

FLYNOTES: CIVIL PROCEDURE – Contract Law – Interpretation and the true meaning of a word defined in a Service Level Agreement – whether the prior Proposal forms part of the Service Level Agreement – How the word “savings” should be interpreted in relation to Value-Added-Tax (VAT) liability

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

Case Number: 1250 / 2016

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

12 FEBRUARY 2025

DATE

SIGNATURE

MALUNGA TAX CONSULTANTS (PTY) LTD

PLAINTIFF

and

**GREATER TZANEEN MUNICIPALITY
MUNICIPAL MANAGER N.O GREATER TZANEEN
MUNICIPALITY**

FIRST DEFENDANT

SECOND DEFENDANT

JUDGMENT

CINDY MARAIS AJ:**INTRODUCTION:**

[1] In the courtroom, contracts speak louder than intentions, and in this dispute, it is the voice of the written agreement - or lack thereof, that takes centre stage. At the heart of this matter lies a contract born of mutual expectations: terms and conditions agreed upon, services rendered (or so it is claimed), and payments withheld (or so it is denied). While the plaintiff asserts that they did render the services that what was agreed upon, the defendant alleges a mismatch between the services provided and the services (or terms and conditions) that were agreed upon, sparking a battle not merely over unpaid invoices but over the very interpretation of their agreement. Did the plaintiff fulfil their contractual obligations, or did the defendant have cause to withhold payment?

[2] The law of contract, steeped in centuries of negotiation, ink, papyrus and parchment, has evolved from ancient handshakes to today's fine print, a testament to humanity's enduring appetite for trust, bargaining, and inevitable disagreement. As Shakespeare mused in *The Merchant of Venice*¹ '*The bond doth give thee here no jot of blood*'. Indeed, contracts are about defining obligations, not dispensing fairness. In this judgment, I shall peel back the layers of the agreement history between the plaintiff and defendants to unravel the tangled threads of this dispute to the declare upon the true meaning of the terms and conditions agreed upon.

[3] The plaintiff initiated an action against the defendants for breach of contract. The plaintiff asserts that the sum of R7,602,106.02 (seven million six hundred and two thousand, one hundred six rand and two cents) is owed by the defendants for professional services provided by the plaintiff - a claim the defendants contest.

¹ Shakespear's 'Merchant of Venice', Act 4, Scene 1.

[4] The plaintiff's pleaded case is that the plaintiff made a written proposal to the defendants whereby the plaintiff would render certain professional services to the defendants, which, according to the plaintiff, the defendants accepted. Following the acceptance of the proposal, the parties then entered into a Service Level Agreement ("*SLA*") on 12 May 2014. According to plaintiff, the *SLA* must be read together with the written proposal that plaintiff made to the defendants. In other words, the plaintiff asserts that the written proposal that they made to the Municipality prior to the *SLA* forms part and parcel of the *SLA* and further extension agreement.

[5] It is not in dispute that the *SLA* was for certain tax-related services rendered until 30 June 2014 (the "*ORIGINAL SLA*") and which agreement was then extended to end on 30 September 2014 (the "*EXTENDED SLA*"). It is further not in dispute that for services rendered during and before the end of the original *SLA*, plaintiff would be entitled to 20% commission, and for services rendered during the period of the extended *SLA*, plaintiff would be entitled to 13% commission, on a contingency basis.

[6] The essence of the dispute in this case pertains to the interpretation of the *SLA*, specifically whether the plaintiff's proposal to the defendants constitutes a component of the *SLA*, whether the plaintiff provided services as stipulated in the *SLA*, and if so, at what rate. Ultimately, it must be determined if the defendants still owe the plaintiff an amount and/or if the defendant lawfully withheld payment and if such withholding is substantiated.

PLAINTIFF'S EVIDENCE

[7] The plaintiff called one witness, Mr Malunga, who is the sole director of the plaintiff. Mr Malunga confirmed that he is a registered tax practitioner. He holds a national diploma in costs and management accounting and an advanced certificate in taxation. His field of speciality is in Value-Added Tax ("*VAT*"). Mr Malunga confirmed that he has been practising as a tax consultant since 2009. He initially started his career in a graduate program presented

by the South African Revenue Service (“SARS”) in 2002, where he worked for SARS until 2007. Thereafter, he registered the plaintiff company.

[8] Mr Malunga confirmed that plaintiff made a written proposal to the first defendant to render specific tax-related professional services to the defendants, which proposal the defendants accepted in writing on 22 April 2014 – an issue which is not in dispute.

[9] In the proposal, Plaintiff pertinently stated: “[o]ur fee will be calculated on a contingency basis of 20% VAT inclusive of the gross amount of any savings identified and received. ‘Savings’ will include an amount of:

- *Overpayments*
- *Under deductions*
- *Undue assessments*
- *Undue penalties*
- *Interest*
- *Additional assessments*
- *Exposures by the municipality to SARS*
- *Submissions made to SARS on behalf of the municipality”.*

[10] Further in the proposal, under the heading of “*Scope of Work/Duties*”, the plaintiff listed that they would, *inter alia*, make submissions of VAT201 to SARS, determine the amount of VAT payable to or receivable from SARS, identify areas where savings of VAT can be achieved in respect of past and future tax periods and to review transactions to identify whether over payments of output tax and under claiming of input tax has occurred.

[11] On 22 April 2014, the first defendant (the “*MUNICIPALITY*”), duly represented by its acting municipal manager at the time, Mr OZ Mhkombo, accepted the plaintiff’s proposal. The acceptance letter states: “[t]he Greater Tzaneen Municipality has resolved to appoint

you based your proposal submitted to the Municipality be accepted for the Vat, UIF, SDL, PAYE review and recovery, your proposal of 20% of the recovered money is accepted.” (sic) It further states: “1. That your proposal is accepted for the period up to 30 June 2014” (own emphasis).

