

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2021 / 17889

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

17 MARCH 2025

Judge Dippenaar

In the matter between:

ANDZANIMIKULA TRADING (PTY) LTD

PLAINTIFF

and

TCI-TISO (RF) (PTY) LTD

DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 17th of MARCH 2025.

DIPPENAAR J:

[1] This is a trial action in which the plaintiff sought payment of an amount of R817 500, together with interest and costs. The salient facts were common cause and were agreed to at pre-trial conferences held on 12 and 22 February 2025 respectively. They further agreed the contents of the documentary evidence attached to the particulars of claim. At the pretrial conferences, the parties further agreed on certain dates, relevant to the action, which had been incorrectly referred to in both parties' pleadings.

[2] That notwithstanding, the defendant did not agree to the matter being presented based on the common cause facts. It insisted on evidence being presented. The plaintiff accepted the duty to begin and called Mr Makgatsa as witness. He was the individual who oversaw the transaction. The defendant intimated at the commencement of the hearing that it intended calling a witness. After the closure of the plaintiff's case, it however elected not to call a witness and closed its case.¹

[3] The genesis of the dispute lies in a facilitation agreement concluded between the parties on 31 July 2020 in terms whereof the defendant would facilitate the supply of goods and/or services by the plaintiff from various suppliers of such products, for on-sale by the plaintiff to various off-takers. In terms of the agreement, a bank account was designated by the plaintiff which was ceded to the defendant in terms of a security cession agreement concluded between the parties. The conclusion of the agreements and their terms were common cause.

¹ Both parties provided written heads of argument at the hearing. After the finalisation of oral argument, the defendant's counsel sought an opportunity to deliver supplementary heads of argument. I acceded to this request and afforded the plaintiff an opportunity to respond. Both parties delivered supplementary heads of argument, which have been taken into consideration.

[4] The background facts were common cause. The plaintiff on 23 June 2020 purchased certain goods from a supplier for R15 million and on-sold them to the Department of Health, Gauteng for R18 million. On 30 October 2020, the defendant sent an invoice to the plaintiff for R16 350 100 relating to amounts due to it in terms of the facilitation agreement. The facilitation agreement provided that the plaintiff was to pay all amounts due to the defendant by 30 October 2020. It did not. Payment was only made on 18 November 2020. On 18 November 2020, the defendant presented the plaintiff with a further invoice for R940 125, dated 30 October 2020. That invoice forms the nub of the dispute ('the penalty invoice').

[5] The penalty invoice provided in relevant part:

'Tax invoice dated 30 October 2025, Invoice Number – INV-0442, Reference Penalty, VAT Number (4320289244),

Description - Penalty fee @ 5% of the total of R16 350 100,

Quantity (1.00) Unit Price (817 500.00) Vat (15%) Amount ZAR (817 500.00), Subtotal (817 500.00), Total Standard Rate Sales (excluding capital goods) 15% (122 625.00), Invoice Total ZAR (940 125.00), Total Net Payments ZAR (0.00), Amount Due ZAR (940 125.00)

Due Date: 31 October 2020.'

[6] The plaintiff's pleaded case was that the defendant without authority transferred amounts of R16 350 100 and R940 125 from the plaintiff's designated account to itself. At the hearing, the plaintiff abandoned reliance on the transfer of the amount of R16 350 100.

[7] The plaintiff pleaded:

'When the defendant made the payment of R940 124 from the plaintiff's FNB account to the defendant's designated account, the defendant did so without any legal basis to do so, without valid causa alternatively fraudulently alternatively in error. The said sum was neither due nor owing to the defendant'.

[8] It was undisputed that during November 2020, the defendant repaid an amount of R122 650 to the plaintiff, resulting in the dispute between them concerning the balance of R817 500, reflected on the penalty invoice. The defendant pleaded that '13. *The said amount was a discount of 13% on the penalty fee*'.

[9] The parties agreed that the date of 31 July 2020 was incorrect and should have been 30 October 2020 as being the date on which payments by the plaintiff to the defendant should have occurred. They further agreed that the defendant was only paid on 18 November 2020, correcting the date pleaded. It was thus common cause that the plaintiff did not pay the amount due on 30 October 2020, but only paid it late and on 18 November 2020.

[10] The parties further agreed that the averment in para 5.18² of the particulars of claim was incorrect wherein it was pleaded that the parties agreed the defendant would be payable on the successful conclusion of the services and payment received from the off-taker. It was agreed at the last pre-trial conference that the facilitation agreement did not contain such a provision. The plaintiff further abandoned reliance on the notion in the particulars of claim that the defendant was required to obtain the plaintiff's consent prior to transferring any amounts from its account. It thus conceded the defendant's contention that the invoices were deducted under clauses 10.1 and 10.3 of the security cession agreement. By necessary implication it was undisputed that no consent was sought or provided for the transfer of the amount of R940 000.

