



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

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

SIGNATURE

DATE: 11 June 2025

Case no: A2024-084497

In the matter between:

CATALINA INVESTMENTS (PTY) LTD

Appellant

and

GOVERNMENT PENSION ADMINISTRATION AGENCY

Respondent

CORAM: REID J, COWEN J AND WILSON J

JUDGMENT

WILSON J (with whom REID J and COWEN J agree):

- 1 The appellant, Catalina, takes issue with an order given by a single judge of this division. In that order the judge answered two of six questions posed to her as part of an agreement to separate the issues raised in a trial action Catalina had instituted.

The agreements

- 2 Catalina was appointed to a panel of specialist tracing agents set up by the respondent, the GPAA. The panel provided the GPAA with a stable of agents upon which it could call from time-to-time to trace individuals to whom pension benefits were due, but with whom the GPAA had lost contact.
- 3 The GPAA appointed Catalina to the panel after a competitive tendering process. The terms of Catalina's appointment were set out in two documents: a "master agreement" and a "service level agreement". The master agreement set out the conditions of Catalina's membership of the panel, and was terminable on notice, or by effluxion of time after 36 months. The service level agreement dealt with the standards to be adhered to, and the process to be followed, in carrying out instructions to trace specific beneficiaries of government pension funds. The service level agreement also set out the fee Catalina would be paid on the completion of each instruction. The service level agreement was not terminable on notice. It could only be cancelled on breach.

The dispute

- 4 A dispute arose about the number and frequency of instructions Catalina could expect to receive as a result of its membership of the GPAA's panel. Although the master agreement made clear that "[a]ppointment to the Tracing Panel does not guarantee that the Service Providers will receive work during their appointment term", and that the issuing of instructions to Catalina would be strictly "*ad hoc*" (clause 4.2), representatives of the GPAA apparently created the unfulfilled expectation that Catalina would receive a minimum number of

instructions – not less than 1000 during every year that Catalina remained a member of the panel.

- 5 The GPAA ended the dispute by terminating its master agreement with Catalina on notice, as it was entitled to do. The notice of termination, signed by the GPAA's chief executive officer, was issued on 22 October 2018. It is clear from the notice of termination that the GPAA took the view that the service level agreement would also be cancelled, even though the service level agreement itself could only be cancelled on breach, and it was not suggested that Catalina had committed any breach of either the service level agreement or the master agreement.
- 6 On 13 October 2020, Catalina's attorneys wrote to the GPAA's chief executive officer and claimed that the service level agreement was not terminable on notice, but only cancellable on breach. Since there was no suggestion that Catalina had committed any such breach, so Catalina's attorney contended, the attempt to invoke the master agreement's termination clause to bring an end to the service level agreement was unlawful, and constituted a repudiation of the service level agreement. Catalina accepted that repudiation, and alleged that, as a result of it, Catalina had suffered a loss of R5.55 million, being the amount that Catalina would have profited had the service level agreement continued for the remainder of the 36 month period for which Catalina had been appointed to the panel under the master agreement. Payment in that amount plus interest was demanded within ten days, failing which action for the recovery of the loss would be instituted.

Proceedings in the court below

- 7 The GPAA did not see things Catalina's way, and in due course, Catalina issued summons for recovery of R5.55 million plus interest. Catalina's claim came before the court below on 31 October 2023. At the outset of the hearing, the court below was asked to accept an agreement between the parties to separate six issues from the remaining questions in the action, and to decide them first.
- 8 The court below appears to have accepted that agreement, but there is nothing on the record to suggest that an order to that effect was made. This was irregular. A court asked to separate issues may not informally adopt the parties' agreement to do so. It must evaluate the separated issues carefully, bearing in mind that questions which appear discrete at the outset of a trial often become hopelessly entangled, and that the duty to ensure that "the issues to be tried are clearly circumscribed" falls ultimately upon the court itself (see *Denel (Pty) Ltd v Vorster* 2004 (4) SA 481 (SCA), paragraph 3). That is why rule 33 (4) requires a separation order. In making such an order, a court must "apply its mind to whether it is indeed convenient that [issues] be separated". If a separation is appropriate in principle, then "the questions to be determined must be expressed . . . with clarity and precision" (*Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) paragraph 21).
- 9 The court below did not apply its mind in the manner required, and did not make the necessary order. As a result, the trial proceeded over five days of evidence on six separated questions, many of which were as entangled with each other as they were with the issues from which they were purportedly

separated. Much of the evidence led was also immaterial to the main dispute between the parties.

- 10 The court below appears to have appreciated this, since it eventually resolved the matter by answering only two of the questions posed to it. However, when the matter came before us, counsel conceded, in my view correctly, that only one of these issues really needed to be decided. It is to that issue that I now turn.

The issue on appeal

- 11 The trial court ultimately dealt with Catalina's claim on the straightforward basis that the effect of terminating the master agreement was also to bring an end to the service level agreement. Although the trial court did not expressly say so in its judgment, it appears to have accepted that the service level agreement could not survive the termination of the master agreement for very long. This is because the service level agreement only applies to instructions sent to entities which are on the panel of tracers the GPAA constituted. Since the termination of the master agreement meant that Catalina was dismissed from the panel, the service level agreement could only subsist for so long as Catalina had not completed the instructions that had been sent to it before the master agreement was terminated (see paragraphs 50 and 51 of the judgment of the court below).