[12] Following the acceptance of the proposal (the “ACCEPTANCE LETTER”), the parties entered into a written SLA on 12 May 2014. The contract period was for services rendered up until 30 June 2014, for which the plaintiff would be compensated 20% on a contingency basis. These facts, too, are not in dispute.

[13] According to the plaintiff, in the SLA, under the definition of “Services”, it must be understood to mean “the Proposals for Review and Recovery of VAT, UIF, SDL and PAYE” (own emphasis).

[14] It is undisputed that while the plaintiff reviewed the UIF, SDL, and PAYE, the Municipality's UIF, SDL, and PAYE were deemed in order, and no commission was due to the plaintiff in this regard. The plaintiff did not provide any additional services concerning these three items, nor is their claim predicated on services provided for such items. The plaintiff, thus, was only required ultimately to attend to the Municipality's VAT and whether there was a liability towards SARS or not, and if not, to remedy any claim by SARS against the Municipality.

[15] On 25 July 2014, the parties entered into an extension agreement to the SLA, whereby the Plaintiff agreed to extend their professional services for the period 01 July 2014 to 30 September 2014. It was further agreed that for the work performed by the plaintiff on behalf of the first defendant during this period, the plaintiff would be compensated 13% on a contingency basis – facts which are also not in dispute.

[16] Plaintiff asserts that multiple invoices issued to the defendants pertain to services provided prior to 30 June 2014, hence obligating the defendants to remit a 20% commission for these services performed. The defendants paid for certain invoices at a rate of 20% commission, while other payments were only made at 13% commission. The plaintiff asserts the remaining 7% commission (thus an underpayment of the total commission due) owed for services provided before the conclusion of the original SLA, is due and payable by the defendants. The plaintiff claims that they are entitled to a 13% commission only for the services provided under the extended SLA, as per the agreement.

[17] It is not in dispute that plaintiff reviewed the Municipality's VAT liability for the five years immediately prior to entering into the original SLA. For these services, plaintiff alleges they are entitled to 20% commission, as the work done and objections lodged were done before the expiry of the original SLA, being 30 June 2014.

[18] Plaintiff's claim, as set out in his particulars of claim and as amplified through his oral testimony and discovered documents, is that the following invoices rendered for the specific periods in which they rendered services, and which are due at 20% commission on a contingency basis, are as follows:

- 23.1 for the period 2013-06, there was a SARS liability of R11'962 691.15. After the plaintiff reviewed the liability, the full amount was to be refunded to the Municipality. Plaintiff issued two invoices for a total amount of R2'392 538.23, which constitutes 20% of the amount of R11'962 691.15. The first invoice is numbered 2015/04 and dated 13/03/2015² for an amount of R1,555,149.85, which constitutes 13%. The Municipality paid this amount. The second invoice is number: 2015/061, dated 09/11/2013³ for the remaining 7% due, in an amount of **R837,388.38**, which the Municipality refuses to pay.

² Plaintiff's Discovered Documents Bundle, page 4 and exhibit A1.

³ Plaintiff's Discovered Documents Bundle, page 1.

- 23.2 for the period 2012-06, there was a SARS liability of R5,103,898.00 as a result of a miscalculation of VAT input tax. After the plaintiff reviewed the liability, it was found that the Municipality did not owe SARS the said amount, and because of the review, the plaintiff saved the Municipality from paying the same (*"savings"*). Plaintiff issued invoice number 2012/0601 dated 05/06/2015⁴ for an amount of R1,020,779.00, which constitutes 20% of the amount of R5,103,898.00. The Municipality did not make any payment to the plaintiff, and as a result, plaintiff is entitled to claim the amount of **R1,020,779.00** for the 'savings'.
- 23.3 for the period 2012-09, there was a SARS liability of R7,847,744.32. After the plaintiff reviewed the liability, the full amount was to be refunded to the Municipality. Plaintiff issued two invoices for the total amount of R1,569,548.86, which constitutes 20% of the amount of R7,847,744.32. The Municipality only paid R1,020,206.76, which constitutes 13%. There is thus a shortfall of **R549,342.10**, which constitutes 7% due by the Municipality to the Plaintiff. The second invoice number is: 2015/062 dated 09/11/2013.⁵
- 23.4 for the period 2012-09, there was a SARS liability of R5,716,808.00 as a result of a miscalculation of VAT input tax. After the plaintiff reviewed the liability, it was found that the Municipality did not owe SARS the said amount, and because of the review, the plaintiff saved the Municipality from paying the same (*"savings"*). Plaintiff issued invoice number 2012/0902 dated 05/06/2015⁶ for an amount of R1,143,361.60, which constitutes 20% of the amount of R5,716,808.00. The Municipality did not make any payment to the plaintiff, and as a result, plaintiff is entitled to claim the amount of **R1,143,361.60** for the 'savings'.

⁴ Plaintiff's Discovered Documents Bundle, page 9.

⁵ Plaintiff's Discovered Documents Bundle, page 2.

⁶ Plaintiff's Discovered Documents Bundle, page 11.

