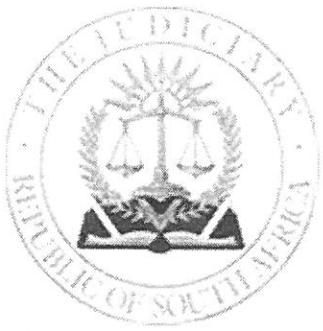

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***3rd February 2017*** Signature:

CASE NO: 2016/25501

In the matter between:

ADAMANTIUM CONSULTING (PTY) LIMITED Applicant

and

ABC HOLDINGS LIMITED Respondent

JUDGMENT

ADAMS AJ:

[1]. In this application the applicant claims payment from the respondent of the sum of R230,048.00, together with *mora* interest thereon at the rate of 10.25% per annum from the 21st July 2016, being the date of service of the application, to date of final payment and cost of the application. The application is founded on an oral agreement *('the agreement')* between the parties concluded on or about the 2nd of December 2015, and the terms and conditions of the agreement were evidenced by an email sent to respondent by the applicant.

[2]. In terms of the agreement, the applicant agreed to render *'consultancy services'* to the respondent at an agreed discounted rate of R220,000.00 per month. The payment terms of the agreement were that payment was to be effected 5 days from date of invoice, and strict compliance with the payment terms was required by the agreement.

[3]. The agreement endured for the period January 2016 to 20th April 2016, when the applicant cancelled same. It appears to be common cause between the parties that the applicant was entitled to cancel the agreement due to breach by the respondent of the payment terms of the contract. Nothing turns on this issue anyway.

[4]. On the 31st October 2016 the respondent made a *'with prejudice'* tender to applicant of an amount of R77,314.02, which amount equates to that portion of the applicant's claim relating to Value Added Tax *('VAT')* payable by the respondent to the applicant in respect of the undisputed amounts due to the applicant, being professional fees and disbursements for consultancy services render at the discounted rate of R220,000.00 per month up to the 20th April 2016, being the date on which the contract was

cancelled by the applicant. The respondent's tender incorporated an admission of liability by it for payment of this amount which relates to the Value Added Tax, which had hitherto not been paid by respondent, despite the fact that, by all accounts the applicant was legally obliged to charge and the respondent was obligated by law to pay same. I interpose here to mention that the correct amount in respect of the outstanding VAT is in fact an amount of R75,950.00, which is less than the amount tendered by the respondent. All the same, in the light of the respondent's *'with prejudice'* tender, there is agreement between the parties that the respondent is liable to the applicant for payment of this amount of R75,950.00.

[5]. The net effect of this admission was that the remaining balance in dispute between the parties was an amount of R154,098.00, which sum relates to the discount of R36,000.00 per month afforded to the respondent.

[6]. It is the case of the applicant that it was a term of the contract that the reduced and agreed consultancy fee was conditional on the applicant's invoices being paid within 5 (five) days of receipt of the invoice, failing which the applicant could claim a reversal of the rebates.

[7]. The respondent does not agree with the applicant's interpretation of the agreement. It was submitted on behalf of the respondent that, whilst the payment terms of the agreement provided that payment should be effected 5 (five) days from the date of the invoice and that the payment terms are to be adhered to strictly, the agreement did not go so far as to provide that in the event of payment of the invoices not being effected timeously, the applicant would be entitled to claim a reversal of the discounted amounts.

[8]. The disputed provision, as incorporated into the email of the 2nd December 2015, provides as follows:

> *'I can agree to reduce my rate as requested further from R256k to R220k, representing a 45% rebate on my rate.* ***I can only offer this rate on a month to month contract basis.*** *A similar clause wrt all time over 160 hours will apply as per the current contract. It is with the understanding that I will have to strictly apply the payment on invoice requirement of the contract, unlike what has been experienced ito super late payments of invoices'.*

[9]. The applicant interprets this clause, especially the portion which reads *'... It is with the understanding that ...'* to mean that the respondent will be charged a reduced fee on condition that the payment terms are strictly adhered to. If not, the applicant would be legally entitled to claim a reversal of the discounted amount from the respondent.

[10]. The first question which requires an answer is whether or not the clause is capable of being interpreted as contended for by the applicant. In my view it does. That leads me to the next inquiry which relates to whether the clause should be interpreted as advocated for by the applicant. That enquiry can best be addressed by reference to the relevant case authority and the principles relating to the interpretation of contracts, to which I now turn my attentions.

THE LAW

[11]. The dispute between the applicant and the respondent is a matter of contractual interpretation. In my opinion, this court is called on to interpret, first and foremost, the agreement and in particular, the above clause relating the alleged conditional provision that the original rate would be

payable by the respondent in the event of the respondent not keeping to the payment terms of the agreement.

