REPUBLIC OF SOUTH AFRICA

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

CASE NO: **12184/2013**

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

SIGNATURE 09/02/2017 DATE

In the matter between:

FLI-AFRIKA TRAVEL (PTY) LTD Appellant

and

SOUTH AFRICAN FOOTBALL ASSOCIATION Respondent

JUDGMENT

MATOJANE J

Introduction

[1] On 9 April 2013, the plaintiff issued summons against the defendant for the payment of the sum of R13 989 452.78. The plaintiff relies on a written agreement dated 23 January 2009 in terms whereof it alleges that the defendant undertook to supply the plaintiff with 2500 tickets per week, to various World Cup games for the

FIFA World Cup held in South Africa in 2010. It is alleged that the damages flow from the plaintiff's loss in paying for hotel rooms in terms of the written agreement.

[2] In the alternative, the plaintiff alleges that it was a tacit term of the agreement that, in complying with its obligations in terms of the agreement, the plaintiff would lay out money for hotel accommodation and would be reimbursed by the defendant for the costs of all travel arrangements.

[3] The defendant avers that the parties concluded an agreement in full and final settlement whereby there was no further obligation on the defendant to provide tickets for the World Cup arising from the written agreement of 23 January 2009. Alternatively, the defendant avers that the agreement concluded on 23 January 2009 is void and of no force or effect arising from an earlier agreement entered between FIFA and SAFA in 2004. Further alternatively, the defendant relies on prescription and impossibility of performance and waiver.

[4] In its amended replication the plaintiff pleaded as follows:

1. Insofar as the defendant's defense that the claim has been extinguished by the full and final settlement agreement of 15 April 2010, the plaintiff replicates that "only obligations for the period after 16 April 2010 were affected" and " the obligations which arose before 16 April 2010 remain unaffected and "that the plaintiff is not barred from claiming any payment as alleged by the defendant".
2. Insofar as the defendant's defence that the SLA is void, the plaintiff replicates by raising estoppel. Estoppel is also raised to the defence of impossibility of performance on the grounds of so-called "representation" by the defendant, which it is alleged was to the plaintiff's detriment.
3. With regard to prescription the plaintiff has replicated that the full and final settlement agreement constitutes an admission of liability which interrupted prescription.

Background

[5] On 10 July 2007 the parties concluded a Memorandum of Understanding ("MOU") which provided for a cooperation framework for a period of four years, commencing on 1 July 2007. It was recorded that the plaintiff will be the official

travel agency of the defendant and as such responsible for all travel arrangements both locally and internationally, inclusive of the executives and various regions' arrangements for the 2010 FIFA World Cup.

[6] The MOU discloses that the close corporation controlled by Mr Camaroodeen was responsible for all travel arrangements. Nothing turns on the apparent error. As a partner of the project, it was agreed that the defendant would receive 40% of all benefits arising out of the MOU.

[7] On or about 20 July 2009, the plaintiff and the defendant concluded what was called "addendum to the joint-venture agreement". It was recorded that contrary to the agreement of 10 July 2007, the defendant has requested and has guaranteed to FIFA through MATCH Event Services ("Match"), that it will effect payment and guarantee the relevant Tour Operator Programme License Fee and deposit on tickets requested in connection with the Tour Operator Program, for and on behalf of Fli-Afrika, thus ensuring that Fli–Afrika is able to meet its obligation in terms of the Tour Operator Programme for the FIFA 2010 World Cup in South Africa.

[8] The MOU was cancelled by mutual agreement between the parties on 27 January 2009. It was recorded that the Service Level Agreement replaces the MOU in its entirety from the date of signature of the Service Level Agreement by both parties, being 23 January 2009.

[9] The rights and obligations of the parties in terms of the Service Level Agreement as set out in clauses 3 and 4 thereof as follows:

> "3.1 The Association requires Fli-Afrika to source and supply 2 500 (two thousand five hundred) Football World Cup 2010 "Packages" per week for and on behalf of the Association, its VIPs and various international Football Federations referred to Fli-Afrika Travel by the Association.
>
> 3.2 These Football World Cup 2010 Packages are to include accommodation in various host cities, tickets to various Football World Cup Games, and return transport from the accommodation provided in terms of the Package to the Stadium where the games are played.