- 23.5 for the period 2012-10, there was a SARS liability of R1,064,473.92 as a result of a miscalculation of VAT input tax. After the plaintiff reviewed the liability, it was found that the Municipality did not owe SARS the said amount, and because of the review, the plaintiff saved the Municipality from paying the same (“savings”). Plaintiff issued invoice number GTM201/06 dated 05/06/2015⁷ for an amount of R212,894.78, which constitutes 20% of the amount of R1,064,473.92. The Municipality did not make any payment to the plaintiff, and as a result, plaintiff is entitled to claim the amount of **R212,894.78** for the ‘savings’.
- 23.6 for the period 2013-01, there was a SARS liability of R4,273,202.88 as a result of a miscalculation of VAT input tax. After the plaintiff reviewed the liability, it was found that the Municipality did not owe SARS the said amount, and because of the review, the plaintiff saved the Municipality from paying the same (“savings”). Plaintiff issued invoice number GTM2015/07 dated 05/06/2015⁸ for an amount of R854,640.57, which constitutes 20% of the amount of R4,273,202.88. The Municipality did not make any payment to the plaintiff, and as a result, plaintiff is entitled to claim the amount of **R854,640.58** for the ‘savings’.
- 23.7 for the period 2013-03, there was a SARS liability of R4,454,182.17 as a result of a miscalculation of VAT input tax. After the plaintiff reviewed the liability, it was found that the Municipality did not owe SARS the said amount, and because of the review, the plaintiff saved the Municipality from paying the same (“savings”). Plaintiff issued invoice number GTM2015/05 dated 05/06/2015⁹ for an amount of R890,836.43, which constitutes 20% of the amount of R4,454,182.17. The Municipality did not make any payment to the plaintiff, and as a result, plaintiff is entitled to claim the amount of **R890,836.43** for the ‘savings’.

⁷ Plaintiff’s Discovered Documents Bundle, page 13.

⁸ Plaintiff’s Discovered Documents Bundle, page 15.

⁹ Plaintiff’s Discovered Documents Bundle, page 17.

- 23.8 for the period 2013-03, there was a SARS liability of R11,987,076.77. After the plaintiff reviewed the liability, the full amount was to be refunded to the Municipality. Plaintiff issued two invoices for the total amount of R2,397,415.35, which constitutes 20% of the amount of R11,987,076.77. The first invoice is numbered: 2015/03 dated 30/01/2015 for an amount of R1,558,319.98, which constitutes 13%.¹⁰ The Municipality paid this amount. The second invoice is numbered: 2015/063 and dated 09/11/2013 for an amount of **R839,095.37**,¹¹ which the Municipality failed and/or refuses to pay.
- 23.9 for the period 2013-06, there was a SARS liability of R4,274,472.00 as a result of a miscalculation of VAT. After the plaintiff reviewed the liability, it was found that the Municipality did not owe SARS the said amount, and because of the review, the plaintiff saved the Municipality from paying the same (“*savings*”). Plaintiff issued invoice number 2013/0602 dated 05/06/2015¹² for an amount of R854,894.40, which constitutes 20% of the amount of R4,274,472.00. The Municipality did not make any payment to the plaintiff, and as a result, plaintiff is entitled to claim the amount of **R854,894.40** for the ‘savings’.
- 23.10 for the period 2013-06, the plaintiff reviewed the SARS liability. After SARS revised the additional assessment, the Municipality owed SARS R2,265,216.00. The Municipality overpaid plaintiff **R294,478.08**, which plaintiff tenders to pay back to the Municipality.
- 23.11 In the result, plaintiff alleges in his particulars of claim that the defendants are indebted to Plaintiff in the amount of R7,896,584.10 less the overpayment of R294,478.08. A total amount of **R7,602,106.00** is due and payable by the defendants to the plaintiff. I will elaborate on this figure later in my judgment.

¹⁰ Defendant’s Discovered Documents Bundle, page 19.

¹¹ Plaintiff’s Discovered Documents Bundle, page 3.

¹² Plaintiff’s Discovered Documents Bundle, page 19.

[19] The plaintiff testified that the aforementioned invoices, which are still unpaid and owed by the Municipality, relate to the services they provided during the original SLA. They also filed their objections with SARS prior to the end of June 2014, and as such, they are entitled to a 20% contingency fee and not the 13% that the Municipality paid.

[20] In the event that the plaintiff did submit the required objections or documents for assessment to SARS' satisfaction, the Municipality would not receive the outcome until long after the submission because it is common cause between the parties that SARS does not immediately consider, refund, or extinguish a liability (or assessment) upon receipt of an objection, and if a refund or liability is to be extinguished, the same would occur sometime after the objection was submitted.

[21] The outcome would be received via eFiling, or if there was a refund to be received from SARS, the payment would be reflected in the Municipality's bank account. It is only once the outcome of SARS' decision is made that the plaintiff could issue an invoice to the Municipality.

[22] When the two SLA's came to an end, the Municipality stopped the plaintiff's access to the Municipality's eFiling system and also did not provide the plaintiff with their bank statements to confirm whether the objections were successful or not.

[23] It was put to the plaintiff that the Municipality did not pay the outstanding invoices, *inter alia* as (1) there is no agreement that the plaintiff would be entitled to 'savings' and (2) the Municipality received SARS' outcome, whether it was a refund or a liability that was extinguished, after the end of June 2014 and as such, only 13% was payable to the plaintiff, which the Municipality paid.

[24] Plaintiff testified that the defendants' argument, as put forth to plaintiff, was nonsensical because (1) the agreement was that 20% would be paid for work done before the expiry of the original SLA, and they did submit the work before the expiry date and (2) SARS' decision regarding the objection, whether it was a refund or a liability extinguished, was made after the original SLA had expired, and despite that fact, the Municipality paid certain of the invoices at 20% commission, which they supplied in accordance with the original SLA. Plaintiff therefore questioned why certain invoices were correctly paid at 20% commission and other invoices were only paid at 13% commission.

[25] Although SARS' decision was received by the Municipality (sometimes) months after the original SLA expired, it is common cause between the parties that the plaintiff provided services for the following periods, for which the Municipality paid the full 20% commission:

- a. For the period April 2014, SARS refunded the Municipality an amount of R2,176,397.94. The Municipality paid a 20% contingency commission to the plaintiff in the amount of R435,279.59.
- b. For the period January 2013, SARS refunded the Municipality an amount of R1,290,703.45. The Municipality paid a 20% contingency commission to the plaintiff in the amount of R258,140.69.
- c. For the period March 2013, SARS refunded the Municipality an amount of R703,660.40. The Municipality paid a 20% contingency commission to the plaintiff in the amount of R140,732.08.
- d. For the period May 2013, SARS refunded the Municipality an amount of R925,814.09. The Municipality paid a 20% contingency commission to the plaintiff in the amount of R185,162.82.

