defendant opposed the application.

[7] On 16 May 2013, the application for summary judgment was granted in the terms set out in paragraph one above. Before setting out the defendant's basis for resisting the summary judgment application, I pause to briefly say something about rule 32(3) (b) sub-rule 5. The sub-rule reads as follows:

> "Upon the hearing of an application for summary judgment the defendant may –
>
> (a) …
>
> (b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other

> person who can swear positively to the fact that he has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

In terms of sub-rule 5, if the defendant does not satisfy the court as provided in paragraph (b) of sub-rule 3, the court may enter summary judgment for the plaintiff. Sub-rule 5 confers a discretion on the court to refuse to grant summary judgment even in cases where the affidavit in terms of rule 32(3)(b) is not entirely satisfactory. The discretion should however not be exercised capriciously so as to deprive a deserving plaintiff of the relief to which he/she is entitled. The discretion should also not be exercised against a plaintiff on the basis of mere conjecture or speculation. The "test" for refusing summary judgment where the affidavit does not strictly meet the threshold in rule 32(3)(b) has been stated as follows:

> "If, on the material before it, the court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is a sufficient basis on which to exercise its discretion in favour of the defendant."

See: **<u>Breitenbach v Fiat SA (Edms) Bpk</u>** 1976 (2) SA 226 (TPD) at 229 A – H; **<u>Gruhn v M Pupkewitz and Sons (Pty) Ltd</u>** 1973 (3) SA 49 (AD) at 58 C – E.

[8] In **<u>Joob Joob Investments (Pty) Ltd v Stocks Mavundla ZEK Joint Venture</u>** 2009 (5) SA 1 (SCA) at para 31 Navsa

JA set out a brief history of the summary judgment procedure and pointed out that the procedure was not intended to "shut (a defendant) out from defending", unless it was very clear indeed that he had no case in the action, but that it was intended to prevent sham defences from defeating the rights of parties by delay and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

[9] Summary judgment proceedings are a relatively inexpensive and quick way for a plaintiff to enforce his/her claim. It obviates the need for a long protracted trial where the defendant has an unmeritorious defence. The expeditious resolution of disputes holds self-evident benefits for the litigants, in terms of excessive costs and time, and the administration of justice, in terms of resolving more disputes in less time and thereby reducing the backlogs which plague our courts.

[10] Navsa JA also pointed out that summary judgment proceedings only hold terrors and are drastic for a defendant who has no defence. He stated it thus:

> "The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is

not shut out. In the *Maharaj* case at 425G - 426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G - 426E."

[11] In **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) at 426 A – E Corbett JA, as he then was, said the following:

"Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

> All that the Court enquires into is: *(a)* whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and *(b)* whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully' as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence… At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading."

[12] In its affidavit filed in terms of rule 32(3)(b) the defendant denied that it has no defence against the plaintiff's claim and that appearance to defend was only given with the intention of delaying the plaintiff's claim. It admitted that it entered into an agreement with the plaintiff.

[13] The relevant parts of the affidavit read as follows:

> "5.1.2 In terms of said agreement the Plaintiff will deliver accounts and claims to the Defendant in respect of professional services rendered by the Plaintiff. The

Defendant will in turn verify and submit said accounts to the department for payment.

5.1.3 In this regard the Honourable Court is respectfully referred to Clause 5 of said Agreement under the heading 'Remuneration – General'.

5.1.4 In terms of Clause 5.2 all undisputed claims of the Plaintiff (Consultant) will be settled by the Defendant (Client) 'in full on the agreed dates or within thirty (30) days of the date of issue of any account'.

5.1.5 I respectfully draw the Courts attention thereto that the Plaintiff is a well-established Engineering Firm in the Free State and that it has, as such, on previous occasions dealt with the Free State Provincial Government either directly or, indirectly in matters where it was appointed by other consultants.

5.1.6 Although not specifically mentioned in the Agreement entered into between the parties it is a well-known fact that the Defendant only acts as intermediary between the government (Department) and the Plaintiff (Consultants) in as far as payment of all accounts are concerned.

