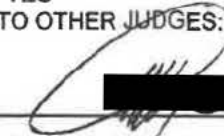


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
17/3/25	
DATE	SIGNATURE

Case Number: 2023-112430

In the matter between:

WORKING ON FIRE

APPLICANT

and

MINISTER OF THE DEPARTMENT
OF FORESTRY, FISHERIES AND ENVIRONMENT

FIRST RESPONDENT

THE DIRECTOR- GENERAL: THE DEPARTMENT,
OF FORESTRY, FISHERIES AND ENVIRONMENT

SECOND RESPONDENT

JUDGMENT

Ramawele AJ

Introduction

- [1] This is an application for the payment of an amount of R29 482 325,92 (Twenty - Nine Million, Four Hundred and Eighty- Two Thousand, Three Hundred and Twenty Five Rand, Ninety Two Cents) and other ancillary relief, which amount constitutes the Value Added Tax (VAT) allegedly due / owing and payable to the Applicant.

Background

- [2] The First Respondent and Applicant entered into a Memorandum of Agreement for a seven-year period commencing on 1 April 2014 and ending on 31 March 2021. Upon the expiry of the seven-year Agreement, the parties entered into a further Memorandum of Agreement on 3 May 2021 for a six-month period commencing on 6 April 2021 until 5 October 2021. The Applicant was appointed as a single source Service Provider on a working on programme.
- [3] The services that the Applicant would render, included, inter alia, the management of the programme, including financial management, corporate governance, human resources, information technology and legal matters. The Applicant was further required to assess, identify, assume and accept vulnerability of the risk, limited to veldfire management risk, reputational risk, life, property, environmental and social risk.
- [4] The Memorandum of Agreement also provided that the costs of the project were the actual costs incurred by the service provider and that the costs of the project would not be more than R350 000 000. The Memorandum of Agreement further provides that the total costs of the project is inclusive of VAT and that the Applicant was required to ensure that the project deliverables and other related activities are inclusive of VAT, where VAT is applicable.
- [5] In terms of the Memorandum of Agreement, the Applicant was required to employ Extended Public Works Programme employees (EPWP) and pay such employees after which the Respondent would re-imburse the Applicant for the expenses incurred. The participants were employed in terms of the Ministerial Determination No: 4 Public Works Programme as contained in Government

Gazette No: 35310 of May 2012. Their remuneration was paid in terms of the EPWP wage rates under the Expenditure Line item and contained in the approved Project Performance Plan (PPP).

- [6] The Applicant employed the EPWP participants and paid them in accordance with the Memorandum of Agreement. The Applicant then raised invoices in the amount of R196 548, 839,46 which did not, according to the Applicant, include VAT. The Department paid these invoices.
- [7] The Applicant states that it did not include VAT in the EPWP wages because Dr Christo Marais, Chief Director Natural Resource, Management of the Respondents had advised them in an email dated 19 April 2021 that the budgeted amount excludes VAT.
- [8] In his email dated 19 April 2021 Dr Marais stated as follows:

Hallo Colleagues

"Attached hereto find the revised project performance framework for the three Wofire sub programmes.

The following are aspects to be considered when finalizing the deliverables rates: The initial draft of the performance framework was split up as per our meeting on Friday the 16th April.

There are therefore as a least two sheets for each sub-programme. The spreadsheets as per the excel are as follows....."

- [9] In the aforesaid email, Dr Marais states that *"note that EPWP employment costs do not have a weight as actual payments will be claimed"*. This accords with the Memorandum of Agreement which provides that the Applicant shall employ the EPWP employees and remunerate them. It is clear from the above that Dr Marais did not refer to any payment of VAT in his email. After the Applicant had remunerated the EPWP employees as agreed, the Applicant claimed reimbursement from the Respondents. The Respondents duly reimbursed the Applicant.

[10] It is common cause that the Applicant did not include VAT in the wages and salaries that were paid to the EPWP employees.