[26] The amounts in the previously indicated paragraph are based on a spreadsheet that the defendants prepared and are not in dispute.¹³

[27] During the plaintiff's testimony, he explained the various terms used. According to Mr Malunga, when SARS performs an assessment and finds that someone (I'll use "Mr. X" for convenience) owes money, an objection is submitted using a form called an ADR1, and SARS evaluates the ADR1 and concludes that the objection was successful, Mr. X is "saved" from having to pay the money. "Savings" is what that is. After conducting an assessment and SARS determining that Mr. X was required to pay a certain amount, which he did, Mr. X submitted an objection with supporting documentation, which SARS then evaluated and determined that Mr. X should not have paid the amount, that would be called a "refund".

[28] The plaintiff and the defendants did proceed with alternative dispute resolution, and a resolution was reached between the parties during these proceedings.

[29] The plaintiff referred the Court to a letter by the first defendant dated 29 February 2016 (the "ADMISSION LETTER") (which was a result of the alternative dispute resolution), addressed to the plaintiff's attorneys of record. In this letter, the first defendant states the following, which plaintiff submits is an admission:

"2. After having thoroughly listened to the audio recordings in terms of the above, both the Municipal Manager and the Legal Manager have come to a similar conclusion that the audio recordings principally reflect the following as the recorded arrangement:-

2.1 The Municipality is prepared to pay 20% on anything that was submitted to SARS during the existence of the contract (the contract that lapsed on the 30th June 2015) (own emphasis) (both parties later confirmed the date is a typing error and should read 2014).

¹³ Plaintiff's Discovered Documents Bundle, page 21.

- 2.2 *That the Municipality is prepared to pay 13% on anything that was submitted to SARS after the lapse of the contract (own emphasis).*
- 2.3 *That payments referred to on 2.1 and 2.2 are subjected to the Municipality deducting an amount of Two Million Rands (R2 000 000.00) thereof resulting from the liability at your instance.” (both parties later agreed the amount should not be read as two million rands, but in fact, the amount of R294,478.08, which Plaintiff tendered to pay back).*
3. *The above represent a true reflection of the arrangements which were made as per the audio recordings.*
4. *In the absence of any objection from yourselves regarding our reflection on the audio recordings as stated above, we are open to discussions with a view to bringing this matter to finality.”*

[30] The plaintiff contends that the admission letter obligated the defendants to remit the complete 20% commission for the services rendered prior to the termination of the original SLA, which encompasses anything that was reviewed and/or objected to at SARS, to the defendants' benefit.

[31] At the end of 5 September 2023, the plaintiff completed his evidence in chief, and it was agreed upon that the case would be postponed to 7 September 2023 so that the plaintiff could be cross-examined. Until this date, the defendants' witnesses remained absent; the defendants' counsel confirmed that the one witness they wanted to call was on sick leave and that the other witness was at Wits University. It was confirmed that the latter witness would “*definitely*”¹⁴ be available the following week to testify on behalf of the defendants, but

¹⁴ Transcribed record dated 05 September 2023, page 84, line 7.

they were unsure about the first witness and whether she would have recovered enough from her illness to take the stand.¹⁵

[32] During cross-examination, it was put to Mr. Malunga, *inter alia*, that the Municipality paid the invoices at 13% because that is the percentage at which the plaintiff invoiced the Municipality, that various payments were made at 13% because the work was done during the extended SLA period, and other payments were not made because either the plaintiff did not perform the work, or his invoices were for “savings” and which does not form part of the SLA, in the further alternative, that the Municipality never received the invoices.

[33] Mr Malunga persisted in his version even after the defendants' counsel offered the plaintiff the defendants' version to answer or respond to. Mr. Malunga explained¹⁶ that during the original SLA period, they issued invoices at 20%, but the Municipality had financial difficulties and stated to the plaintiff that they would not pay 20% but rather 13%. After receiving legal advice, the plaintiff decided to submit the 13% invoice in order to receive at least a portion of their commission due. Later, the plaintiff may pursue the remaining 7% from the Municipality, as per the agreement.

[34] It was also further later argued on behalf of the plaintiff that the invoices, which the defendants claim were never received by them (because it was not signed or stamped), were not paid because they were never received (they had no receipt stamp on it), but rather it was not stamped because the payment was refused. Only those invoices which were paid were stamped.

[35] The defendants' counsel contended that it is not the plaintiff's pleaded case that they were entitled to 20% commission but invoiced 13% and now claim the remaining 7% allegedly due during the trial stage and that the plaintiff was attempting to introduce new evidence in

¹⁵ Transcribed record dated 05 September 2023, page 83.

¹⁶ Transcribed record of 08 September 2023, from page 60.

this regard. This submission contradicts the acceptance letter, which forms part of the pleadings.

[36] At approximately 13h50 on 08 September 2023, Plaintiff closed its case. It was agreed between all parties that the matter would be postponed to 13, 14 and 15 November 2023 for the defendants to present its case. I agreed to this postponement, *inter alia*, as the defendants' witnesses were still not available.

[37] On 24 October 2023, a notice of set down was served upon the defendants' legal representative, whereby they were formally informed that the hearing would continue on 13, 14 and 15 November 2023, as per the parties' agreement.

[38] On 13 November 2023 the matter could not proceed and was postponed as a result of two interlocutory applications which the defendant launched. I've handed down judgment on those two applications, and it is not necessary to repeat the same in this judgment.