[11] The crux of the defendant's defence was that it deducted the disputed amount as a penalty in terms of clause 8.1 of the facilitation agreement and was entitled to do so. The penalty invoice stated expressly that the charge was levied as a penalty. In argument, the defendant submitted that the entire basis of the plaintiff's claim fell away once the late payment was conceded as the agreement in its terms does not support an unlawful payment made outside the terms of the agreement. It further contended

² The second para 5.18.

that no case for fraud was made out and that a new claim for enrichment was raised in the plaintiff's heads of argument.

[12] The plaintiff on the other hand argued that the common cause facts established that the payment of R817 500 was made to the defendant without just cause and it was entitled to judgment. It submitted that the defendant's interpretation of clause 8.1 was wrong and that the agreement did not provide for the imposition of any penalty as set out in the penalty invoice. It abandoned any reliance on fraud and limited its case solely on the contention that the payment was made *sine causa*.

[13] In its heads of argument, the defendant submitted that *"the plaintiff pivots away from the claim set out in the particulars of argument and seeks to introduce a claim from interpretation of contract"*. It disputed that there was any interpretation issue. That contention is untenable. The very issue to determine is whether clause 8.1 permits the defendant to levy a penalty of 5% of the contract price on the defendant. That requires a proper interpretation of the facilitation agreement.

[14] The defendant's further submissions that the 'new claims' raised in the heads of argument for the first time are 'baseless, procedurally unfair and impermissible', are equally untenable. As the defendant itself relied on a particular interpretation of clause 8.1, it invoked the need to consider a proper interpretation of that clause. The enrichment claim based on the *condictio sine causa*, is also not a new claim, but is set out in the particulars of claim when read in context, including paragraph 15.

[15] The issue between the parties in my view calls into question the proper interpretation of the facilitation agreement. Clause 8.1 of the facilitation agreement provides:

'If any amount which is due and payable in accordance with the provisions of this Agreement is not paid in full on its due date, the outstanding amount shall bear interest at the prime overdraft rate plus 5% (five percent), calculated on and with effect from the due date for payment thereof up to determining the date of actual payment thereof.'

[16] It is trite that a unitary linguistic, contextual and purposive interpretation is required.³ From a simple reading of the clause, the word 'interest' is expressly used. If clause 8.1 was intended to provide for a penalty fee as a percentage on the outstanding amount, the clause would have expressly stated it. Instead, the clause provides for the insertion of a time period, which when considered with the express use of the words 'interest' and 'prime overdraft rate plus 5%' signifies an intention to calculate interest at a specific rate over a specific period of time. The clause nowhere refers to the full contract price forming a component of the interest calculation. The levying of interest is an entirely different matter to the levying of a penalty. The context and purpose of the clause affirms this. In terms of clause 8.1 interest is to be levied at a specific rate over a specific period, because a payment is not made on due date.

[17] The agreement in any event in express terms provides for the levying of a penalty in certain circumstances in a separate provision. That makes it clear that a distinction is to be drawn between interest and a penalty. In terms of clause 13 of the agreement, a penalty is levied based on the amount due under the agreement at a value of 5% of that value in the circumstances set out in clauses 11 and 12. The levying of a 5 % penalty fee is expressly referred to in clause 13.2. It is undisputed between the parties that the provisions of clauses 11, 12 and 13 do not relate to the present dispute.

[18] During argument, the defendant submitted that on a proper interpretation, the word 'interest' must include 'penalty'. That submission lacks merit. It is clear that the agreement expressly draws a distinction between interest and penalty. In my view, for the reasons provided, applying the relevant principles, clause 8.1 of the agreement relates to interest and not a penalty.

[19] It is clear that there was a measure of confusion on the part of the defendant if regard is had to its plea. The defendant pleaded:

³ *Natal Joint Municipal Pension Fund v Edumeni Municipality* 2012 (4) SA 596 (SCA) at 603F-604E; *Bothma-Batho Transport (Edms)Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 94 (SCA0 para 12; *KPMG Chartered Accountants (SA) v Securefin Limited and Another* 2009 (4) SA 399 (SCA0 at 409F-410A.

'8.2 The amount of R940 125 was a penalty fee which was due and payable by the plaintiff to the defendant, as the plaintiff failed to make full payment to the defendant on or before 31 July 2020.

8.3 While the defendant was entitled to charge the plaintiff interest at the prime interest overdraft rate plus 5%, calculated from the due date for payment up to and including the date of actual payment, that is, from 31 July 2020 to 30 October 2020, the defendant elected to charge the plaintiff only 5% of the total amount due, calculated over only one calendar month'.

[20] It thus expressly pinned its colours to the mast of a penalty fee in paragraph 8.2 of the plea. That accords with the contents of the penalty invoice which also expressly refers to a penalty fee. Whilst paragraph 8.3 of the plea is difficult to understand, it is underpinned by the notion that instead of charging interest under clause 8.1 of the agreement, the defendant elected to charge 5% of the total amount due, 'calculated over only one month.' That seems to conflate the contractual provisions pertaining to interest and those pertaining to a penalty. That is impermissible and is not in accordance with the relevant contractual provisions which regulate the parties' relationship.

