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

CASE NO: 2021/25614

Reportable: No

Of interest to other Judges: No

Revised: No

12/08/2022

In the matter between:

VBS MUTUAL BANK (IN LIQUIDATION)

Applicant

and

**THE UNIVERSAL SERVICE AND ACCESS AGENCY
OF SOUTH AFRICA**

Respondent

J U D G M E N T

MAIER-FRAWLEY J:

Introduction

1. In this application, the applicant, VBS Mutual Bank (in liquidation), ('VBS') claims payment of the sum of R102 546 219.74 together with interest and costs from the respondent, The Universal Service and Access Agency of South Africa, ('USAASA') in terms of a written payment undertaking provided by USAASA to VBS.

2. USAASA is a State owned entity which continues to exist as provided for in section 80(1) of the Electronic Communications Act 36 of 2005 (the 'ECA'). In terms of s 82 read with s 1 of the ECA, it is *inter alia* obliged to provide access to electronic communication network services, electronic communication services and broadcasting services to the people of South Africa.

3. USAASA was tasked to implement the Broadcasting Migration Policy of the Government of the Republic of South Africa, which entails the acquisition of certain Set Top Boxes ('STB's') which are designed to convert the outdated analogue television set to receive digital content.¹

4. A company known as Leratadima Marketing Solutions (Pty) Ltd ('Leratadima') was one of the service providers appointed to a panel of manufacturers of the STB's for USAASA. Pursuant to the conclusion of a Supply and Delivery agreement (the 'supply contract') between USAASA and Leratadima, the latter supplied USAASA with a quantity of STB's in accordance with a purchase order drawn by USAASA on Leratadima. USAASA has paid Leratadima for all STB's delivered to it in terms of the relevant purchase order. Pursuant to the conclusion of the supply contract, VBS provided loan funding to Leratadima in terms of a Revolving Credit Financing Facility Agreement (the 'facility agreement') it concluded with Leratadima, to enable Leratadima to fulfil its obligations to USAASA under the supply contract. As security for the funding advanced to Leratadima, VBS required Leratadima to procure USAASA's written confirmation that all monies payable to Leratadima for goods supplied by it to USAASA under the supply agreement would be paid into Leratadima's banking account held at VBS for the duration of the loan. On 18 January 2016, USAASA addressed a letter to VBS in which it *inter alia* undertook to make all payments regarding the supply contract into Leratadima's account at VBS. USAASA made payment into the VBS account for a period of time but later commenced making payments into Leratadima's Absa bank account as opposed to making payments into Leratadima's VBS bank account. VBS alleges that USAASA breached its obligations under its payment undertaking in so doing. It thus claims the

¹ Approximately 5 million poor qualifying households in SA who still own analogue television sets and who cannot afford to acquire digital content television sets will receive these STB's and related equipment for free.

aggregate total amount paid by USAASA into Leratadima's Absa bank account (R102 546 219.74) from USAASA in these proceedings.

5. USAASA opposes the application on various grounds, namely, that:

5.1. The alleged payment undertaking did not create any enforceable payment obligations on the part of USAASA to VBS ('the main defence');

5.2. Mr Nkosi, the then CEO of USAASA, who signed the payment undertaking on its behalf, had no authority to do so;

5.3. VBS's claim has become prescribed;

5.4. Application proceedings are impermissible for the resolution of material disputes of fact which have arisen on the papers; and

5.5. In the event that any of the above points are not upheld, that oral evidence be received from the directors of Leratadima in support of a defence that USAASA was released by VBS from its payment undertaking in consequence of an oral agreement concluded between the then CEO of VBS and the directors of Leratadima (currently in liquidation).

6. In the light of the conclusion to which I have arrived in relation to the respondent's main defence, it is not necessary for me to determine whether the other defences relied on by the respondent hold merit, as a decision on the enforceability of the payment undertaking is in my view dispositive of the matter. I will therefore assume in favour of the applicant, without deciding, that the applicant's claim has not prescribed and that the person who signed the payment undertaking on behalf of the respondent had the necessary authority to do so.²

7. The outcome of the main defence depends on a proper interpretation of the true import of the payment undertaking, considered within the full context of the circumstances under which it was given,³ for purposes of determining what the legal consequences of the payment undertaking are. The context is predominantly

² It bears mention that the payment undertaking was contained in a letter addressed to VBS, signed by the then CEO of ACAASA, one Zami Nkosi (*Nkosi*). The existence of the letter and the authenticity of the signature of Nkosi were not in dispute.