3.3 The Association irrevocably undertakes to supply Fli-Afrika Travel with 2 500 (two thousand five hundred) tickets per week to various World Cup Games.

3.3.1 The Association further irrevocably undertakes to make payment to Fli-Afrika Travel of the balance of any weekly unsold Packages in the event that Fli-Afrika is not able to sell 2 500 Packages per week.

3.4 All such amounts as shall become payable by the Association to Fli-Afrika Travel from time to time shall be paid by not later than the 7th day of the next succeeding month in which the debt arose."

[10] In terms of clause 4 thereof it is recorded that:

"FLI-AFRIKA agrees to pay over to the Association 10% of any benefits which may accrue after the inception of the partnership, net after payment of all expenses relating to the FIFA World Cup, which amount will be utilised towards the Association's Development Programme."

[11] Regarding funding it is recorded that:

"FLI-AFRIKA will provide the necessary capital and in turn, the Association will guarantee all travel arrangements."

[12] Clause 9 provides that:

"9.1. This agreement constitutes the whole agreement between the parties relating to the subject matter hereof."

[13] On 6 August 2009, Fli-Afrika was informed that it had been appointed by Match on behalf of FIFA as a Participating Tour Operator in the Tour Operator Programme for the 2010 FIFA World Cup in South Africa, with effect from 24 July 2009.

[14] On the 17 August 2009 and in terms of the Service Level Agreement and the addendum thereto, SAFA on behalf of Fli-Afrika, made payment of Match's Tour Operator's License and Reservation fee.

[15] On 15 April 2010 the parties concluded a full and final agreement which terminated the defendant's obligation to supply tickets to the plaintiff for the World Cup because the plaintiff would, instead, obtain such tickets from Match.

[16] In April 2010, the plaintiff entered an agreement with Match in terms whereof Match, as the operator of the Tour Operator Program on behalf of FIFA, agreed to allocate and supply to the plaintiff the tickets identified in the schedule to the agreement and Match undertook to endeavor to source, allocate and supply to the plaintiff a second tranche of tickets.

[17] The plaintiff alleges in its particulars of claim that during the period January until December 2009, it got hotel accommodation in compliance with its contractual obligation to the defendant and incurred other expenses, including travel, in terms of the agreement. It further alleges that the defendant failed to perform in terms of the agreement and that it did not supply the plaintiff with any tickets.

The evidence

[18] Mr Nazeer Camaroodeen, the managing director of Fli-Afrika, Mr Raymond Hack, a former CEO or general secretary of SAFA and Mr Danny Jordaan, the current president of SAFA testified on behalf of the plaintiff. Mr Jordaan attended by means of subpoena. The only witness who testified on behalf of SAFA was Mr Gronie Hluyo, who is the financial director of SAFA.

[19] Mr Camarooden testified that under the addendum to the joint venture he marketed packages primarily to consumers within the SADC region, for the attendance of soccer games during the 2010 World Cup. These packages included, inter alia, accommodation, flights and other services like tours and transport to and from stadiums. He testified that he was unable to sell the packages without securing confirmation from the defendant of at least 13 996 tickets to various matches to be held during the 2010 World Cup.

[20] Mr Hack resigned from SAFA with effect from early January 2010. He was replaced by Mr Leslie Sedibe. Messrs Sedibe, Hluyo and Camaroodeen held a meeting at Melrose Arch Hotel on 26 January 2010, where Fli-Afrika kept asking for

confirmation of tickets. Following on this meeting, Mr Sedibe sent a letter to Mr Camaroodeen on the same day stating:

> "As discussed at the meeting, you indicated to me and Gronie that you had copies of the agreements which explain the relationship between SAFA and Fli-Afrika in your office but later advised that the documents are with your attorneys. In this regard, I would urge you to please forward whatever documents which explain the nature of the relationship and the various commitments made by either SAFA or Fli-Afrika or visa versa to enable me to advise FIFA and MATCH of the total number of tickets to be allocated to Fli-Afrika (depending on the resolution of the payments terms and methods for such tickets). In the absence of such an agreement, I think it would be difficult to explain any purchase of tickets by SAFA on behalf of Fli-Afrika."