5.1.7 Payments are made to the Defendant by the Department who in turn, make payments to the Plaintiff and other consultants on submitted accounts.

5.1.8 All accounts lodged by the Consultants are verified by the Defendant and the Departments in-house engineers and payment officers. Once all requirements have been met, the Department initiates payment to the Defendant who in turn pays the Consultants (Plaintiff).

5.1.9 It is therefore my submission that it was, and is at present, specifically agreed upon by the Parties that payments will only be made to the Plaintiff once payment was received from the Department, and that it will thus be done as envisaged in Par. 5.2, 'on agreed dates..'.

5.1.10 During the recent past and even now the Department are (sic) experiencing difficulty in meeting its obligations towards its consultants. To that effect I attach hereto marked as Annexure 'B' a letter received from the Department of Public Works dated 9 October 2012 and as such respectfully refer the Court thereto.

5.1.11 This delay was brought to the attention of the Plaintiff and was accepted by the Plaintiff as will be shown herein later.

5.1.12 I also herewith marked as Annexure 'C' correspondence dated 26 September 2012, received from Phatsoane Henney Attorneys who at that time acted on behalf of and on instruction of the Plaintiff.

5.1.13 The Court's attention is specifically drawn to paragraph 2 of said correspondence where the Plaintiff requests payment of his account 'once the Department has come into the necessary funds…'.

5.1.14 It is therefore clear that the Plaintiff agreed to the late payment of his claims.

5.1.15 It is therefore my respectful submission that not only is the Plaintiff premature in his action, but also that it is clear that the Plaintiff reached an agreement with the Defendant that his account will be settled as soon as funds become available from the Department.

5.1.16 This agreement was never cancelled by the Plaintiff and therefore still subsist.

5.1.17 I therefore deny that the Defendant is in 'material breach of the agreement' as alleged, and specifically pleads (sic) that any amount due to the Plaintiff will only become due and payable by the Defendant once payment was (sic) received from the Department."

Paragraph 2 of annexure "C" referred to in paragraph 5.1.12 reads as follows:

> "We are addressing this letter to your good selves with the request that our client's account first be paid once the Department has come into the necessary funds, thereafter the remaining consultants be paid pro rata with regard to their outstanding accounts."

[14] The defendant filed a supplementary affidavit wherein it stated that it paid the plaintiff an amount of R339.091.76, on 19 April 2013, in accordance with the agreement between them.

[15] In the court *a quo* the defendant took a technical point relating to the fact that clause 8.1 of the contract, which states that the parties shall negotiate in good faith with a view to settling any dispute or claim arising out of or relating to the agreement and may not initiate any further proceedings until either party has, by written notice to the other, declared that such negotiations have failed. The defendant contended that the plaintiff did not comply with clause 8.1 and that the application should be dismissed for that reason too. The court *a quo* rejected that argument.

[16] The court *a quo* also rejected the defendant's explanation that the parties agreed that the plaintiff would be paid when the Department paid the defendant. The court *a quo* said the following in this regard:

> "I found no support whatsoever of (sic) this allegation from all documents placed before me, except repeating that the contract 'B' identifies the parties to the contract herein – client being defendant and plaintiff herein as the consultant with no reference to the Department, expressly nor impliedly as being a party thereto."

The court *a quo* therefore found that the defendant did not have a *bona fide* defence to the plaintiff's claim.

[17] It is clear from the court *a quo*'s judgment that it did not consider the factual matrix or context within which the contract ought to be interpreted.

[18] Clause 5.2 of the agreement states that:

> "Amounts due to the consultant shall be paid in full on the agreed dates or within thirty (30) days of the date of issue of any account."

[19] Mr Hefer argued that because there was no payment schedule, clause 5.2 empowered the parties to enter into an agreement as to a date of payment. He contended that by virtue of paragraph 2 of the letter dated 26 September 2012, the parties agreed that the plaintiff will be paid when the Department pays the plaintiff.

