



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

CASE NO: 2017/43073

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED



SIGNATURE

25/07/2024
DATE

In the matter between:

TOP QUARTILE PMSA (PTY) LTD

Plaintiff

and

SIBANYE GOLD LIMITED

Defendant

This order was handed down electronically by circulation to the parties' legal representatives by email on 25 July 2024.

JUDGMENT

INGRID OPPERMAN, J

Introduction

[1] This action was initiated in November 2017 under the Uniform Rules of Court. After the close of pleadings, the plaintiff applied for the action to be certified a

Commercial Court matter. At the first case management meeting held before me on 27 June 2019, the defendant recorded that it was participating under protest, that it had objected to the referral to the Commercial Court and that it would object to any prejudice it suffered as a result of being denied any right under the Uniform Rules of Court.

[2] The matter proceeded under what I will term a hybrid set of rules consisting of both Commercial Court Directives and Uniform Rules of Court. By agreement between the parties, the procedural landscape included amendments to the pleadings under the Uniform Rules of Court, a reply to the request for particulars and a revised discovery affidavit – all procedures not being provided for under the Commercial Court Directives.

[3] The parties ultimately agreed to a separation of issues which was embodied in an order and endorsed by this Court. It provided:

ORDER: SEPARATION IN TERMS OF RULE 33(4)

By agreement between the parties, it is hereby ordered that:-

1. Subject to what is set out in paragraphs 2 to 4 below, the following issues arising out of Claim A are to be determined separately from the remaining issues in the action:
 - 1.1 Whether the Professional Services Contract ("**the PSC**") concluded on or about 1 September 2015 precludes reliance by the plaintiff on the prior representations or agreements allegedly made by the defendant that are the subject of Claims A and E;
 - 1.2. Whether the Non-Disclosure Agreement ("**the NDA**") concluded on or about 10 February 2014 precludes reliance by the plaintiff on the representations or agreements allegedly made by the defendant that are the subject of Claims A and E;
 - 1.3. Whether the defendant's alleged negligent misrepresentations are wrongful in the circumstances pleaded and for the purpose of Claim A;
 - 1.4. Whether the defendant made the representations that are the subject of Claim A;

- 1.5. Whether the defendant acted negligently in making the representations that are the subject of Claim A;
- 1.6. Whether the defendant's negligent misrepresentations caused the plaintiff to terminate the "LMC service agreement" referred to in Claim A.
2. The merits of Claim B are separated from the remaining issues in the claim, being paragraph 37 of the particulars of claim read with paragraph 25 of the plea and paragraph 23 of the replication.
3. Claim C is separated from the remaining issues in such claim, being paragraphs 41 to 51 of the particulars of claim and prayer 6 read with paragraphs 27 to 33 of the plea; paragraphs 24 —27 of the replication.
4. The merits of Claim E are separated from the remaining issues in such claim, being paragraphs 69 and 71 of the particulars of claim read with paragraph 37 of the plea and paragraph 29 of the replication.
5. The issues referred to in paragraph 1 — 4 (including sub-paragraphs) of this court order will be heard at the same hearing of the matter.
6. If necessary, the determination of the quantum of Claims A, B and E, and the merits and quantum of Claim D stand over for adjudication pending the final determination of the issues referred to above.

[4] The matter proceeded to trial on the separated issues. Mr Kotze testified on behalf of the plaintiff whereafter the plaintiff closed its case.

[5] This then is an application for absolution from the instance in respect of four of the five claims (claims A, B, C and E) advanced in the particulars of claim. Claim A is a claim based on a negligent misrepresentation causing pure economic loss; Claim B is an alternative claim to Claim A based on the unlawful interference in the contractual relationship between the plaintiff and an entity called Long March Capital; Claim E is an alternative to Claims A and B based on an oral agreement to pay for expenses incurred by plaintiff but not recovered; Claim C is one based on rectification of an agreement concluded on 1 September 2015 which the parties have referred to as the Professional Services Agreement.

Is absolution on a separated issue competent in a Commercial Court matter?

[6] The first issue which falls for determination is whether absolution can be granted on a separated issue in a Commercial Court matter. This judgment does not seek to answer this question definitively because of the manner in which things unfolded *in casu* ie that it was conducted under a 'hybrid' set of rules and directives.

