REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2021/12086

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

[14 MARCH 2022]

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SIGNATURE

In the matter between:

MAZULE ENERGY AND RESOURCES (PTY) LTD **APPLICANT**

and

TULSALOGIX (PTY) LTD **RESPONDENT**

J U D G M E N T

MUDAU, J:

[1] This is an opposed application for a monetary judgment order in which the applicant seeks payment of R1 350 397.53 with interest and costs ("Part A"), in terms of a prepayment agreement entered into between the parties. The applicant also seeks payment of R6 308 129.62, with interest and costs ("Part B"), in respect of certain advance payments made to the respondent.

The respective claims under Part A and Part B flow from different causes and are in consequence separate claims.

[2] The background facts are largely common cause. On 5 March 2019, a written prepayment agreement was entered into between the applicant and the respondent. The material terms of the prepayment agreement, were that the applicant agreed to prepay an amount of R3,000,000.00 to the respondent for the provision of logistic services as a prepayment amount. In return for the applicant's payment of the prepayment amount, the respondent granted the applicant a right of first refusal in respect of all rail capacity allocated to the respondent by Transnet SOC Ltd ("Transnet").

[3] The logistics services undertaken by the respondent for the applicant entailed the transportation and delivery of manganese ore from the Northern Cape to Port Elizabeth, and the provision of Free On Board ("FOB") services at the agreed rates. It was agreed the applicant would be entitled to deduct R40.00 per tonne from each invoice submitted to the applicant by the respondent.

[4] The prepayment agreement further provided that, in the event that no trains are received from the respondent for a period of 2 months, any outstanding balance on the prepayment amount would become repayable to the applicant, on demand; and in any event, any outstanding balance on the prepayment amount became repayable, on demand, after 26 August 2020.

[5] In terms of clause 15 of the prepayment agreement, the applicant and respondent specifically agreed that: "[n]o variation or consensual cancellation of this agreement shall be of any force or effect unless reduced to writing and signed by all of the parties". Clause 9 of the prepayment agreement states that: "[a]ny outstanding balance on the prepayment amount becomes

repayable on demand eighteen months after the date of payment to Tulsalogix (26 August 2020)".

[6] During or about 2019, to assist the respondent with its working capital requirements and to ensure that the applicant was allocated train capacity by the respondent, the applicant agreed to make advance payments to the respondent in an amount equal to the full cost to the respondent of the trains that were allocated to it by Transnet from time to time (which amount would be on-paid to Transnet in advance). In respect of such prepayments, it was agreed between the parties that the advance payment would be credited to the relevant invoice submitted to the applicant by the respondent for the related logistics services.

[7] The applicant alleges that it complied with its obligations in terms of the prepayment agreement in that, on 26 February 2020, it paid an amount of R3 000 000.00 to the respondent and thereafter deducted R 40.00 per tonne from each FOB invoice received from the respondent. Consequently, to date, the current amount of R 1 350 397.53 is due, owing and payable by the respondent to the applicant.

[8] Part B of the application relates to the applicant agreeing to advance payments to the respondent in an amount equal to the full cost of the trains that were allocated to it by Transnet from time to time. In respect of these prepayments, it was agreed between the parties that the advance payment would be credited to the relevant invoice submitted to the applicant by the respondent for the related logistics services.

[9] It is the applicant's case that it made certain prepayments to the respondent on the basis of specific representations made by the respondent's duly authorised representatives to the applicant's duly authorised representatives

from time to time, that train capacity was available, which representations were made by the delivery of a Transnet "intent" and an accompanying invoice from the respondent for the relevant logistics services. Consequently, 5 train allocations were prepaid by the applicant in the individual amounts of R1 297 293.40 in respect of which the respondent failed to honour its undertaking.

[10] The relevant Transnet 'intents' and corresponding invoices received by the applicant are for train booking reference numbers 586753965; 586754021; 046JHL1914374 and 046JHL1912848. The Transnet intent for booking reference number 046JHL1914367 was credited by the respondent which it confirmed that it was not delivered. On 10 February 2020, the respondent issued a credit note ("KB7") in favour of the applicant when it acknowledged that these bookings were not fulfilled. On 28 January 2021 the applicant's attorneys of record addressed a letter of demand to the respondent. The respondent failed to respond thereto.