- 12 Accordingly, the termination of the master agreement did not constitute a repudiation of the service level agreement, since the service level agreement applied only to instructions sent to Catalina by virtue of its membership of the panel. Once Catalina's membership of the panel had been ended, the service

level agreement would fall away after any pending instructions sent to Catalina had been completed.

13 Before us, Ms. Mpakanyane, who appeared with Mr. Bellin for Catalina, contended that the court below ought to have found that the GPAA was precluded from terminating the service level agreement on notice, because no right to do so was expressly recorded in the service level agreement itself. But to accept this argument, we would have to treat the master agreement and the service level agreement as hermetically sealed from each other.

14 Neither Catalina nor the GPAA could seriously have intended that approach, because neither agreement can function without the other. The express terms of the service level agreement make clear that it is umbilically linked to the master agreement: “[t]his Agreement together with the Main Agreement and Annexures thereto constitutes the entire agreement between the parties” (clause 21.1 of the service level agreement). Moreover, the master agreement defines the services to be performed by a member of panel by reference to “Service Levels” which “shall be set out in” the service level agreement (clause 6.1 of the master agreement).

15 There are several other textual indicia of this relationship in both the service level and master agreements, but I need not deal with them. There is no conceivable basis on which it could be contended that the master agreement and the service level agreement did not in fact form one larger arrangement. In terms of that arrangement, instructions to trace government pension beneficiaries would be assigned to Catalina by virtue of its membership of the panel. Catalina would then carry those instructions out in terms of the service

level agreement. The termination of Catalina's panel membership, which Catalina accepts the GPAA could execute more or less at will, meant the end of the whole arrangement, at least once Catalina had completed any pending instructions assigned to it at the time of its dismissal from the panel.

- 16 It was faintly contended that this way of interpreting the two agreements together lacked business efficacy, and for that reason was not a "sensible or businesslike" construction of the agreements of the sort required by the decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph 18. I can see how reading the two agreements together in the manner the court below did was not particularly efficacious for Catalina, but that is not the test. "Businesslike" interpretation is not merely interpretation that favours the commercial interests of the party relying on it. It is interpretation that gives business efficacy to the agreement as a whole. I fail to see how the arrangement between the GPAA and its agents defined in the service level and master agreements could function except by treating each agreement as part of a larger contract incorporating both of them. The master agreement provides only for membership of a panel, but not for the processing of instructions or the payment of Catalina. Conversely, the service level agreement provides for the processing of instructions and the payment of Catalina, but the right to process the instructions and to be paid for doing so only accrues to members of the panel appointed in terms of the master agreement. Treating the two agreements as entirely separate is neither sensible nor businesslike.

- 17 Finally, it was contended that the relationship between the master agreement and the service level agreement had to be ascertained in light of the maxim “*generalia specialibus non derogant*”. This Latin maxim, which roughly translates as “general provisions do not derogate from specific ones”, is usually deployed to interpret statutory text. Although I accept, as Ms. Mpakanyane urged, that there is authority for the proposition that the maxim can also play a role in contractual interpretation (see *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 at paragraph 11), the maxim finds no application in this case.
- 18 The maxim was relied upon to contend that the “general provision” authorising the termination of the master agreement could not be read to qualify or detract from the “special provision” in the service level agreement which states that the service level agreement can only be cancelled on breach. But the maxim does not work like that. For the maxim to apply, the provisions being interpreted would, on the face of it, have to apply to the same thing. Here the termination clause in the master agreement and the cancellation clause in the service level agreement apply to two different things: membership of the panel on the one hand, and the processing of specific instructions on the other. The clause allowing the GPAA to terminate Catalina’s panel membership did not “derogate” from the clause providing for the cancellation of the service level agreement on breach.

Order

- 19 It follows from all of this that the court below was right to conclude that the termination of the master agreement did not constitute the repudiation of the

service level agreement. Far from being repudiated on termination of the master agreement, the service level agreement would have to continue until Catalina had completed any pending instructions.

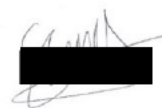
20 However, in my view, the court below ought to have appreciated that its conclusion on that issue spelt the end of Catalina's case, and to have dismissed the action outright. Counsel before us were agreed that this is the correct approach. Ms. Mpakanyane quite properly conceded that if we agreed with the court below on the principal issue, then there was nothing left of Catalina's case. In exercising our power to "amend" the decision of the court below and to "render any decision which the circumstances may require" (section 19 (d) of the Superior Courts Act 10 of 2013), we shall substitute paragraph 4 the order of the court below with an order dismissing Catalina's action.

21 For all these reasons –

21.1 The appeal is dismissed with costs. Counsel's costs may be taxed on scale "B".

21.2 Paragraph 4 of the order of the court below is set aside and is substituted with the following order –

"The plaintiff's action is dismissed with costs."



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 11 June 2025.

HEARD ON: 7 May 2025

DECIDED ON: 11 June 2025

For the Appellant: M Mpakanyane
P Bellin
Instructed by Edward Nathan Sonnenbergs Inc

For the Respondent: W Lusenga
Instructed by Ledwaba Mazwai Attorneys