[7] In her supplementary heads of argument, the plaintiff's legal representative, Ms Marks, relied on *Osman Tyres*¹ in support of the contention that an order absolving the defendant from the instance cannot be granted in respect of separated issues. Her reliance on *Osman Tyres* for such proposition, in my view, is misplaced. The trial before the court *a quo* in *Osman Tyres* concerned two claims: a claim by the first plaintiff, Osman Tyres and Spares CC (the CC) and a claim by the second plaintiff, Mr Osman. The defendant was ADT Security (Pty) Ltd. The CC's claim was for contractual damages based on a written agreement concluded between the CC and ADT for the rendering of security services at the CC's business premises. Mr Osman's claim, on the other hand, was a delictual claim. The parties agreed at a pre-trial conference that '*the merits and quantum should be separated in terms of rule 33(4) and that the trial would be confined at first to the merits of the plaintiffs claims*'. The trial proceeded on this basis, and ADT applied at the close of the plaintiffs' cases to be absolved from the instance in respect of both claims. The trial court granted the application. It found that the plaintiffs had failed to make out a *prima facie* case in respect of each claim. On appeal, the principal issue before the SCA was whether the trial court had correctly granted an order absolving ADT from both claims. In a minority judgment, Koen AJA found that the trial court correctly absolved ADT from Mr Osman's

¹ *Osman Tyres and Spares CC and Another v ADT Security (Pty) Ltd*, [2020] 3 ALL SA 73 (SCA) (3 April 2020)

claim but held that the order absolving ADT from the CC's claim was incorrect. Writing for the majority, Ponnann JA disagreed, finding instead that the trial court correctly absolved ADT from both claims.

[8] Crucially, neither the minority nor the majority expressed any doubt that absolution could be granted in respect of separated issues. Koen AJA inter alia expressed doubt that every element of the CC's cause of action (causation specifically) had been separated with sufficient clarity in terms of the pre-trial minute. For this and other reasons, he concluded that the trial court should not have granted absolution in respect of the CC's claim. He, however, accepted without reservation that it was competent for the trial court to grant absolution (if warranted) in respect of those issues that had been separated. The majority, on the other hand, found that while the separation may not have been formally ordered, with the individual elements of the cause of action surgically separated out, the parties had approached the trial on the basis that liability and quantum had been separated, thus, *'the CC could not have been under any illusion as to the elements of the claim that had to be satisfied to survive absolution'*. For this reason, the majority found that absolution was justified because Mr Osman had failed to establish a *prima facie* case in respect of each element of the CC's cause of action that was required to hold the defendant liable.

[9] I agree with Mr Seape, representing the defendant, when he submitted that it is unsurprising that the SCA was comfortable with the notion that absolution is competent in respect of separated issues. An order separating issues is simply a procedural device that allows parties to have issues decided separately if it would be convenient to do so. In other words, a separation order does no more than direct which issues must be decided; it does not direct how they must be decided. The separation

order in this case did not contain a direction precluding absolution as a means of deciding the issues.

[10] The fact that the Commercial Court Directives do not expressly make provision for absolution to be sought, in my view, is of no consequence in this case because the matter proceeded under a 'hybrid' but agreed set of rules. The parties expressly agreed that the separation order is to be granted in terms of rule 33(4) of the Uniform Rules of Court. This request was made by agreement and the draft order was amended at the instance of this court to identify the issues to be separated clearly and with precision so as to avoid prejudice. The final order was consented to and reflects that it was done by agreement between the parties.

[11] The Commercial Court Directives provide expressly that matters heard in the Commercial Court are to be dealt with in line with broad principles of fairness, efficiency and cost-effectiveness². In my view, an application for absolution from the instance brought after the parties agreed to separate issues in terms of rule 33(4) of the Commercial Court Directives, fits neatly into this description and constitutes a valuable tool in achieving those objectives.

[12] Ms Marks sought to draw from the principles governing the adjudication of arbitrations³ and how our courts have dealt with the competency of absolution applications in such matters. Those matters are distinguishable because arbitration agreements generally provide expressly for a final decision to be made by the arbitrator. Because absolution is not a final decision, it is argued that absolution falls outside the authority of the arbitrator. The arbitrator is thus, so the argument continues, under an obligation to give effect to the arbitration agreement between the parties and

² Paragraph 1 of Chapter 4 of the Commercial Court Practice Directive

³ *Van Biljon v Coleman* [2021] NAHCMD 365 (11 August 2021)

make an award which is final. Although matters run under the Commercial Court Directives are conceivably akin to arbitrations, the defendant in this case expressly recorded its objection to being deprived of its procedural rights in terms of the Uniform Rules of Court at the very first case management meeting. Crucially, it was expressly recorded that the separation was requested and ordered in terms of rule 33(4) of the Uniform Rules of Court which implies that it is to be applied in accordance with the relevant authorities including *Osman Tyres*.

[13] I thus find that the application for absolution from the instance can be entertained.

Test in an application for absolution from the instance

[14] In *Gordon Lloyd*⁴ the *locus classicus* test as formulated in *Claude Neon Lights*⁵ was further refined as follows:

‘..... a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) 37G-38A; *Schmidt Bewysreg* 4th ed 91-92). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is “evidence upon which a reasonable man might find for the plaintiff” (*Gascoyne* loc cit) - a test which had its origin in jury trials when the “reasonable man” was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another “reasonable” person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice.’