[11] On 1 March 2021, the applicant's attorneys of record delivered the application. On 1 April 2021, 1 month after service of the application, the respondent's attorneys of record delivered a notice of intention to oppose. Over 3 weeks later, on 26 April 2021, the respondent requested an extension until 4 May 2021 to deliver its answering affidavit. On the respondent's version, its counsel was briefed on the matter during May 2021. On 5 May 2021, the applicant's attorneys of record directed correspondence to the respondent's attorneys of record requesting the respondent's answering affidavit, which was due the day before in terms of the requested extension, i.e. on 4 May 2021.

[12] On 12 May 2021, having received no response to their correspondence or an answering affidavit, the applicant again delivered correspondence to the

respondent's attorneys of record advising that a final extension would be granted until 19 May 2021 to allow the respondent to file its answering affidavit. On 12 July 2021, the respondent requested a further 5 (five) day extension to deliver its answering affidavit.

[13] The respondent finally delivered its answering affidavit at 16h50, on 23 August 2021, which was a day before the hearing of the matter on 24 August 2021 on the unopposed motion court roll, without an application for condonation for the late filing of its answering affidavit. From 01 April 2021 to 22 June 2021 the applicant indicates that the delay was caused because it was searching for documentation pertaining to the agreements and that its sole director, Myeni, who deposed to the answering affidavit runs other businesses "and as such had other considerable commitments and time constrains."

[14] The respondent's defence to Part A of the application can be summarised as follows: the applicant failed to make demand for payment of the amount owing on time. The respondent contends that the applicant ought to have made a demand immediately or within a reasonable time after the debt became due on 26 August 2020. Since the applicant waited until 28 January 2021 to demand repayment, the respondent contends that the applicant tacitly waived its right for repayment because it delivered the demand contemplated in clause 9 of their agreement, as indicated, 5 months late.

[15] The respondent's defence to Part B of the application is as follows. The respondent contends that 4 of the 5 trains were, in fact, delivered. In this regard, it attached what it termed "unit facility visit documents", TM1-TM5. However, the said documents bear no reference to the applicant, nor any relevant train booking number. Trawling through the documents was of no assistance. A court cannot be expected to trawl through attachments to

affidavits without an indication what the relevance thereof is all about.[1] It must be noted that the respondent inexplicably issued the applicant with a credit note for these bookings. In respect of the one train that was not fulfilled, the respondent confirms that the train was not delivered but alleges that it was a term of the agreement that the applicant was required to first demonstrate that it had manganese ore to be transported.

[16] The applicant in its replying affidavit pointed out that it did not sit on its laurels and not demand repayment from the respondent. According to the applicant, in the period April 2020 to August 2020 the parties were in negotiations regarding the funds due to it by the respondent. It points out that, on 6 April 2020, the deponent to the answering affidavit (Myeni) addressed email correspondence to the applicant's duly authorised representative (Gronewald) stating the following: "[w]e are in agreement on what's outstanding as per our recon. We can put together an acknowledgment of debt and make it an order of court including payment timelines. There is no need to discuss recon further. I'm sure we can action this as soon as lockdown is over".

[17] On 1 May 2020, Myeni received an email from one of the applicant's duly authorised representatives (Malashwesky) detailing a discussion they had regarding the outstanding balance owed by the respondent to the applicant including, *inter alia*, the acknowledgment of debt and a proposed 6 months' repayment term. On 4 August 2020, Malashewsky provided Myeni with the acknowledgement of debt document.

[18] On 5 August 2020, Myeni responded to Malashewsky wherein he acknowledged the respondent's indebtedness to the applicant but proposed a trucking solution. During September 2020, Malashewsky directed

[1] *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA).

correspondence to Myeni confirming, *inter alia*, that the respondent received monthly statements from the applicant of the balances owed for the period May 2020 to December 2020.