[39] The matter was then set down for 23 and 25 September 2024 for the defendants to present its case.

DEFENDANTS EVIDENCE

[40] To my surprise, the defendants, without any explanation given to the Court, did not call the two witnesses that they stated they would call (and who had been absent during the whole trial thus far) but elected to call their Expenditure Manager, Ms Mokgadi Sono. I was further informed that Ms Sono would be the only witness the defendants intended to call.

[41] Ms Sono confirmed that she holds a BCom degree, which she obtained from the University of Venda. She has been employed by the first defendant since May 2011 and currently holds the position of Expenditure Manager. Her duties include overseeing payments to creditors and their payroll, which included SDL, UIF, and PAYE.

[42] Whilst Ms Sono is aware of the original SLA and extended SLA agreements entered into by and between the plaintiff and the defendants, she confirmed that she was not part of the negotiations. According to her, Ms Norah Lion (whom the defendants initially wanted to call as a witness), was the direct contact person between the Municipality and the plaintiff, and she was also Ms Sono's supervisor and had to report to her.

[43] Ms Sono confirmed that she knew that plaintiff was contracted to attend to the Municipality's VAT-related issues for the period 2013 and 2014, as well as the five years immediately before the parties entered into the original SLA agreement. In terms of the SLA agreement, the plaintiff had to revisit the Municipality's old files and investigate whether there was a reason to object to any liability due to SARS and, if so, to file the ADR1 form at SARS. If the plaintiff discovered that the Municipality overpaid SARS, the plaintiff had to do a re-assessment, and SARS would refund such overpayment to the Municipality.

[44] During cross-examination, Ms Sono was asked what it is termed when SARS assesses the Municipality and determines a certain amount is owed, whereafter the Plaintiff objects to that amount and provides documentation to refute the liability, after which SARS agrees that the amount is no longer payable by the Municipality (i.e., the liability is extinguished). She stated that it would be referred to as a "savings".

[45] When Ms Sono was referred to the written proposal made by the plaintiff to the defendants and asked to explain the various terms,¹⁷ how she understood it to mean, she stated as follows (paraphrased):

- a. 'overpayment' is when the Municipality pays too much to SARS.
- b. 'collection of the overpayment' is called a 'refund' and not 'savings'.
- c. 'refunds' are referred to in the SLA as 'recovery'.
- d. 'under deduction' is when too little is paid to SARS.
- e. If there was an 'under deduction', then the plaintiff had to review and resubmit the assessment to obtain a better result from SARS.
- f. A 'favourable outcome' for the resubmission of the assessment done by the plaintiff would be a 'refund'.
- g. 'undue assessment' meant that SARS assessed the Municipality, which was done improperly, which negatively affected the Municipality.
- h. 'undue penalties' meant penalties for non-submissions posed by SARS.
- i. 'interest' was to be charged by SARS for non-payment of what is due to the SARS.
- j. 'additional assessment' is when SARS requires more information or documentation to do an assessment.
- k. 'exposure by the Municipality to SARS' - Ms Sono did not understand what this entailed.

[46] Ms Sono stated that all invoices received by the plaintiff were paid. If there are invoices that are outstanding according to the plaintiff, then either the Municipality did not receive it, or the invoice description was set out as a "savings" and such "savings service" does not form part of the SLA - consequently, it was not paid. According to Ms Sono, the plaintiff was only entitled to a contingency commission on monies recovered from SARS.

¹⁷ Plaintiff's Pleadings Bundle, page 20.

[47] When Ms Sono was asked how the plaintiff would ascertain the refund amount received by the Municipality from SARS, given their lack of access to eFiling, she said that she did not know. However, the spreadsheet that she prepared, and which was discovered, did set out all the payments received by the Municipality from SARS.¹⁸

[48] Ms Sono verified that the ADR1 forms submitted by the plaintiff to SARS, which are the basis for the plaintiff's commission, were submitted prior to the conclusion of the original SLA term, which concluded on 30 June 2014. She additionally asserted that she is unable to confirm or refute if the plaintiff submitted the supporting documents required for the ADR1 form. However, there is no evidence presented to the Court indicating that the plaintiff failed to file such supporting documents, and such a defense is also not pleaded by the defendants.

[49] Ms Sono further affirmed that upon the filing of the ADR1 form and its supporting documents, SARS has 90 days to evaluate the objection and either accept or reject it. If accepted, a refund would only be payable subsequent to that acceptance. Consequently, it is logical that although the plaintiff raised objections prior to the expiration of the original SLA, the plaintiff's invoices would only be dated and presented to the Municipality months later, given that SARS had 90 days to decide on the objection raised.

[50] In essence, the defendants' case is that they deny that the plaintiff's written proposal forms part and parcel of the SLA. In the alternative, they pleaded that if it is found that the written proposal constitutes the terms of the agreement together with the SLA, the defendants nevertheless deny that professional tax services for VAT refunds can be legally delineated from the service for savings on VAT liability. Defendants, as such, deny that they are indebted to the plaintiff.

¹⁸ Plaintiff's Discovered Documents Bundle, page 21.

[51] After Ms. Sono was re-examined, no other witness was called to testify on behalf of the defendants, and on 25 September 2024, the defendants closed their case.

[52] It was then agreed that the parties would file their heads of argument, and oral closing arguments would be done on 15 November 2024.

ANALYSIS OF THE EVIDENCE

[53] It is a well-established legal principle that the burden of proof lies against the plaintiff to discharge in a civil case. Hence, the well-known principle is that the party who asserts a fact must prove it. The question for determination is the nature and extent of the evidentiary obligation resting upon a plaintiff to establish a claim on a balance of probabilities. This burden remains on the plaintiff throughout the trial and must be discharged on a balance of probabilities.¹⁹

[54] The balance of probabilities requires the plaintiff to adduce evidence that makes the existence of the fact they seek to prove, more probable than not. If the plaintiff succeeds in doing so, the defendant must then adduce countervailing evidence to refute the claim.