⁴ *Gordon Lloyd Page & Associates v Rivera and Another*, 2001 (1) SA 88 (SCA) at para 2

⁵ *Claude Neon Lights (SA) Ltd v Daniel*, 1976 (4) SA 403 (A) at 409G-H

A bird's eye view of the case

[15] The main protagonists in this case are the plaintiff, Long March Capital and the defendant. Mr Kotze explained in much detail how the relationships developed over the years of their involvement. Most factual propositions were backed up with a contemporaneous note, a subsequent e-mail or a memorandum. As is so often the case, it's the inferences to be drawn from such facts, the role-player's' interpretation of such facts and their understanding, which is less clear.

[16] In short then, the plaintiff, almost exclusively represented in the negotiations and conclusion of agreements by Mr Kotze, was introduced to Long March Capital to investigate the feasibility of developing a solar project for the defendant. Long March Capital in turn introduced the plaintiff to the defendant. What started as a tripartite relationship evolved into potentially two separate relationships with the defendant. It's the severance of the relationship between the plaintiff and Long March Capital and the failure to formalise, alternatively inadequate formalisation of, the relationship between the plaintiff and the defendant which lies at the heart of this litigation.

Claim A

[17] Claim A is a claim in delict. It is a claim for pure economic loss. The plaintiff contends that it suffered loss because of a negligent misrepresentation made by the defendant's representative. The claim is based on the following allegations:

- '19. During or about 15 May 2015 the plaintiff, represented by Kotze advised the defendant, represented by Richard Stewart, that the plaintiff would continue with the work on the feasibility and development phases and allow the defendant full use of the plaintiff's project, engineering, permitting and business track artifacts and the works as developed by the plaintiff, subject to the following conditions ('the representation conditions'):

- 19.1 the mandate between the defendant and the plaintiff would be formalised shortly on a basis similar to the LMC service agreement as amended and as reflected in the Joint Mandate Letter, including that the defendant would make payment to the plaintiff of the risk or development fee;
- 19.2 the defendant would make payment to the plaintiff in full in terms of all effort and expenses incurred by the plaintiff to date as well as all future effort and expenses until such time that the mandate between the defendant and the plaintiff was formalised.
20. The defendant negligently represented to the plaintiff that the representation conditions would be complied with ("the project misrepresentation") and was aware that the plaintiff would rely thereon in terminating the LMC service agreement.
21. The defendant had used the project misrepresentation to induce the plaintiff to terminate the LMC service agreement.
22. As a result of the project misrepresentation made by the defendant the plaintiff agreed to the termination of the LMC service agreement. The plaintiff terminated the LMC service agreement orally or through conduct by advising LMC that it would enter into a separate mandate agreement with the defendant on 17 June 2015. LMC accepted this by implication.
23. If the LMC service agreement was not terminated the plaintiff would have been paid by LMC under such agreement. The plaintiff would have further continued with the project under the LMC service agreement and the development of the works under the LMC service agreement.
- ...
33. The project misrepresentation of the defendant was made unlawfully and negligently and a reasonable person would have realised that such misrepresentation would lead to damages to the plaintiff. The project misrepresentation was made negligently in that a reasonable man would have verified the correctness thereof and

not made such project misrepresentation without ensuring that it was correct.'

[18] The parties concluded two written agreements while working together. Early in their relationship on 10 February 2014, the parties concluded a Non-Disclosure Agreement and later, on 1 September 2015, they concluded what they referred to as the Professional Services Agreement.

[19] In response to claim A, the defendant contended that the parties agreed first, in terms of the Non-Disclosure Agreement (concluded on 10 February 2014), that representations made during the existence of the Non-Disclosure Agreement would not be actionable and thereafter, in terms of the Professional Services Agreement (concluded on 1 September 2015), that representations made prior to the conclusion of the Professional Services Agreement would similarly not be actionable. Accordingly, the defendant contended that the plaintiff is precluded by the terms of the Non-Disclosure Agreement and the Professional Services Agreement from pursuing Claims A and E.

[20] Mr Seape argued that the issues separated out in determining Claim A are legal issues that raise questions of contractual interpretation. He argued that the plaintiff failed to present any evidence that would sustain cognizable defences to the defendant's reliance on the terms of each agreement. He argued that the defendant is accordingly entitled to be absolved from the instance.

The context in which the Non-Disclosure Agreement was concluded

[21] The parties concluded the Non-Disclosure Agreement under the following circumstances: In late 2013, inconsistent and unreliable electricity supply from Eskom was compromising the defendant's operations. Mr Kotze testified that, at the time, he

understood that the defendant's CEO, Mr Froneman, had a working relationship with Mr Kwong of Long March Capital. Mr Kwong, a managing partner at Long March Capital, was a business facilitator who essentially created mutually beneficial commercial opportunities for Chinese business in South Africa and elsewhere. Mr Kotze testified that he was introduced to Mr Kwong by Mr Man, a friend he knew from their time studying together at Stellenbosch. Mr Kotze testified that when he met Mr Kwong, Mr Man was employed by FMO (the Dutch Development Bank) as a senior investment officer responsible for transacting with Chinese Investors.