[20] Mr Keet, on behalf of the plaintiff, argued that the agreement contains a non-variation clause and that the defendant must be kept, strictly, to the terms of the contract. According to Mr

Keet, the defendant should not be allowed to adduce evidence on matters that do not form part of the contract, because the Department is not a party to the contract. According to him the defendant now endeavours to vary the terms of the contract. I disagree.

[21] The non-variation clause reads as follows:

> "7.10 Sole Agreement
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> This Agreement together with the attachments and appendices detailed in the Agreement and the Specific Provisions constitutes the Sole Agreement for the services between the parties and no representation not contained herein shall be of any force or effect between the parties. No amendments will be of any force and effect unless reduced to writing and signed by both parties as expressly intended to form part of the Agreement."

[22] There being no agreed dates of payment, this matter falls to be decided on the interpretation of clause 5.2. In doing so we must, in view of the defence raised, look at the surrounding circumstances to properly contextualise the clause. We would be remiss if we do not have regard to the proper factual matrix. This is so because the proper context is an important tool in interpreting a contractual clause even where there is no ambiguity. In **Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another** 2008 (6) SA 654 (SCA) at para 7 Lewis JA said:

"(i)t is important to state that an ambiguity is not, in my view, a precondition for a court to interpret a provision by having regard to the context of the contract and the surrounding circumstances. More than ten years ago this court said in *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* that the time appeared to be ripe for this court 'to reconsider the limitations placed' on the 'use of "surrounding circumstances" in interpreting documents'" (Footnote omitted)

[23] In **KPMG Chartered Accountants (SA) v Securefin Ltd and Another** 2009 (4) SA 399 (SCA) at para [39] Harms DP lucidly summarised the legal position with regard to establishing the proper factual matrix as follows:

"[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) paras 33 - 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its

> factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (*Delmas Milling Co Ltd v Du Plessis*1955 (3) SA 447 (A) at 455B - C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'.
> The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* 2008 (6) SA 654 (SCA) para 7.)"

[24] I now turn to the factual matrix. The defendant contended that it had always been within the parties' contemplation that the defendant will pay the plaintiff after the Province or Department (they seem to use these words interchangeably) had paid.

[25] On 8 May 2012 the plaintiff's erstwhile attorneys wrote a letter to the defendant wherein it, *inter alia*, stated the following:

> "We require before the close of business on 11 May 2013 confirmation that the account has been submitted to Bernie Keyter at the Province alternatively that you provide us with a tax invoice in the amount of R2 754 383.40 that our clients can submit same to Mr Bernie Keyter."

[26] Thereafter, on 26 September 2012, the plaintiff wrote the letter mentioned in paragraph 13 above.

[27] On 9 October 2012 the Chief Director: Public Works of the Department of Public Works of the Free State Province wrote the following letter to the defendant:

> "Your professional fee invoice no. 8 for the new Government Building refers:
>
> 1. The Department of Public Works acknowledges receipt of the invoice. However due to financial constraints within the Department and the fact that amendments to the invoice of the Quantity Surveyor appointed by your good self, had to be done, lead to delays in processing of the invoice (sic).
> 2. The Department is attending to solving the matter as soon as possible. You are kindly requested to bear with the situation prevailing in the Department."

[28] The defendant brought the contents of the Department's letter to the plaintiff's attention.

[29] On 23 October 2012 the plaintiff wrote the following letter to the defendant:

> "We refer to the abovementioned matter and more specifically your letter dated 9 October 2012 and have noted the contents thereof.
>
> **We confirm that on the 4th of May 2012 our client submitted their fee account Nr 4 to your good selves which you were in turn, suppose (sic) to submit to the Province for payment.**

> **We confirm that it is our instructions that you did not comply with this and did not submit the fee account to Province for payment timeously.**
>
> **We confirm that only after our offices placed demands on your offices, did you submit our client's fee account with the other consultants (sic) accounts to the Province as a collective account.**
>
> **We herewith request by close of business on the 29th of October 2012, that you provide us with a tax invoice in the amount of R2 754 383.40 so that our client's (sic) can submit same to Province, failing which we have instructions to proceed with the necessary legal action and you will also be held liable for any legal costs incurred in such event."** (My emphasis.)