[21] Instead of providing the defendant with the Service Level Agreement the plaintiff approached Webber Wentzel Attorneys, which addressed a letter to the defendant's attorneys stating:

> "As set out at length in our letter dated 24 March 2010, our clients firmly believe that a joint venture agreement is in effect between your client and our client. All discussions to date between yourselves and ourselves, and between our respective clients, have centred on the fleshing out of the existing partly written, partly oral agreement, which exists between our respective clients ...."

[22] It is clear that Mr Camaroodeen had not supplied the Service Level Agreement to his attorneys and in his evidence, he relied on the MOU and the addendum of 20 July 2009 and not the Service Level Agreement upon which the present claim is based.

[23] He instructed his attorneys to demand a written undertaking from the defendant to get from FIFA and to supply the plaintiff's tickets when they became available. He testified that the plaintiff had already incurred substantial expenses in executing the MOU and addendum thereto and had spent R27 million in booking hotels. He testified that nobody told him that the defendant could not supply any tickets because only FIFA, acting through Match, could do so.

[24] Mr Camaroodeen testified that after he was appointed a tour operator, he requested tickets from Match on an ongoing basis, which tickets he did not package as he got them four weeks before the games started. He denies that the termination of the Service Level Agreement was mutual and that he would not have signed the settlement agreement if he knew what it meant at the time. He only found out that the Service Level Agreement could not be fulfilled by SAFA because of FIFA regulations in 2010 from the then CEO of SAFA, Mr Leslie Sedibe.

[25] Mr Camaroodeen conceded under cross-examination that when Match has an agreement with a tour operator, it familiarises that tour operator with its ticketing policy in terms whereof FIFA reserves for itself the sole and absolute right to determine how such rights are exploited. He testified that he knows that one of the important conditions in the ticketing policy is that FIFA tickets supplied by Match cannot be resold. He explained that FIFA, through Match, makes the tickets available and Match appoints tour operators who then package the tickets.

The applicable law

[26] The principles of interpretation of contracts are well settled. Lewis JA in *North East Finance v Standard Bank* (492/2012) [2013] ZASCA 76 had this to say about the interpretation of contracts in general:

> "The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded."

[27] In paragraph 8 of the particulars of claim, the plaintiff contends that on a proper interpretation of clauses 3.2 and 4 of the agreement, the plaintiff would lay out money for all travel arrangements, including accommodation and would be reimbursed therefor on submission of the expenditure to the defendant. Alternatively, it is alleged that it was a tacit term of the agreement that, in complying with its obligations in terms of clause 3.2, the plaintiff would lay out money for hotel

accommodation and would, as contemplated by clause 4, be reimbursed by the defendant for the costs of all travel arrangements.

[28] It is alleged further in the particulars of claim that during the period January until December 2009, the plaintiff procured hotel accommodation in compliance with its contractual obligation to the defendant and incurred other expenses, including travel, in terms of the agreement.

[29] In correspondence addressed by the plaintiff to the defendant on 1 February 2010, the plaintiff expressly states that it secured accommodation throughout South Africa pursuant to its appointment by Match as a tour operator. The correspondence states:

> "Over and above those contractual obligations to one another, I also record that Fli-Afrika is an official tour operator in respect of the FIFA 2010 World Cup, having been appointed by the agency of FIFA, Match, with the knowledge and support of SAFA.
> I also record that Fli-Afrika has incurred considerable expenses, being millions of Rands, in securing accommodation throughout South Africa, pursuant to its appointment as aforesaid and the contracts concluded with SAFA."

[30] By its admission, the plaintiff did not procure hotel accommodation in compliance with its contractual obligation and its loss in paying for hotel rooms does not flow from the alleged failure by the defendant to deliver the tickets in terms of the agreement.