[11] The Applicant apparently obtained legal opinion that VAT should have been included in the wages. The Applicant then revised the invoices and included VAT. The Respondents did not pay the revised invoices and refused to pay VAT. SARS is allegedly demanding VAT payable on the EPWP wages from the Applicant.

[12] Clause 4.1 of the Memorandum of Agreement provides that "*The Project's budget of R350 000 000,00 (VAT inclusive) will be aligned to the approved Project Performance Plan*".

[13] It is common cause that the amount claimed by the Applicant exceeds the budget. It is further common cause that there is an unspent amount in the sum of R23 155 797, 23 from the budget allocated to the Project.

[14] The amount claimed in this application is the sum of R29 482 325,92 which is the amount demanded by SARS from the Applicant.

Issues to be decided

[15] The issue for determination in these proceedings are as follows:

- (a) Whether a party who has not levied VAT for services rendered may upon realising the mistake revise an invoice and include VAT; and
- (b) Whether a budget may be exceeded where parties have agreed that a budget should not exceed a stipulated amount.

Submissions by the Applicant

[16] The Applicant contends that the amount owed is determined having regard to the terms of the agreement, and that the obligations between the parties remain binding despite the fact that a defective Tax invoice was sent to the Respondents.

In other words, the Applicant contends that the Respondent is obliged to pay its invoices which were subsequently revised as long as the contract subsists between them.

- [17] It was contended that on a proper interpretation of section 10(3) of Value-Added TAX¹, consideration includes VAT but that it does not absolve the Respondents from paying the balance of their account for services rendered.
- [18] The Applicant thus concedes that wages and salaries paid to the EPWP employees should have included VAT. I understand the Applicant's submission to be that even if it is accepted between the parties that "*consideration*" includes VAT, the Respondent is still bound to pay the revised invoices including VAT.
- [19] It was further argued that the VAT Act makes provision for the correction of a VAT invoice where an error has occurred in stipulating the amount of consideration payable in a VAT invoice. The Applicant further contended that VAT is payable on the underlying obligation pursuant to which the VAT invoice was raised and that the new invoice is neither a substitution nor a novation of that obligation.

Submissions by the Respondents.

- [20] The Respondents resist payment on the basis that the Memorandum of Agreement provides that the total cost of the project is inclusive of VAT and that the Applicant was required to ensure that the project deliverables and other related activities included VAT and do not exceed the budgeted amount.
- [21] The Respondents submit that the Applicant made a unilateral error and is therefore not entitled to the relief it seeks.
- [22] To the extent that the Applicant relies on Estoppel and Waiver, such were not pleaded and cannot be relied upon.

Evaluation and Analysis

¹ Act No: 89 of 1991

[23] The question arises whether the Applicant's claim is based on any breach of the terms and conditions of the Memorandum of Agreement or in terms of the peremptory provisions applicable for the payment of VAT as contended by the Applicant.

[24] As it will become apparent below, the Applicant's cause of action is unclear.

[25] Section 7 of Value Added Tax provides that *"subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as value added tax-*

(a) on the supply of any vendor of goods or services supplied by him on or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;

(b)

[26] The main purpose of the Value Added Tax is to provide for taxation in respect of the supply of goods². Any vendor who supplies goods and services within the meaning of Value Added Tax Act is required to register and pay value added tax.

[27] The Applicant submits that it is required to levy tax on its invoices in terms of section 10(3) of the VAT Act.

[28] Section 10(3) of the VAT Act provides that

(3) "for the purposes of this Act the amount of any consideration is a consideration referred to in this section shall be-

(a) to the extent that such consideration is a consideration in money, the amount of money; and

(b) to the extent that such consideration is not consideration in money, the open market value of that consideration".