[22] Mr Kotze testified that late in 2013, Mr Kwong began investigating whether it would be technically and economically viable to develop solar plants at certain sites owned by the defendant. Mr Kwong approached the defendant with the possibility of installing solar power at its operations with a view to reducing its reliance on Eskom and the national supply of electricity to its operations. Mr Kotze testified that when Mr Kwong informed Mr Man of his intention to put up solar projects in Southern Africa, Mr Man strongly recommended that Mr Kwong contact and use the plaintiff to facilitate and project manage the proposed projects.

[23] Mr Kotze testified that he met Mr Kwong and Mr Man on 17 October 2013 to discuss the possibility of the plaintiff participating in the proposed solar project. Mr Kotze testified that he was invited to pursue the project in partnership with Long March Capital and that he was presented with the proposed terms of the contemplated partnership. He testified that he considered the proposal and ultimately accepted it over the weekend of 23 November 2013.

[24] Mr Kotze testified that Mr Kwong introduced the proposal on the contemplated solar project in broad outline to the defendant for its consideration. He testified further that Mr Kwong conveyed to the defendant that Mr Kwong had identified the plaintiff as

the lead project management company that would gather information and perform the work necessary to establish whether the project was feasible. It is perhaps important to record at this juncture that there was no agreement about the admissibility of hearsay evidence. Mr Kwong did not testify.

[25] Mr Kotze testified that during December 2013 he met with the defendant's representative, Mr Ashworth, Mr Kwong and others. At this stage, the project was in its infancy. Mr Ashworth was the defendant's representative assigned to liaise with Mr Kotze and provide him with the information required to start the pre-feasibility investigations.

[26] Mr Kotze explained that the plaintiff required sensitive information from the defendant to start conducting the investigations. This information concerned, amongst other things, the positions, locations and capacities of the defendant's substations. Mr Kotze testified that, because the prefeasibility work required the parties to share sensitive information, the defendant suggested that the parties conclude a Non-Disclosure Agreement. Mr Kotze testified that he was willing to conclude such an agreement because it would also protect the plaintiff's interests as the plaintiff was conducting the work at risk in terms of its agreement with Long March Capital and it had to protect its intellectual property ie work artefacts that were to be generated by the plaintiff and made available to the defendant during the course of conducting the pre-feasibility study.

[27] Mr Kotze testified that in January 2014, the parties sourced and engaged the relevant personnel required to conduct the pre-feasibility work. He testified that on 23 January 2014, Mr Ashworth sent him a draft Non-Disclosure Agreement in anticipation of the kick-off meeting scheduled for 27 January 2014. He testified that he made a few minor changes to the draft, like to the duration of the agreement, and then

signed it on 30 January 2014. He confirmed that the defendant signed on 10 February 2014. The Non-Disclosure Agreement was to endure for a period of 2 (two) years from 10 February 2014 thus until 9 February 2016.⁶

[28] In summary, the parties concluded the Non-Disclosure Agreement at the beginning of their relationship when nothing was certain; when, according to Mr Kotze, *'the total amount of work, as a percentage of volume of the overall work, was 1%, maximum 2 %, at that point in time'*; and when the plaintiff's participation in the project, on Mr Kotze's version, was nothing more than a possibility because the parties did not know whether the project was feasible.

[29] They concluded the Non-Disclosure Agreement to create the environment required to advance the project, an environment in which they could act and speak freely without attracting any obligations or liabilities to one another outside the Non-Disclosure Agreement, a fact Mr Kotze accepted under cross-examination.

The terms of the Non-Disclosure Agreement

[30] Claim A is based on negligent misrepresentations allegedly made by the defendant's representative, Mr Stewart, at a meeting at the defendant's offices on 15 May 2015. The representations were made while the Non-Disclosure Agreement was still in force. On the assumption that Mr Stewart made the representations as alleged, the question is whether the defendant can be held liable in view of the provisions of the Non-Disclosure Agreement.

[31] The Non-Disclosure Agreement defines *Possible Transaction* to mean *'...the possible transaction involving [the plaintiff] and the [defendant]'*, and *Permitted*

⁶ Clause 4 read with the definition of 'Signature Date'

Purpose to mean ‘...the consideration, evaluation and negotiation of the *Possible Transaction*’.

[32] Clause 3, the ‘INTRODUCTION’, provides that the plaintiff and the defendant ‘....have an interest in exchanging Confidential Information for the purpose of considering and evaluating the *Possible Transaction*’.