[21] Factually, as appears from the penalty invoice, the defendant charged 5% of the total amount due. That is common cause between the parties. The penalty fee of 5% of the contract does not, *ex facie* the defendant's invoice, constitute a calculation of the outstanding interest from 31 October 2020 to 18 November 2020. Rather, it is framed as a calculation of 5 % of R16 350 100, being the whole contract amount, to which VAT of 15% was added.

[22] The defendant has not in my view established any contractual entitlement to do so and its reliance on clause 8.1 does not avail it. That clause provides a specific basis on which interest may be charged for the period the plaintiff's payment was late. The penalty invoice was not calculated on that basis and is in an amount substantially in excess of what clause 8.1 would allow.

[23] It is trite that in a contractual claim, once a plaintiff has established that there is no basis for a payment, a defendant attracts a duty of rebuttal. As held in *Skjelbreds Rederi A/S v Heartless*:⁴

“The true position as to the question of onus is that the respondent bears the overall burden of showing that it is possessed of rights which entitled it to claim the attachment order. The overall onus remained on it throughout. However, since it is armed with a written agreement which appears, on the face of it, to confer such rights on it, the appellants bear the burden “(weerleggingslas)” of rebutting that prima facie case.”

[24] The defendant did not attempt to present any evidence to justify the penalty invoice in its terms. It further did not raise any counterclaim nor seek set off in its plea. Reliance was solely placed on the provisions of clause 8.1 of the facilitation agreement. The defendant failed to establish that the clause provides it with a valid defence.

[25] The plaintiff’s cause of action was framed on the basis of unjust enrichment. It abandoned reliance on the alternative causes of action. I agree with the defendant that those causes of action were not properly pleaded.

[26] The relevant principles pertaining to the *condictio sine causa* are set out by the Supreme Court of Appeal thus in *Mhlari and Others v Nedbank Ltd*:⁵

‘The requirements for a claim based on unjust enrichment are that the defendant must be enriched, the plaintiff must be impoverished, the enrichment must be at the expense of the plaintiff, and the enrichment must have been unjustified (sine causa). Although there is no unified general enrichment action, these are requisites common to all enrichment actions

[18].....the condictio sine causa specialis lies where the money is in the hands of the defendant without cause, whether due to the plaintiff’s mistake or not’.

[27] Considering all the facts, I conclude that the plaintiff has established that there was no valid basis for the payment of the penalty charge levied. The defendant was

⁴ *Skjelbreds Rederi A/S v Heartless* 1982 (2) SA 710 (A):

⁵ *Mhlari and Others v Nedbank Ltd* [2024] ZASCA 39 (4 April 2024) paras 17- 18 and the authorities cited therein.

thus not entitled to make payment of the amount of R817 500 from the banking account of the plaintiff. The payment of such amount was made without any legal cause. It was not disputed by the defendant that the plaintiff was impoverished and the defendant enriched by the payment of that amount. The common cause facts established this.

[28] It follows that the requirements of the plaintiff's cause of action have been met and it is entitled to judgment as sought. Ultimately, the defendant did not establish any cogent defence to the plaintiff's claim. The plaintiff sought interest from the date on which the payment was made from its banking account, to wit 18 November 2020. Such date is appropriate and no argument was advanced to the contrary.

[29] There is no reason to deviate from the principle that costs follow the result. The plaintiff sought punitive costs on the scale as between attorney and client based on the extension of the trial due to the defendant's insistence that the plaintiff presents evidence, notwithstanding the fact that all the material facts were agreed on between the parties as being common cause. It further sought the costs of senior counsel on scale C.

[30] The defendant in turn argued that no punitive costs order was warranted and that, even if the plaintiff was successful, the matter was not complicated and costs on scale A should be granted.

[31] Ultimately, the purpose of the cross examination by the defendant was unclear and simply resulted in plaintiff's counsel successfully objecting to the line of questioning pursued by defendant as it sought to undermine the very common cause facts the parties had agreed upon on 21 February 2025. However, the evidence did not substantially extend the duration of the trial, which was completed within one day. For that reason, I am not persuaded that a punitive costs order is warranted. Considering the intricacies which arose during the trial I am persuaded that costs should be awarded as sought by the plaintiff.

[32] In the result, judgment is granted against the defendant for:

1. Payment of the amount of R817 500.00
2. Interest on the amount in 1 above *a tempore morae* from 18 November 2020 to date of payment.
3. Costs, including the costs of senior counsel, on scale C.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

HEARING

DATE OF HEARING : 24 FEBRUARY 2025

DATE OF JUDGMENT : 17 MARCH 2025

APPEARANCES

PLAINTIFF'S COUNSEL : Adv R. du Plessis SC

PLAINTIFF'S ATTORNEYS : Geyser van Rooyen Attorneys

DEFENDANT'S COUNSEL : Adv N. Nako

DEFENDANT'S ATTORNEYS : Strauss Daly Inc.