² See: Preamble to the Value Added Tax Act

[29] The Vat Act defines consideration:

"in relation to the supply of goods or services to any person, includes any payment made or to be made (including any deposit on any returnable container and tax), whether in money or otherwise, or any act or forbearance, whether or not voluntary, in response to, or for the inducement of, supply of any goods or services, whether by that person or by other person, but does not include any payment made by any person as a donation to any association not for gain: provided that a deposit (other than a deposit on a returnable container), whether refundable or not, given in respect of a supply of goods or services shall not be considered as payment made for the supply unless and until the supplier applies the deposit as consideration for the supply or such deposit is forfeited".

[30] In *Natal Joint Municipal Pension Fund v Endumeni*³, the Supreme Court of Appeal held that:

*"interpretation is the process of attributing meaning to the words used in a document..... Whatever the nature of the document, the consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation..."*⁴

[31] In the matter of *Cool Ideas 1186 CC v. Hubbard and Another*⁵, the Constitutional Court stated that:

³ 2012 (4) SA 593 (SCA)

⁴ *Id* para 18

⁵ 2014 (4) SA 474 CC

"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in absurdity. There are three important interrelated riders to this general principle, namely;

(a) that statutory provisions should always interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach rereferred to in (a)⁶"

[32] It is important to note that the dispute between the parties is not about the interpretational meaning of "*consideration*". The dispute is whether the Respondent is obliged to pay VAT which was previously not included in the invoices which were submitted by the Applicant to the Respondent and paid.

[33] Section 64(1) of the VAT Act states that "*any price charged by any vendor in respect of any taxable supply of goods or services, shall for purposes of this Act be deemed to include any tax payable in terms of section 7(1)*". Section 64(1) (a) of the VAT Act further provides that "*such tax would be deemed to have been included in the price in respect of such supply, whether or not the vendor has included tax in such price*".

[34] The words in the above provision are clear that any price charged by a vendor in respect of any taxable supply of goods or services, shall for purposes of the VAT Act be deemed to include VAT. In this application this deeming provision does not only work in favour of SARS but also the Respondents.

[35] As I said above, these provisions are meant to facilitate the collection of tax and not impede it. It is further meant to avoid unnecessary disputes between SARS and vendors on whether a vendor has charged VAT on its price. The responsibility is on the vendor to ensure that its price includes VAT where VAT

⁶ Id para 28

is chargeable. If a party shirks its responsibility and fail to include VAT in its taxable price, such party would be deemed to have included VAT. The recovery of VAT from the party that has paid an invoice without the inclusion of VAT is a dispute that should be resolved between the parties themselves.

[36] It is plainly obvious that SARS would be faced with a herculean task which would be difficult to overcome if it were to determine whether parties have complied with their respective obligations. In any event, it is not the duty of SARS to determine whether a supplier of goods has an enforceable contract against third parties. Nor is it the duty of SARS to determine whether a vendor has not made a mistake when issuing an invoice to another party. Such an interpretation would defeat the purpose of the VAT Act and render it unworkable. It would adversely affect the collection of tax by SARS.

[37] I am therefore of the view that the fact that the Applicant may not have levied tax on its invoices is irrelevant for the purpose of its obligation towards SARS. The Applicant is expected to ensure that it collects VAT due to SARS by insisting that its contracting party performs its obligations under the contract. Failure to do so does not excuse its liability towards SARS.

Waiver and estoppel

[38] The Applicant raised waiver and estoppel in its contentions. The Applicant did not persist with its contention on waiver and there is no evidence in this application justifying its consideration. The Applicant's decision not to persist with waiver is understandable under the circumstances. I am further satisfied that such a decision was well taken and is correct.

[39] In respect of estoppel, the Applicant seemed to rely on the email written by Dr Marais for its contention that it was advised by him not to levy tax on the payment of EPWP wages.

[40] There is no need for me to consider whether estoppel applies under these circumstances because Dr Marais stated that there were aspects to be considered when finalising the deliverables rates. Dr Marais did not make any representation which is of material significance to the issues in this application.

Even if I am wrong on this issue, it was held in *Aris Enterprise (Finance) Pty Ltd v Protea Assurance Co Ltd*⁷ that *"the essence of the doctrine of estoppel by representation is that a person is precluded, i.e estopped from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to its prejudice"*⁸.