[33] Clause 10, headed ‘NO OBLIGATION IN RESPECT OF THE POSSIBLE TRANSACTION’, provided that:

- ‘10.1 The parties acknowledge and agree that –
- 10.1.1 **until such time as definitive agreements** regarding the *Possible Transaction* have been executed by the *Parties*, neither *Party*...**shall be under any legal obligation or have any liability of any nature whatsoever with respect to the *Possible Transaction* by virtue of this Agreement or otherwise**; and
- 10.1.2 [the plaintiff] and [the defendant] shall each have the right to terminate discussion with each other at any time without having to indemnify or compensate the other *Party* with respect to such termination (save as otherwise agreed in writing between the *Parties*).
- 10.2 Except for the obligations specifically set out in this Agreement, **no other obligation of any kind is assumed or implied against any *Party* by virtue of such *Party*’s involvement in the discussions in respect of the *Possible Transaction***. Without limiting the generality of the foregoing, each *Party* also acknowledge that this *Agreement* and **any meetings, discussions or communications between the parties relating to the *Possible Transaction* shall not constitute an offer, request, commitment, agreement or contract with the other *Party***’. (emphasis provided)

[34] By concluding the Non-Disclosure Agreement, the parties sought to protect themselves from liability for non-fraudulent representations⁷ made while the Non-Disclosure Agreement was still in force. The ‘*Possible Transaction*’ referred to in the

⁷ *Wells v South African Alumenite Company* 1927 AD 69 at 72 and 73

Non-Disclosure Agreement was the solar project, the feasibility of which they planned to investigate further. In terms of clause 10.1 read with 10.2 the parties agreed that they would not attract obligations (except as set out in the Non-Disclosure Agreement) 'of any nature whatsoever' for statements made and for negotiations or discussions conducted pursuant to the solar project.

[35] This is the plain unambiguous meaning of such terms read in context. In other words, when they concluded the Non-Disclosure Agreement, the parties agreed, for instance, not to assume a duty not to negligently misrepresent facts while engaging in relation to the '*Possible Transaction*'.

[36] It is necessary to deal with the plaintiff's replication to the defendant's reliance on the Non-Disclosure Agreement. The plaintiff pleaded in its replication that the '*Possible Transaction*' referred to in the Non-Disclosure Agreement means the LMC service agreement (ie the agreement which it had concluded with Long March Capital). Later in the replication, the plaintiff contended that clauses 10.1.1 and 10.2 of the Non-Disclosure Agreement referred specifically to the LMC service agreement and that the subject matter of the Non-Disclosure Agreement is the LMC service agreement.

[37] The LMC Agreement is pleaded as follows in the particulars of claim:

3. During or about 17 October 2013 Long March Capital, represented by Kwong and the plaintiff, represented by Zachary Bernard Kotze ("Kotze") and at Rosebank entered into an oral agreement ("the LMC service agreement"). The material express, alternatively implied, further alternatively tacit terms of the LMC service agreement were:

3.1 The plaintiff would develop, manage and assess the feasibility of two 10 MW Photovoltaic ("PV") solar plants. One plant was to be constructed for the defendant ("the solar project"). The second plant was to be developed for Gold One ("the Gold One Project");

3.2 LMC would make payment for the plaintiffs disbursements incurred on the pre-feasibility study work on the solar project and the Gold One Project;

3.3 The plaintiff would pay the costs incurred on the pre-feasibility study work excluding disbursement costs until the pre-feasibility report showed the project to be feasible;

3.4 If the pre-feasibility work showed that the solar project or Gold One Project was not feasible, the plaintiff would not receive compensation for the work performed and LMC would only make payment to the plaintiff for the disbursements;

3.5 Once the pre-feasibility report showed that the solar project or Gold One Project was feasible:

3.5.1 the plaintiff would be eligible for a project development incentive, also referred to as a project development fee of 1.5 percent of the project capital expenditure which would be paid at predetermined project milestones, the first milestone being the completion of the feasibility phase and the last milestone being commissioning, provided that the LMC service agreement was still in force;

3.5.2 the plaintiff would be paid for all the work performed in the pre-feasibility phase which had not been reimbursed;

3.5.3 funding for the further development of the project would be made available.

3.6 At least one of the two projects would proceed;

3.7 LMC planned to structure a number of solar plants with the defendant and other mining entities across Southern Africa, based on the works so developed by the plaintiff (without the inclusion of the criteria specific to the defendant's needs and criteria) and using the works as a base model or template for the roll out of utility scale PV solar plants to other mining houses across Southern Africa, with the plaintiff fulfilling the same role on these projects as for the solar project.

[38] This argument that *the Possible Transaction* could be a reference to the LMC agreement is flawed. The '*Possible Transaction*' is defined in the Non-Disclosure Agreement as the possible transaction involving the plaintiff and the *Interested Party* (i.e., the defendant). The LMC service agreement was an oral agreement concluded between the plaintiff and Long March Capital on 17 October 2013. It had already been concluded by the time the plaintiff and the defendant concluded the Non-Disclosure

Agreement. It was in effect at the time of the conclusion of the Non-Disclosure Agreement. It was no longer '*a possible transaction*'. It was, according to Mr Kotze, a concluded transaction, which for purposes of this absolution application, I must accept. It could thus not possibly have been the *Possible Transaction* referred to in the Non-Disclosure Agreement.