[55] I find Mr Malunga, witness for the plaintiff, to be a credible and reliable witness. Throughout his testimony, he was steadfast about the cause of action, the evidence that supports the plaintiff's case and that the defendants owe the plaintiff money.

¹⁹ Pillay v Krishna 1946 AD 946.

[56] Though it is my finding that Mr Malunga (as a person) was a credible witness, the evidence before me does not support the plaintiff's claim in totality.

[57] In the plaintiff's particulars of claim,²⁰ they set out the invoices that they allege are due and payable by the defendants. As I explained earlier in this judgment, each alleged invoice was explained as to why it was due and owing and which kind of service was allegedly rendered to the defendants – or, put differently, how they assisted the Municipality from paying a tax liability to SARS.

[58] However, when I calculate the alleged invoices outstanding as per paragraph 8 of the particulars of claim, they amount to **R7,203,233.24** and not R7,602,106.02 (which includes the deduction of R294,478.08 agreed between the parties). These invoices are as follows:

Item:	Period:	Amount Due:
1	2012 06	837,388.38
2	2012 06	1,020,779.60
3	2012 09	549,342.10
4	2012 09	1,143,361.60
5	2012 10	212,894.78
6	2013 01	854,640.58
7	2013 03	890,836.43
8	2013 03	839,095.37
9	2013 06	854,894.40
<i>Total allegedly due and owing</i>		7,203,233.24

[59] In the Plaintiff's heads of argument, they contest the evidence presented by Ms Sono. They asserted that Ms Sono was present in Court during the whole trial, and therefore, her evidence should be afforded minimal weight. In the oral closing arguments, I cautioned the plaintiff's counsel that I would not entertain their objection since they had adequate

²⁰ Index: Pleadings Bundle, page 11, para 8.

opportunities to address that matter with me during the trial, yet they permitted her presence in Court. I was not informed that Ms Sono was present in Court and would be testifying. I was unexpectedly surprised when the defendants summoned an individual other than the two witnesses they had first said would be called at the beginning of the trial.

[60] Ms Sono's evidence, in all respects, did not weaken the plaintiff's case. Her evidence was scant and, in fact, corroborated portions of the plaintiff's version more than that of the defendants. She was absent during the negotiations of the SLA terms and conditions and was not the person appointed as liaison between the two sides. As she was not involved in the negotiations, she is unable to attest to the true intentions of the parties. She lacks legal expertise and qualifications and, therefore, was unable to assist the Court in interpreting the SLA. She was, nevertheless, candid and forthright during her testimony, asserting that if SARS claims a liability owed to it, and upon the plaintiff's review, it is determined that no payment is due, the Municipality would have gained from the plaintiff's services, resulting in "savings".

[61] The written proposal explains in detail what the plaintiff's scope of work, or duties in terms of the SLA to be entered into, would entail. Their scope of work would relate to overpayments, under deductions, undue assessments, undue penalties, interest, additional assessments, exposures by the Municipality to SARS and submissions made to SARS on behalf of the Municipality. If the plaintiff was successful in their scope of work, it would amount to a "savings" for the Municipality, and their fee would be payable on a contingency basis, at 20% VAT inclusive of any 'savings identified and received'.

[62] It is not in dispute that the Municipality accepted the written proposal on 22 April 2014. Their acceptance letter pertinently states that the "*Greater Tzaneen Municipality has resolved to appoint you based your proposal submitted to the Municipality be accepted for the Vat, UIF, SDL, PAYE review and recovery, your proposal of 20% of the recovered money is accepted.*" (sic) (own emphasis)

[63] Cognisance must be taken that the proposal does not contain the words refund or “recovery” and the acceptance letter by the Municipality of the proposal does not contain the words “savings”. The original SLA defined “Services” to mean “the Proposals for Review and Recovery of VAT, UIF, SDL and PAYE” (own emphasis).

[64] The acceptance letter does not indicate that the Municipality has approved only a specific portion of the proposal while rejecting the remainder. It explicitly indicates acceptance of the proposal as presented to the Municipality. The SLA interprets the services to be executed by the plaintiff as the proposal submitted to the Municipality, which the Municipality accepted.

[65] However, in the SLA the “Service Provider” is defined to mean the plaintiff. Clause 3.1 of the SLA states that the Municipality appoints the Service Provider to supply the services in accordance with and as specified in the contract. Clause 4 states that the Service Provider “*must provide the services for retrofits of energy efficient street lighting, and the Municipality shall remunerate the Service Provider for the services rendered*”. This is clearly wrong, as there was no such agreement between the parties, and it is common cause that the services to be rendered would be, *inter alia*, VAT-related.

[66] In terms of clause 6 of the SLA, the Municipality was under an obligation to provide the plaintiff with all relevant documentation and or information to allow the plaintiff to perform in terms of the SLA.

[67] In clause 8, it stipulates that the “*all-inclusive contract price shall be 20% VAT inclusive of the amount recovered*”. It further states that the contract price is “*payable upon satisfactory discharge of all obligations of the Service Provider and delivery of the services to the Municipality in terms of this contract. The Municipality will not make payment to the Service*”

Provider in the event the Service Provider fails to satisfactorily perform any of its obligations in terms of this contract....and [t]he price is fixed for the duration of the contract, and the Service Provider may under no circumstances approach or request the Municipality for an increase in the contract price” (own emphasis).