[19] The law in relation to waiver of contract is trite. Waiver may be express or implied. A party relying on this defence must plead and prove that when the alleged waiver took place, the other party had full knowledge of the right that was abandoned. There is, however, a strong presumption against waiver. A tacit term is an unexpressed term read into the contract based on the unarticulated but inferred or imputed intention of the parties. A tacit term, once found to exist, is simply read or blended into the contract. As such, it is 'contained' in the written deed.[2] The onus is on the party averring waiver to prove it.

[20] Although normal civil standard of proof on a balance of probabilities is applicable, the onus is a stringent one and is not easily discharged. Clear proof of waiver is required more so if it is of a tacit nature, as opposed to an express waiver. The clear proof must demonstrate that the person alleged to have waived his or her rights fully knew what those rights were and decided to abandon same.[3] The decision to abandon the right, in this instance the right of the applicant to demand payment, must have been conveyed to the respondent.[4] Delay in enforcing a right may create a waiver thereof. But by itself and without more, it does not deprive a party of a right conferred by the terms of a contract except by prescription.[5]

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[2] As Nienaber JA said in *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 144C-D.
[3] See generally *Le Roux v Odendaal and Others* 1954 (4) SA 432 (N) at 441E; *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A) at 778; *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A) at 704; *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 698-9.
[4] *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634.
[5] *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) at 532; *Mahabeer v Sharma* NO 1985 (3) SA 729 (A).

[21] The test is whether or not the other party could fairly have inferred a waiver from the delay.[6] The criterion in this regard is an objective one. Whether or not a waiver has taken place is to be judged by the outward manifestations thereof which are to be judged from the perspective of a reasonable person in the position of the other party.[7]

[22] In the instant matter there is simply no justification in conduct or from the written communication between the parties that the applicant waived or abandoned its claim for payment against the respondent. The converse is the case. Any suggestion to the contrary lacks merit and stands to be rejected. It follows, accordingly, that the respondent failed to prove waiver. It is clear from the evidence presented by the applicant, and on a consideration of a balance of probabilities, that there was no tacit waiver by the applicant to its Part A claim.

[23] The denial by the respondent of the facts alleged by the applicant in relation to non-delivery of the trains due does not raise a real, genuine or *bona fide* defence and is coupled with a mix of seemingly random documents, which do not take its defence any further. The respondent's answering affidavit should, accordingly, be rejected.

[24] The allegations by the respondent do not raise a real, genuine or *bona fide* dispute of fact in relation to Part B of the claim. The respondent merely made bold claims. In my opinion, the respondent's allegations' are so far-fetched or clearly untenable that this court is justified in rejecting them merely on the

[6] *Potgieter and Another v Van der Merwe* 1949 (1) SA 361 (A) at 372.
[7] See *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at 49 – 50.

papers.[8] The allegations that the applicant made its case only in reply are without merit. The evidence presented was nothing more than an augmentation of its case established in the founding affidavit.

[25] To the contrary, the applicant has provided clear and unequivocal evidence in support of its Part B claim in respect of which the respondent failed to demonstrate a *bona fide* and convincing defence. As to the question of costs, it follows the result.

[26] **ORDER:**

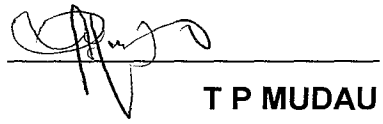
26.1 that the respondent be ordered to pay an amount of R1, 350, 397.53 (one million, three hundred and fifty thousand, three hundred and ninety-seven Rand, and fifty-three Cents) to the applicant;

26.2 interest on the above amount at the prescribed rate to date of final payment in full calculated from 28 January 2021;

26.3 that the respondent be ordered to pay an amount of R6, 308, 129.62 (six million, three hundred and eight thousand, one hundred and twenty-nine Rand, and sixty-two Cents) to the applicant;

26.4 interest on the above amount at the prescribed rate to date of final payment in full calculated from 28 January 2021; and

26.5 costs of this application.



T P MUDAU
Judge of the High Court

[8] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

Date of Hearing:	24 January 2022
Date of Judgment:	14 March 2022

APPEARANCES

For Applicant:	Advocate Aasifa Saldulker
Instructed by:	SCHINDLERS ATTORNEYS
For Respondent:	Advocate V Mabuza
Instructed by:	BOPHELA MOLEKANE INC