[30] It is clear, in my view, that if one has proper regard to the factual matrix of this matter, that, although the Department was not a party to the contract, both parties were aware that the payment of the plaintiff's fees was conditional on the Department paying the defendant. The plaintiff's missives to the defendant are very clear in this regard. The subsequent conduct of both parties show what their common intention was at the time they made the contract. See **Breed v Van den Berg** 1932 AD 283 at 292 – 293. The request of the plaintiff that it be paid first once the Department has come into the necessary funds, is indicative of the fact that the date of payment was to be the date when the Department pays.

[31] Clause 5.2 empowers the parties to agree on a payment date. When the parties so agree, verbally or in writing, that

would not constitute a variation of their agreement. That agreement, relating to the date of payment, would give meaning to what is agreed on in the contract. The non-variation clause prohibits a variation of the contract except under the circumstances as mentioned therein. In this case there was no need for a variation, because of the wording of clause 5.2. The evidence relating to the agreed date would probably, at trial, be admitted irrespective of the parol evidence rule. In **Affirmative Portfolios CC v Transnet Ltd t/a Metrorail** 2009 (1) SA 196 (SCA) at para [14] it was said:

> "Where the written agreement is intended merely to record a portion of the agreed transaction, leaving the remainder as an oral agreement, then the rule prevents the admission only of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement. This is often referred to as the 'partial integration' rule."

[32] Likewise if a contract records a portion of an agreement and leaves the other portion for subsequent agreement, whether oral or in writing, evidence of the subsequent agreement would not be precluded by the parol evidence rule. All that the defendant did in this matter was to prove that the "agreed date" mentioned in clause 5.2 was subsequently agreed to as the date on which the Department pays.

[33] Although the defendant did not expressly accept the offer to pay the plaintiff when the Department pays, it is clear that there was, at least, tacit acceptance of the offer. The

defendant did not reject the offer. In fact, it relied on the offer and its tacit acceptance thereof in its opposing affidavit. In **Timoney and King v King** 1920 AD 133 at 141 it was said that:

> “”An acceptance may be inferred from conduct.”

[34] In **Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd** 1943 AD 232 at 241 the following was said:

> “Now a binding contract is as a rule constituted by the acceptance of an offer, and an offer can be accepted by conduct indicating acceptance, as well as by words expressing acceptance.”

[35] It must be remembered that it is always open to the defendant to apply for rectification, at trial, in order to align the written agreement with the true agreement between the parties. I say this because the defendant, in paragraph 5.1.2 of its affidavit, states that it was part of the agreement between the parties that it will receive and verify accounts for professional services rendered by the plaintiff and submit same to the Department for payment. This allegation is supported by the facts. There is, however, no such clause in the contract. I am of the view that the defendant has satisfied us that it has a *bona fide* defence to the action. In any event, in my judgment, in the light of all material placed before us, there is a reasonable possibility that an injustice may be done if summary judgment is granted.

[36] I accordingly make the following order:

1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside and replaced with the following:
   - (i) The application for summary judgment is dismissed.
   - (ii) The costs of the application for summary judgment shall be costs in the action.
   - (iii) The defendant must file its plea within twenty (20) days of the date of this order.

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**C.J. MUSI, J**

I agree.

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**S. EBRAHIM, J**

I agree.

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**C. VAN ZYL, J**

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| On behalf of appellant: | Adv J.J.F. Hefer<br>Instructed by:<br>Alberts Attorneys<br>BLOEMFONTEIN |
| On behalf of respondent: | Adv Keet<br>Instructed by:<br>Van der berg Van Vuuren<br>Attorneys<br>BLOEMFONTEIN |

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