[31] Clause 3.2 of the Service Level Agreement merely states that the "*Football World Cup 2010 packages are to include accommodation in various host cities, tickets to various Football World Cup Games, and return transport from the accommodation provided in terms of the Package to the stadium where the games are played.*" It does not impose any obligation on the defendant to reimburse the plaintiff for the costs of the hotel accommodation.

[32] In terms of clause 3.1, "*Fli-Afrika is required to source and supply 2500 Football World Cup 2010 'Packages' per week for and on behalf of the Association*"

and in terms of clause 3.3 the "*Association irrevocably undertakes to supply Fli-Afrika with 2500 tickets per week to various World Cup Games*".

[33] Clause 4 deals with contributions by and benefits to the parties and records that Fli-Afrika agreed to pay over to the Association 10% of any benefits which may accrue after the inception of the partnership, net after payment of all expenses relating to the FIFA World Cup.

[34] On a proper reading of clauses 3 and 4, Fli-Afrika would be responsible for the day to day running of its finance and administrative affairs and as such would make travel arrangements and ensure that the necessary costs of such travel arrangements are submitted to the defendant. The necessary costs of travel arrangements do not include hotel accommodation. Mr Camaroodeen conceded under cross-examination that the plaintiff can only source tickets from FIFA. Nowhere does the Service Level Agreement require the plaintiff to book hotels without Match's tickets. Contrary to the allegations in the particulars of claim, Mr Camaroodeen testified that he got hotel accommodation based on an understanding between the parties and in terms of a verbal agreement.

[35] Mr Camarooden's evidence, whilst contrary to the "*whole agreement, no amendment*" term of the agreement, at least confirms that the booking of hotel accommodation was never part of the Service Level Agreement.

[36] On 6 August 2009, the plaintiff was informed by letter that it had been appointed by Match as a participating tour operator in the tour operator programme ("TOP") for the 2010 FIFA World Cup, with effect from 24 July 2009. The letter requested the plaintiff to provide proof of accommodation as a condition for its appointment in terms of the Tour Operator Program terms and conditions. In my view, the plaintiff was obliged to and in fact booked hotel accommodation to comply with the terms and conditions of this appointment.

[37] Mr Camaroodeen testified that the plaintiff was unable to sell packages without confirmation that the defendant will supply the event tickets, for the same reason the plaintiff would not have proceeded to book hotel accommodation without

first receiving confirmation from SAFA about the availability of tickets and not knowing where and when the games will be played unless the bookings were in compliance with Match's terms and conditions.

[38] Mr Camarooden referred to the MOU of 10 July 2007 and the history of his long relationship with SAFA as the reason for booking the hotel accommodation. He never referred to the Service Level Agreement. The plaintiff's attorneys, Webber Wentzel in their letter of demand to the defendant dated 15 March 2010, also do not rely on the service level agreement; the letter reads:

> "Pursuant to the MOU (as amended by the addendum) and in consultation with both parties to these agreements, our client has organised and sold packages primarily to consumers within SADC region for the attendance of soccer games during the 2010 World Cup. These packages include, inter alia, accommodation, flights and, most importantly, match tickets to the various games."

[39] Further, confirmation that the plaintiff was fulfilling its obligation to Match is borne by the fact that contrary to the allegations in paragraph 15 of the particulars of claim, the costs of cancellation to the plaintiff amounted to R27 698 839.26. Mr Camaroodeen denied that he cancelled the hotel bookings. The plaintiff continued paying for hotel accommodation even after concluding an agreement in full and final settlement with the defendant on 16 April 2010 in order to satisfy Match's requirements.

[40] On 15 April 2010 the parties concluded a full and final agreement which terminated the defendant's obligation to supply tickets to the plaintiff for the World Cup because the plaintiff would, instead, obtain such tickets from Match. The plaintiff contends that only obligations for the period after 16 April 2010 were affected and the obligations which arose before 16 April 2010 remain unaffected, and accordingly the plaintiff is not barred from claiming payment. The defendant however, argues that the parties' respective obligations to source and supply tickets were extinguished.