[12]. It is trite that the principles applicable to the interpretation of written documents apply to the interpretation of written contracts, namely that the primary meaning of the document must be determined from the language in accordance with the well-known rules of interpretation.

[13]. A written agreement between the parties must be read as a whole to determine the true intention of the parties thereto and if unambiguous, no intrinsic facts or evidence are permissible to contradict, amend or qualify the terms thereof. In that regard, I have had regard to the matter of *Total SA (Pty) Ltd v Bekker*, 1992 (1) SA 617 (A) at 624J-625B where Smalberger JA held that:

> *'What is clear, however, is that where sufficient certainty as to the meaning of a contract can be gathered from the language alone it is impermissible to reach a different result in drawing inferences from the surrounding circumstances... The underlying reason for this approach is that where words in a contract, agreed upon by the parties thereto, and therefore common to them, speak with sufficient clarity, they must be taken as expressing their common intention..."*

[14]. Also, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2012 (4) SA 593 (SCA), at paragraph 18 where Wallis JA held that:

> *'The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its*

coming into existence. Whatever the nature of the document, 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 these factors. The process is objective, 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; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document'.

[15]. The above principles, although cited in the context of written agreements, are in my view applicable to the present case especially in view of the fact the agreement, although not reduced to writing, had its terms and conditions recorded in writing in a missive between the parties.

[16]. It is settled law that interpretation is a matter of law and not fact. The interpretation is a matter for the court to decide and not for a witness or for the parties to a contract. This was set out in *KPMG Chartered Accountants SA v Securifin Ltd & Another*, 2009 (4) SA 399 (SCA) at par 39.

APPLYING THE PRINCIPLES TO THE FACTS *IN CASU*

[17]. If one applies the *'sensible meaning'* approach to the interpretation of contracts, as against one which leads to an unbusinesslike result, the inescapable conclusion is that the parties intended that the applicant would be entitled to claim a reversal of the discounts afforded to it in the event of payment in settlement of invoices was not effected timeously.

[18]. In my view, that is also the conclusion to be reached if the context within which the agreement came into existence is taken into account. In that regard, I am persuaded by the argument that the respondent knew and was well aware of the fact that, in view of the fact that the rates had been dramatically discounted to the detriment of the applicant, timeous payment of the invoices was of the essence, and that it was probably within the contemplation of and agreed upon between the parties that failure to effect payment of invoices in time would result in the revocation of the rebates.

[19]. Moreover, it is instructive to note that from the inception it has always been the stance of the applicant that he was contractually entitled to reinstate the discounted amounts in the event of a breach by the respondent of the payment terms of the contract. This view was communicated to the respondent who never disputed that this was the agreement between the parties. On the 20th June 2016 the applicant addressed an email to the respondent in which it is confirmed by the applicant that its view is that, in terms of the agreement between the parties, the respondent is liable to pay to applicant the discounted amounts in view of respondent's breach of the payment terms. The applicant furthermore rendered a revised invoice based on its aforesaid interpretation of the agreement. This email was not responded to and the contents were not disputed by the respondent. The most plausible inference to be drawn from the respondent's quiescence is that it had

acquiesced in the understanding on the part of the applicant that the agreement between the parties was that the respondent is liable to the applicant for the pre – discounted.

[20]. For all of these reasons, I am of the view that there was agreement between the parties that the applicant would be entitled to claim from the respondent professional fees on the basis of the pre – discounted rate in the event of the respondent breaching the payment terms of the contract.

[21]. I therefore intend granting judgment against the respondent in favour of the applicant for the amount of R238,048.00. Applicant also claims mora interest from the 21st of July 2016. I can perceive of no reason why the applicant should not be awarded interest as prayed for at the legal rate.

COSTS

[22]. When this application was launched during July 2016, an amount of R241,474.02 was claimed from the respondent. The quantum of the judgment which I intend granting in favour of the applicant is for R238,048.00. Both these amounts fall within the monetary jurisdiction of the Magistrates Court.

[23]. I can think of no reason why these proceedings should not have been instituted in the Magistrates Court, nor was Ms Ternent, Counsel for the applicant, able to justify the institution of the application in this court.

[24]. I am therefore of the view that the applicant should not get a cost award on the High Court scale.

ORDER

In the circumstances I make the following order:

1. The respondent shall pay to the applicant the amount of R230,048.00.

2. The respondent shall pay to the applicant interest on R230,048.00 at the rate of 10.25% per annum from the 21st July 2016 to date of final payment.

3. The respondent shall pay the applicant's taxed party and party costs on the appropriate Magistrate Court scale.

L ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	1st February 2017
JUDGMENT DATE:	3rd February 2017
FOR THE APPLICANT:	Adv P V Ternent
INSTRUCTED BY:	Tanya Brenner Attorneys
FOR THE RESPONDENT:	Adv L M Spiller
INSTRUCTED BY:	Norton Rose Fulbright South Africa Inc