[39] In addition, the plaintiff's version as pleaded is unsupported by the facts. Mr Kotze did not testify that he disclosed the terms of the LMC service agreement to the defendant before the parties concluded the Non-Disclosure Agreement. He also accepted in cross-examination that both Mr Ashworth and Mr Froneman did not attend the meeting in October 2013 when Mr Kwong proposed the terms of the LMC service agreement. So, on the plaintiff's version, there is no evidence that the defendant knew about or had in mind the LMC service agreement when it concluded the Non-Disclosure Agreement.

[40] The interpretation advanced by the plaintiff gives rise to an unbusinesslike construction. One asks, why would the terms of the Non-Disclosure Agreement have application if the parties to the solar project are the plaintiff, the defendant and Long March Capital but not if the parties are only the plaintiff and the defendant? If one of the objectives sought to have been achieved by the conclusion of the Non-Disclosure Agreement was to protect the use of such confidential information by the recipient thereof, why on earth should that protection fall away when Long March Capital falls out of the picture? That is particularly so as Long March Capital was not even a party to the Non-Disclosure Agreement. The Non-Disclosure Agreement was concluded between the plaintiff and the defendant. The '*Possible Transaction*' was defined to '*involve*' the plaintiff and the defendant.

[41] In the circumstances, this court finds that the Non-Disclosure Agreement precludes the plaintiff from relying on the representations that are the subject of Claim A. It follows that the defendant is entitled to absolution from the instance in respect of Claim A on this basis alone.

Claim E

[42] Claim E is a contractual claim which has been pleaded as an alternative to Claim A. Plaintiff relies on an oral agreement concluded between it and the defendant on or about 15 May 2015 ie at a time when the Non-Disclosure Agreement governed their relationship. Clause 10 of the Non-Disclosure Agreement precludes not only delictual liability as formulated in Claim A but also contractual liability where reliance is placed on an oral agreement not reduced to writing.

[43] Furthermore, in terms of clause 25.1.1 of the Non-Disclosure Agreement, the parties agreed that *'no undertaking, representation, term or condition relating to the subject matter of the [NDA] not incorporated in the [NDA] shall be binding on either of the Parties'*

[44] It follows that the defendant is entitled to absolution in terms of Claim E.

Claim B – Contractual Interference

[45] Claim B concerns a delict. The plaintiff pursues Claim B in the alternative to Claim A. The plaintiff pleaded that the defendant:

'37.1used its influence under the First Sibanye-LMC Contract to expedite the solar project', which led to the plaintiff 'expending substantial time and effort on the solar project'.

'37.2did not provide the project finance for the solar project as required by the First Sibanye-LMC Contract as orally conveyed to the plaintiff' which

placed LMC 'in the position of being unable to make payment to the plaintiff in terms of the LMC service agreement';

'37.3used the provision of the project finance as an inducement to persuade LMC and the plaintiff to agree to the defendant's request during or about May 2015 to conclude a new agreement with LMC and a direct agreement with the plaintiff for the technical delivery and management of the project.';

'37.4.....thus requested the termination of the LMC service agreement';

'37.5.....unlawfully interfered in the contractual relationship between the plaintiff and LMC which led to its termination', which led to the plaintiff terminating the LMC service agreement 'by advising LMC orally or through conduct that it would enter into separate mandate agreement with the defendant on 17 June 2015';

'37.6.....was aware that the plaintiff would suffer damages if the LMC service agreement was terminated through the interference of the defendant in the contractual relationship between the plaintiff and LMC...' and 'The defendant reconciled itself hereto which is dolus eventualis.'

[46] Based on these allegations, the plaintiff contends that it would have been paid under the LMC service agreement had it not terminated the LMC service agreement. Accordingly, the plaintiff claims the same damages it claims in terms of Claim A, Claim B being an alternative claim to Claim A.

[47] The evidence does not establish intentional wrongful interference by the defendant.

[48] The plaintiff contends that it was deprived by the defendant, a stranger to the LMC services agreement, of the benefits it would otherwise have obtained from performance under the LMC service agreement. It contends that the defendant's

decision not to conclude the joint mandate that LMC proposed on 30 March 2015 constituted unlawful interference

[49] In *Country Cloud (CC)*, Khampepe J held that:

‘The cases where conduct may arguably be *prima facie* wrongful, are limited. They involve a situation where a third party, A, the defendant, intentionally induces a contracting party, B, to breach his contract with the claimant, C, without lawful justification for doing so.”⁸

[50] In light of these requirements, the question is whether the plaintiff led sufficient evidence to establish intentional interference in the sense contemplated by the authorities. Mr Kotze conceded under cross examination that he did not disclose the terms of the LMC service agreement to any of the defendant's representatives before the alleged interference occurred.⁹

[51] Knowledge of contractual terms must be proved for a court to regard interference as actionable. Without knowledge of the terms of the LMC service agreement, it would not have been possible for the defendant to foresee the possibility that its decision not to conclude the joint mandate would likely cause the plaintiff loss, and it would not have been possible for the defendant to reconcile itself with the fact.