[41] As I have stated above, Dr Marais made no representation which is prejudicial to the Applicant. Further, Dr Marais has not even given any evidence denying what he had said in the email. Dr Marais cannot be estopped when he is not denying what he had written in the email.

[42] Reliance on estoppel by the Applicant is thus misplaced.

[43] It is not the Respondents' case that Dr Marais did not say what the Applicant purports him to have said. The Respondents' case is that the Applicant is not entitled to be granted the relief sought because the amount claimed would exceed the Project's budgeted amount. In respect of the alternative relief sought, the Respondents submit that the Applicant is not entitled to any sum of money because all invoices are, in terms of the Memorandum of Agreement, inclusive of VAT.

[44] I now proceed to deal with whether the Applicant is entitled to the relief sought.

[45] As I have already set out above, Clause 4.1 of the Memorandum of Agreement provides that the Project's budget of R350 000 000,00 (VAT inclusive) will be aligned to the approved Project Performance Plan. The Memorandum of Agreement sets out various activities to be performed by the Applicant i.e management of ground operations, incident command system, working on fire programme and others. These were the obligations of the Applicant which the Applicant was obliged to perform and be paid within the budgeted amount.

[46] The Applicant stated in its papers that it had made an error by not including VAT in its invoices but then abandoned this submission when the Respondent countered by submitting that it was its unilateral mistake. The Applicant then

⁷ [1981] ZASCA 25 24 March 1981

⁸ *Id* para 28

changed tack and nailed its colours to the mast by relying on the fact that it was entitled to payment because of its obligations towards SARS and secondly, that the amount of R23 155 797, 23 falls within the allocated budget.

Claims of R29 482 325, 92 alternatively R23 155 797,23

[47] In the Notice of Motion, the Applicant claims payment of the amount of R29 482 325, 92 from the Respondents. During argument, the Applicant submitted that the amount of R23 155 797,23 which is within the Project's budget, should be paid or tendered to it.

[48] The Applicant further submitted that the remaining balance of R6 326 528,70, which exceeds the allocated budget is also payable on the basis that it had paid the wages and salaries of the EPWP employees without including VAT.

[49] The Respondent contended that the Applicant is not entitled to payment of the entire amount claimed for reasons stated above. The parties made submissions during the hearing about the alternative prayers i.e the payment R23 155 797, 23 and R6 326 528,70 respectively. The Respondent did not object to this approach which was not in accordance with the prayers in the Notice of Motion.

[50] In *Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws and Another*⁹ the Appellate Division stated that

"I am not aware of any general proposition that a Plaintiff who has two or more remedies at his disposal must elect at a given point of time which of them he intends to pursue, and that, having elected one, he is taken to have abandoned all others. Such a situation might well arise where the choice lies between two inconsistent remedies and the Plaintiff commits himself unequivocally to the one or other of them".

[51] In this application, the Applicant is not seeking different remedies, it is the same remedy with the lesser amount in the alternative. It is trite that even in motion

⁹ 1965 (4) SA 373 (A)

proceedings this should have been pleaded in the alternative to the main relief sought.

[52] The alternative relief sought by the Applicant does not in any way prejudice the Respondent. If such failure to plead the alternative relief constitutes a procedural defect, the evidence presented cured the defect. The Respondents elected to oppose the application without putting the Applicant to the task of amending its prayers. It should also be noted that the main relief sought, and the alternative relief thereof, do not constitute two distinct causes of action.

[53] I am therefore of the view that even though the Applicant prayed for the payment of the amount of R23 155 797,23 in the alternative, such a relief is not incompetent where the parties had fully argued the point and the opposing party had no objection to such a point being raised.

Is the Applicant entitled to payment of the amount of R29 482 325 92,00.

[54] The main relief sought by the Applicant is for payment of the sum of R29 482 325 92,00.