[68] It is common cause that the plaintiff was not in breach of the contract and did not receive any letter of demand to perform or to be placed on terms as stipulated in the SLA's terms and conditions. The Municipality extended the SLA to permit the plaintiff to provide their professional services for an extra three months, even though the SLA allowed the Municipality to engage another contractor if the plaintiff failed to fulfil their obligations adequately. This event did not occur.

[69] Moreover, the defendants' own evidence, as per their spreadsheet of payments received from the Municipality, demonstrates that, indeed, the Municipality did receive a benefit from whatever VAT-related service it was that the plaintiff rendered on their behalf at the Municipality.

[70] Clause 9.2 of the SLA states that “[a]ll written information, warranties and representations made by or on behalf of the Service Provider before conclusion of this contract are binding upon the Service Provider and are deemed to have induced the Municipality to enter into this contract.” When read in conjunction with the Municipality's acceptance letter, it indicates that the Municipality accepted the plaintiff's proposal without any counterproposals or alterations (own emphasis).

[71] Clause 18 confirms that the contract constitutes the whole agreement between the parties, notwithstanding any acceptance, order, or other documents or discussions to the contrary. Clause 19 is a non-variation clause and states that no amendment of the contract or document issued or executed pursuant to or in terms of this contract shall be binding

unless recorded in writing. There was never any agreement that the plaintiff would decrease his fee of 20% to 13%.

[72] The plaintiff asserts entitlement to a 20% commission on refunds received by the Municipality from SARS, in addition to any amounts the Municipality saved following the plaintiff's review of their VAT liability. As such, they are entitled to payment of the invoices they rendered for the 'savings' that occurred to the benefit of the Municipality. Conversely, the defendants argue that they accepted the proposal, but they described the services as refunds and recovery - definitions that are not present in the accepted proposal.

[73] When the plaintiff demanded payment of the outstanding invoices, the parties attempted to settle their disputes via alternative dispute resolution. The Municipality's admission letter is of importance. In this letter, the Municipality conceded and agreed to pay 20% "*on anything that was submitted to SARS during the existence of the contract*" (the original SLA) and "*to pay 13% on anything that was submitted to SARS after the lapse of the contract*" (own emphasis).

[74] When considering the admission letter by the Municipality, two issues must be taken into consideration. First, the ADR1 forms, on which the plaintiff claims 20% contingency commission, were all submitted before 30 June 2014. Secondly, the invoices which the plaintiff rendered at 13% for the work completed or submitted at SARS before 30 June 2014 were not tendered in the full and final settlement of the plaintiff's claim.

[75] Upon reviewing the evidence, it appears that the plaintiff established a *prima facie* case for claiming outstanding invoices from the defendants, a claim that the defendants did not significantly contest, particularly given that their witness provided only minimal assistance for the defence they intended to present to this Court.

LEGAL PRINCIPLES AND DISCUSSION

[76] In South African law, the interpretation of contractual terms is essential for ensuring that agreements are executed as intended by the parties concerned. Contract interpretation largely entails comprehending the meaning of the terms and expressions within the contract, taking into account the context of its formation, and assessing the mutual intent of the contracting parties.

[77] As referenced in my introduction above, I shall make use of Shakespeare's reasoning in *The Merchant of Venice*—"The bond doth give thee here no jot of blood" (though it was a theatrical performance, it became a legal principle that was followed for centuries) —with modern contract law principles set out in ***Natal Joint Municipality Pension Fund v Endumeni Municipality (2012) 4 SA 593 (SCA)***, to do a comparative analysis of literal versus purposive interpretation.

[78] In *The Merchant of Venice*, the contract between Shylock and Antonio entitled Shylock to a pound of flesh if Antonio failed to repay the loan. Portia, disguised as a judge, rules that while the contract permits Shylock to take a pound of flesh, it does not entitle him to spill any blood. This ruling strictly adheres to the contract's wording but frustrates its obvious intent—since taking flesh without shedding blood is impossible. This illustrates a hyper-literal approach to contract interpretation, where the exact wording governs despite the broader commercial and practical implications. Such an approach often leads to absurd or unjust outcomes.

[79] In recent times, the methodology for contract interpretation integrates common law principles with modern interpretative techniques shaped by local jurisprudence and developments in comparative legal systems. Historically, the Courts preferred a literal or textual interpretation, emphasising the exact language employed in the contract. Nonetheless, there has been a significant shift towards a purposive and contextual

methodology over time. Our Courts now evaluate not just the literal interpretation of contract words but also the contextual circumstances, commercial facts, and the contract's purpose to determine the parties' intents effectively.

[80] The modern approach is guided by several landmark cases, such as ***Natal Joint Municipality Pension Fund vs Endumeni Municipality 2012 (4) SA 593 (SCA)***, where the Supreme Court of Appeal underscored the necessity to interpret contracts contextually. Courts are thus inclined to look beyond the text, including earlier negotiations and conduct, providing such analysis fits in with what a reasonable person would understand the provisions to imply under similar conditions. Additionally, interpretation must align with public policy, good faith, and fairness as laid out in our Constitution.

[81] Defendants' counsel argued that should the proposal be accepted as part and parcel of the SLA, it would amount to the admission of extrinsic evidence, which is not permissible.

[82] Extrinsic (or external) evidence refers to evidence outside the written text itself that may be used to clarify, interpret, or support the provisions of a document. Modern interpretations of the admission of extrinsic evidence frequently balance the concepts of textualism (the plain sense of the document's terms) with contextualism (the broader circumstances around the agreement).

[83] In the past, the integration rule precluded parties from using extrinsic evidence to alter or contradict the written provisions of a contract. However, our Courts acknowledge the contextual approach, which uses extrinsic evidence to assess the purpose of the parties, even if the wording of the contract appears obvious, as illustrated in the ***Endumeni*** case above.

[84] In the case of ***KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA)***, the Court emphasised that interpreting a contract requires considering both the text and the context in which it was concluded. Extrinsic evidence can, therefore, be admissible to establish context, even when the language seems unambiguous.