[41] The crisp legal issue the court has to decide on the evidence is whether objectively construed, the aforesaid settlement agreement was made for the purpose of terminating the written agreement concluded on 3 January 2009 and entering a new contract with the defendant, *animo contrahendi*. See *Harris v Pieters* 1920 AD 644, at 654-5.

[42] Watermeyer ACJ in *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241, explains that acceptance of the offer can be done by conduct indicating acceptance of the offer as well as by words expressing it. He made the following observation:

> "Now, a binding contract is as a rule constituted by the acceptance of an offer, and an offer can be accepted by conduct indicating acceptance, as well as by words expressing acceptance. Generally, it can be stated that what is required in order to create a binding contract is that acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can logically be drawn."

[43] The settlement agreement states:

> "FULL AND FINAL SETTLEMENT AGREEMENT
> BETWEEN:
>
> Fli-Afrika (Pty) Limited of 53 Central Street, Houston, Johannesburg, 2198, South Africa ("Fli-Afrika").
>
> South African Football Association of 41 Tiger Moth Road, Cnr Aerodrome Road, and Sailor Malan Street, Building No. 2 Left Wing, Omni Park Offices, Aeroton, Johannesburg ("SAFA").
>
> BACKGROUND
>
> Fli-Afrika and SAFA have together been engaged in certain discussions and/or arrangements which include the provision by SAFA to Fli-Afrika of match tickets for the 2010 FIFA World Cup South Africa.

Fli-Afrika and SAFA wish to confirm by the execution of this full and final settlement agreement that no such commitments for the provision of tickets by SAFA to Fli-Afrika are continuing from the date hereof.

THEREFORE, IT IS AGREED AS FOLLOWS:

1. SAFA hereby confirms that Fli-Afrika has no continuing commitment of whatever kind to acquire tickets for the 2010 FIFA WORLD CUP South Africa from or through SAFA.
2. Fli-Afrika hereby confirms that SAFA has no continuing commitment of whatever kind to provide tickets for the 2010 FIFA World Cup South Africa.
3. The parties, therefore, release each other from any obligations, implied or otherwise, that may exist in connection with any such commitments."

[44] The use of the word '*final*' signifies an intention to put an end to a dispute finally, as does reference to '*settlement in full*'. Clause 1 emphasises that Fli-Afrika has no continuing commitment of whatever kind to acquire tickets from or through SAFA. Clause 2 emphasises the same with SAFA.

[45] Clause 3 refers to '*continuing commitment of whatever kind*' referred to in the preceding paragraphs. In my view, continuing commitments of whatever kind includes an obligation by SAFA to provide tickets before the match. Mr Camaroodeen testified that the obligation to provide tickets arose only once Match had provided SAFA with the tickets. Mr Gronie Hluyo, the financial director of the defendant, confirmed that tickets were confirmed and received from Match during the first week of June 2010.

[46] In my view, the settlement agreement was entered for the purpose of terminating the Service Level Agreement and concluding a new agreement that was to exist independent of the *causa* which gave rise to the compromise. This is apparent from the letter of the 15 April 2010 that Match addressed to the plaintiff and the defendant, in which it is recorded that:

"There seems to be an intention by the parties to enter a formal joint venture agreement at some stage in the future. However, given the commencement of the

Last Minute Sales Phase today, and the need to resolve matters before it becomes impossible to satisfy the ticket requirements of Fli-Afrika, the parties have requested MATCH to assist in an effort to resolve this longstanding impasse."

[47] In all the circumstances, I conclude that the obligation by the defendant to provide tickets before 16 April 2010 was also extinguished by the full and final settlement agreement.

In the circumstances, I make the following order:

The plaintiff's claim is dismissed with costs

K E Matojane
Judge of the High Court
Gauteng Local Division, Johannesburg

APPEARANCES

PLAINTIFF:	Adv. P Pauw SC
	Adv. R G Cohen
Instructed by:	Georgiou Attorneys
DEFENDANT:	Adv. W R Mokhari SC
	Adv. N Ali
Instructed by:	Dikotope Attorneys
HEARING DATE:	28 October to 04 November 2016
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