[55] As I have indicated above, the Applicant struggled to find a cause of action on which it bases its application for the payment of VAT. Initially, the Applicant stated that it had made an error in not including VAT in its invoices and later raised estoppel and half-heartedly waiver. The issue of mutual mistake, common mistake or rectification does not arise because it has neither been raised nor pleaded in the papers. Eventually, the Applicant submitted in the main that it seeks payment of VAT because of its tax obligation towards SARS. But this does not constitute a recognisable cause of action. The Applicant's liability towards SARS is of no concern to the Respondents. As a business enterprise involved in such an important project involving the public purse, the Applicant should and is expected to know its tax obligations.

[56] It defies logic and does not make business sense for a party to submit a tender of this magnitude without any knowledge of its tax obligations. Although this is not in the papers, it is fair and reasonable to assume that the Applicant would previously have been involved in such projects requiring the payment of VAT.

- [57] It is not in dispute that the invoice that was presented to the Respondent was according to the Memorandum of Agreement, to be VAT inclusive.
- [58] In *Ally v Courtesy Wholesalers (Pty) Ltd*¹⁰ it was held that the obligations imposed by the terms of a contract are meant to be performed, and if, they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract or, in the first two cases, to be in mora, and, in the last case, to be guilty of positive malperformance¹¹.
- [59] I know of no general proposition that a contracting party in the position of the Respondent should make its contracting party aware of one of the terms of the contract which both parties are aware of. A party who does not include VAT on its invoices under circumstances where it should have done so, cannot blame its contracting party about its own reckless mistake. In any event, the invoices were supposed to be VAT inclusive, and this is how the Respondent understood them to be. It was not unreasonable for the Respondent to believe that the invoices included VAT. Section 64(1) of the VAT Act also supports the contention of the Respondents that the invoice paid to the Applicant included VAT or at least is deemed to have included VAT.
- [60] Any cause of action for the recovery of VAT by the Applicant must have addressed this deeming provision which the Applicant did not even attempt to do.
- [61] The *Public Finance Management Act No: 1 of 1999* ("the PFMA Act") provides for the roll-over of unspent budget from the preceding year to the following year¹². Contrary to the Applicant's submissions, the unspent budget is not available at all times to a department because the PFMA Act as well as the Treasury Regulations govern how it should be allocated. Section 53(4) places the responsibility on the accounting officer of a state organ to ensure that expenditure of the public entity is in accordance with the approved budget and the PFMA

¹⁰ 1996 (3) SA 134 (N)

¹¹ Id 149F-150H

¹² Section 31(2)(g) of the PFMA

further makes provision for unspent budget to be returned to the National Revenue Fund.

[62] I am of the view that an organ of state cannot spend public funds merely because such funds are within the allocated budget. I therefore disagree with the Applicant that it is entitled to payment of the amount of R23 155 797, 23 simply because it falls within the allocated budget. The Applicant must identify a cause of action in terms of which it relies upon for the payment of VAT by the Respondent and has failed to do so.

[63] I accordingly find no basis for the payment of R29 482 325, 92 to the Applicant and this claim should therefore fail.

Is the Applicant entitled to payment of the amount of R6 326 528,70

[64] It is common cause that the payment of the amount of R6 326 528,70 to the Applicant would fall within the allocated budget of R350 000 000.

[65] For the reasons stated above in respect of my take on the payment of the amount of R29 482 325, 92 I am of the view that this alternative claim should also suffer the same fate.

[66] For all these reasons the application is dismissed with costs, those costs to include the costs of two counsel, where so employed.


A handwritten signature in black ink, appearing to read 'Rathaga Ramaweale', is written over a horizontal line. The signature is stylized and cursive.

RATHAGA RAMAWELE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

For the Applicant: M Dewrance SC with Mark Smith instructed by Cliffe Dekker
Hofmeyr

For the Respondent: V Notshe SC with Mandla Mkhatswa instructed by The
State Attorney, Pretoria