[85] In ***Comwezi Security Services (Pty) Ltd vs Cape Empowerment Trust Limited (Comwezi) [2012] ZASCA 126***²¹ the Court held that even in the absence of ambiguity, the parties' conduct in implementing the agreement may provide clear evidence as to how reasonable persons of business construed a disputed provision in a contract.

[86] Tax liability "savings" or deductions often come under scrutiny, as they involve interpreting whether certain expenses or financial obligations qualify for tax relief under the provisions of the Income Tax Act 52 of 1962.

[87] Considering the objective of the SLA and the rationale behind the Municipality's need for the plaintiff's professional services concerning their tax matters, the only possible conclusion this Court can draw is that the Municipality sought these services to prevent overpayment to SARS or to avoid payment when no liability existed. The Municipality wanted to be 'saved' from paying any tax to SARS, which was not due and owing by the Municipality.

[88] The term "savings," in the context of tax liability, often refers to a reduction in the tax amount owed to SARS. This may occur through various means. First, through a tax deduction. Claiming permitted deductions, such as donations to retirement funds, medical expenditures, or company expenses, diminishes taxable income, thus reducing the tax liability. Secondly, through tax rebates. This transpires when SARS provides specific refunds (including primary, secondary, and tertiary rebates for individuals based on age), which

²¹ At para 15.

immediately diminish the tax liability, leading to savings. Third, tax incentives or exemptions, such as those applicable to small enterprises or renewable energy projects, can diminish a tax liability and generate savings. Fourth, through tax credits. Payment of specific taxes, such as foreign taxes or health care contributions, may be applied against tax liability, thereby diminishing the amount owed. Therefore, in essence, "savings" refers to the reduction of tax obligations in relation to initial calculations, typically achieved through the utilisation of legal mechanisms (such as the submission of an ADR1 form) within the tax framework to diminish liability.²²

[89] I find that the proposal by the plaintiff, which the Municipality accepted in writing, formed part and parcel of the SLA. This is so, as both the acceptance of the proposal as well as the SLA itself speak to the proposal presented by the plaintiff and which the Municipality accepted, without any counterproposal or amendments thereto. Even if I am wrong in this finding, the Municipality's admission letter supports the plaintiff's claims that the plaintiff is entitled to 20% commission on "anything that was submitted to SARS...." before 30 June 2014 (own emphasis). There was never an agreement reached that this percentage would be reduced.

[90] The defendants' assertion that they are not required to pay the invoices referencing "savings," as this term is not included in the SLA, is untenable. The SLA does not mention the term "refund"; however, the Municipality had no issue processing invoices that included the term "refund". Moreover, the defendants' own witness concurred that if a debt liability is, *inter alia*, extinguished, it amounts to a "savings" in favour of the Municipality.

[91] No evidence exists to suggest that the plaintiff failed to fulfil its obligations under the SLA. The evidence presented to the Court substantiates that the plaintiff submitted documents to SARS, from which the Municipality derived benefit and these submissions

²² <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/Legal-Pub-Guide-Gen01-Taxation-in-South-Africa.pdf>

occurred prior to 30 June 2014. The plaintiff never breached the SLA, necessitating reprimand or imposition of terms by the Municipality. Their execution of duties led to the Municipality extending the SLA.

[92] The defendants further argued that the plaintiff had a duty to discharge and the burden of proof, and not the defendants. I agree with this submission. Nonetheless, the defendants had a duty to refute the plaintiff's claims (especially in light of the fact that they filed a counterclaim), which they failed to satisfy, thereby substantiating the plaintiff's claim on a balance of probability.

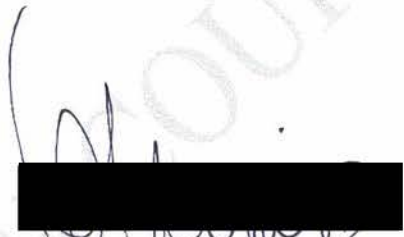
[93] It is my view that the plaintiff has substantiated its claim on a balance of probabilities; therefore, the plaintiff's claim must succeed, considering that they offered to reimburse the Municipality an amount of R294,478.08, which was overpaid to the plaintiff. The defendants owe the plaintiff **R7,203,233.24**, derived from the outstanding invoices totalling R7,497,711.32, less R294,478.08.

[94] As far as costs are concerned, there is no reason why costs should not be granted in favour of the successful party. I have also considered that both parties employed senior counsel to present their respective cases, the various interlocutory applications brought by the defendants that caused unnecessary delays, and the defendants' request to postpone the matter (more than once). As such, I am inclined to grant costs in favour of the plaintiff on a party and party scale, which shall include counsel's costs on scale "C".

In the result, I make the following order:

- 95.1 The first and second defendants are ordered to pay the amount of R7,203,233.24 (seven million two hundred and three thousand, two hundred and thirty three rand, and twenty-four cents) to the Plaintiff.

- 95.2 The first and second defendants are to pay interest on the amount of R7,203,233.24 (seven million two hundred and three thousand, two hundred and thirty-three rand, and twenty-four cents) at 9% per annum, calculated from 22 April 2016, being the date upon which the summons was served upon both defendants.
- 95.3 The first and second defendants shall pay the costs of the plaintiff, on a party and party scale, to include counsel's costs on scale "C".


CINDY MARAIS
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

HEARD ON :

04 September 2023; 05 September 2023; 07 September 2023; 08 September 2023; 13 November 2023; 19 December 2023; 14 March 2024; 23 September 2024; 25 September 2024 and 15 November 2024.

JUDGMENT DELIVERED ON:

12 FEBRUARY 2025. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down of the judgment is deemed to be **12 FEBRUARY 2025 at 14:00**

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