⁸ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) at para [30]

⁹ Transcript: XIC, 017-688 to 690

"MR SEAPE: No no, perhaps my question was not clear. You never disclosed or discussed the terms of the agreement that you had with LMC, you never discussed that with Mr Stewart?

MR KOTZER: Not in person.

...

MR SEAPE: Please do not speculate. You – my question to you was that you never told prior to the 15th of May meeting, you never told Mr Stewart about the terms, the specific terms of your agreement with LMC.

MR KOTZER: I did not tell him that terms, although all those terms are or 90 percent of those terms are in the joint mandate letter."

(Emphasis added)

This proposition explains why successful contractual interference claims involve proof that the defendant was aware of the contractual relationship between the plaintiff and the third party.¹⁰

[52] Without any evidence that the defendant knew the terms of the LMC service agreement, this court cannot conclude that the defendant acted intentionally. In any event, before this court can find that the defendant acted wrongfully, the plaintiff would have to establish something more than the defendant's mere knowledge of the terms of the LMC service agreement.¹¹ It has not done so. Thus, the plaintiff's cause of action is incomplete, which means the claim must fail on this ground alone.

[53] To overcome the problem of knowledge of the contractual terms, Mr Kotze testified that Mr Stewart would have been aware of the terms of the LMC service agreement from the proposed terms of the joint mandate. The cogency of this version collapsed under cross-examination. Mr Kotze first testified that Mr Stewart would have been aware of the terms of the LMC service agreement because "90 percent of those terms are in the joint mandate letter".¹² He later revised this assessment down to "60 percent"¹³ after it was put to him that, on a plain reading of the joint mandate, the first two terms of the LMC service agreement (as set out in paragraphs 3.1 and 3.2 of the Particulars of Claim) were not reflected in or conveyed by the joint mandate.¹⁴ Faced with the problem that the joint mandate did not convey the terms of the LMC service agreement because that was not its purpose,¹⁵ Mr Kotze asserted that Mr Stewart

¹⁰ *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T)

¹¹ *Country Cloud (CC) supra* where Khampepe J expressed her belief that "a certain level of intent greater than subjective foresight that breach would result...would be necessary to place it in this category [i.e., the category of interference that is prima facie wrongful]".

¹² Transcript: XIC, 017-689

¹³ Transcript: XIC, 017-702

¹⁴ Transcript: XIC, 017-703

¹⁵ Transcript: XIC, 017-729:

would have acquired knowledge of the terms of the LMC service agreement from reading the joint mandate in light of certain other "data points" of which he was aware. The logic of this version is unsustainable as the LMC service agreement was oral. Mr Kotze conceded that he did not advise the defendant representatives of the terms of the LMC service agreement. It would not have been possible for Mr Stewart to infer the precise terms of an oral agreement the existence of which was never communicated to him. To compound matters, some terms were tacit.

[54] In addition, no persuasion was established. Mr Kotze testified that the defendant's desire not to conclude the joint mandate was first conveyed to him at the meeting of 15 May 2015. Mr Kotze testified that at the meeting, Mr Stewart conveyed that the defendant was considering splitting the mandates, a revelation that came as a surprise. He testified further that Mr Stewart requested him to work with Mr Ashworth to compile draft terms for the defendant's consideration. The meeting concluded on this basis.¹⁶

MR SEAPE: Thank you, M'Lady. All right. I want to try and just try and cut through this. The mandate agreement, the joint mandate, excuse me, the joint mandate, its principal purpose was to outline what the nature of the defendants' relationship would be with you and LMC, if the defendant accepted the mandate?

MR KOTZER: That is correct.

MR SEAPE: So it was forward-looking?

MR KOTZER: It was forward ... "

¹⁶ Transcript: XIC, 017- 757 to 761: Specifically, at 760:

MR SEAPE: Well, you accepted... You may not have been satisfied and you are right, maybe I used the wrong word, but you accepted it, because we then see as you go forward you try to put together a package of terms that would be acceptable to the defendant.

MR KOTZER: Yes.

MR SEAPE: So you proceeded on that basis.

MR KOTZER: I proceeded. That was the instruction from the defendant. Yes.

MR SEAPE: Yes. So from the... At the close of that meeting you understood. Joint mandate is out of the way. What we need to do is conceive of terms that will possibly be acceptable to the defendant.

MR KOTZER: Yes. Yes. And... Yes."

[55] Mr Kotze gave no evidence that the defendant had engaged, at any point, in an act of persuasion directed at either of the contracting parties with the intent that it dishonour its agreement with the other party. The evidence was that the defendant did no more than exercise its right to arrange its affairs in accordance with its interests. This is the import of Mr Kotze's evidence. Mr Kotze himself understood that the defendant had taken an independent decision because, as he put it, he had to 'break the news' to Mr Kwong that the defendant was proposing separate mandates.

[56] In sum, the plaintiff failed to lead any evidence upon which this court might conclude that the defendant attempted to persuade any of the parties to the LMC service agreement to dishonour its obligations. The defendant simply exercised a choice; it elected not to conclude the proposed joint mandate. Because the decision did not involve an act of persuasion intended to induce another to breach their contract, it follows that the decision did not constitute *interference* in the relevant sense. The implication is that the plaintiff seeks extension of liability in a truly novel case.

[57] The plaintiff invites this court to extend delictual liability even further, in respect of an even narrower range of conduct, to cases where there is no interference at all. The plaintiff has failed to lay any factual basis for the implied assertion that delictual liability should be extended in this case.

[58] In sum, it is evident that the plaintiff has failed to lead evidence that might establish intent or interference on the part of the defendant.

[59] The defendant will accordingly be absolved from this claim.

Claim C – Rectification of the Professional Services Agreement

[60] The plaintiff seeks rectification of the Professional Services Agreement by the deletion of the last sentence of clause 15.3. Clause 15.3 of the Professional Services Agreement provides:

‘The Deliverables, including but not limited to all technical information, reports, all drawings and other documents, will become the property of the Company on handover. Insofar as it may be necessary, the Contractor cedes and assigns to the company all intellectual property rights in any work created or executed by it in the course and scope of the contract. The Contractor undertakes not to exercise any residuary write and undertakes to procure that the affected parties shall not exercise any residuary rights in respect of any work created or executed by it or them in the course and scope of this Contract. **All work created or executed by the Contractor will be deemed to have been created or executed by it in the course and scope of the contract.**’ (emphasis provided)

[61] Mr Kotze testified that on 2 November 2015 the plaintiff submitted its comments on the proposed Professional Services Agreement. Mr Kotze testified that there were three very pertinent comments from the plaintiff on the proposed Professional Services Agreement that have relevance. Clause 1.1.4: ‘Contract’ means collectively the contract document **for the contract period under consideration** together with its Annexures or schedules listed and attached hereto from time to time, including, Particular Conditions, constituting one indivisible Contract; Clause 22.1: This Contract embodies the entire agreement between the Parties **for the period under consideration**; Clause 19.1: In acceptance of the Contract **the Company** and Contractor undertakes to act only on the basis of utmost good faith and trust in the execution thereof. The emboldened text is that which Mr Kotze had added and on which he placed much significance.

[62] Mr Kotze testified that the Professional Services Agreement does not reflect the common intention of the parties to the extent that it does not reflect that it would only

govern the scope of work to be developed by the plaintiff during the course and scope of it. Mr Kotze testified that had it indeed been the common intention of the parties that: *'All work created or executed by the Contractor will be deemed to have been created or executed by it in the course and scope of the Contract.'*, as reflected in the last sentence of Clause 15.3, then the defendant would not have requested the plaintiff for an invoice for direct man-hours for the work conducted prior to the commencement of the Professional Services Agreement to the value of R 1 553 577.50 and even less so, under a different contract number; the defendant would not have effected payment under such other contract number, for work deemed to have been created or executed by the plaintiff in the course and scope of the Professional Services Agreement; the defendant would not have acknowledged to the plaintiff, orally and in writing, that an amount was outstanding to the plaintiff for work performed by the plaintiff prior to the commencement of the Professional Services Agreement and would not have engaged with the plaintiff over a period of 21 months (August 2015 to May 2017).

[63] The inference the plaintiff draws from these facts is that it was not the common intention of the parties to include the final sentence in paragraph 15.3. I am unable to conclude at this stage of the proceedings that it is an unreasonable inference – it is not the only reasonable one but it need not be, to overcome absolution. As has been stated repeatedly, absolution at the end of the plaintiff's case, in the ordinary course of events, should be granted sparingly. In my view it will not serve the interests of justice to grant absolution in respect of Claim C.

Conclusion

[64] The defendant is entitled to an order of absolution in respect of:

- 64.1 Claim A as this court has found the issue formulated in paragraph 1.2. of the separation order in favour of the defendant.

64.2 Claim B, as this court has found the issue formulated in paragraph 2 of the separation order in favour of the defendant.

64.3 Claim E, as this court has found the issue formulated in paragraph 1.2. of the separation order in favour of the defendant.

[65] The defendant is not entitled to an order for absolution in respect of Claim C.

Order

[66] I accordingly grant the following order:

66.1 In respect of Claims A, B and E – absolution from the instance is granted with the plaintiff to pay the costs of the action in respect of such claims.

66.2 In respect of Claim C – absolution from the instance is refused with costs.

A black rectangular box redacting the signature of the judge.

I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Appearances

For the Plaintiff: J Marks

For the Defendant: M Seape instructed by Cliffe Dekker
Hofmeyer Inc

Date of final argument: 18 October 2024
Date of supplementary heads: 16 November 2024