³ In this regard, see: *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) para 13.

informed by the interrelation of certain written agreements, which, as is common cause between the parties, were concluded between USAASA and Leratadima on the one hand, and VBS and Leratadima on the other hand, and the implementation by USAASA of its payment undertaking. The facts relevant to the interpretive exercise are not contentious, and as such, the point as to whether motion proceedings were appropriately employed need not be further considered in the judgment.

Background factual matrix

8. The following facts are either common cause or undisputed or unrefuted on the papers.

9. During November 2014, USAASA issued its terms of reference for the supply and delivery of STD's, in terms of which interested parties could bid for the production and supply thereof to USAASA. Leratadima's bid was successful and in 2015, ACAASA and Leratadima concluded the supply contract.

10. In terms of the supply contract:

10.1. Leratadima was obliged to manufacture, supply and deliver the STB's and ancillary equipment to USAASA as set out in the terms of reference;

10.2. In terms of clause 10.1, USAASA was obliged to make payment in respect of the STD's delivered by Leratadima within 30 days from date of receipt by USAASA of an invoice, subject thereto that the Ssrvicees (and/or equipment supplied) were rendered or performed to USAASA's reasonable satisfaction.

10.3. In terms of clause 12, in consideration for the services rendered and/or equipment supplied, USAASA agreed to pay Leratadima the fees as set out in its purchase order within thirty (30) days of receipt of an accepted and signed delivery note, the Invoice and all the documents listed in Clause 8.2. The Project Manager of USAASA was required confirm by signature that the said task had been completed and that she or he was satisfied with the delivery thereof, before the Invoice was paid;

10.4. In terms of clause 10.2, USAASA agreed to make payment to Leratadima by way of electronic transfer of funds directly into the bank account of Leratadima held at Absa Bank, Sandton, under account number [40 95];

10.5. In terms of clause 15, neither party was entitled to cede or assign any rights and or obligations which it may have in terms of the contract to any third party unless the prior written consent of the other party had been obtained;

10.6. In terms of clause 17, the contract constituted the whole of the agreement between the parties and no amendment or consensual cancellation would be binding unless recorded in writing and signed on behalf of the parties;

10.7. In terms of clause 29, the contract, read with the relevant purchase order raised thereunder, would constitute the sole record of the agreement between the parties and no novation, variation or agreed cancellation would be of any force or effect unless reduced to writing and signed on behalf of the parties.

11. On 6 August 2015, USAASA drew a purchase order on Leratadima for the supply and delivery of 500 000 STD's for the fixed price of R344 630 000.

12. Leratadima approached VBS to procure loan funding to fulfil its obligations under the supply contract. On 15 January 2016, VBS and Leratadima entered into a written Revolving Credit Financing Facility Agreement (the 'facility agreement') in terms whereof VBS agreed to loan an amount of R100 million⁴ to Leratadima in the form of a revolving credit facility, subject to the terms and conditions contained in the facility agreement.⁵ The Revolving Credit Financing Facility account was defined in

⁴ Defined in clause 1.2.5, as the 'facility amount'.

⁵ The loan amount was later increased to R250 million in terms of a written addendum concluded between VBS and Leratadima. In terms of the facility agreement, *inter alia*, VBS was entitled to charge an initiation fee of 7% of the facility amount (clause 3.2) and to charge interest at a rate of Prime plus 4% on the facility amount (clause 3.4). In terms of clause 3.5, all charges accruing in respect of the facility account as a result of the facility agreement would be for the borrower's [Leratadima] account.

the facility agreement as the account held by Leratadima with VBS under account number [...] (the 'VBS Account').⁶;

13. The duration of the facility agreement was 12 months, commencing on 15 January 2016 and terminating on 14 January 2017, however, the period was subsequently extended by agreement between VBS and Leratadima for a further period of 3 months, thus terminating by effluxion of time on 25 April 2017.⁷

14. The facility agreement was subject to certain suspensive conditions, amongst others, that '*A written confirmation from a duly authorised person from USAASA confirming the change of banking details to the Leratadima account held at VBS, as well as confirmation that the banking details will remain unchanged for the duration of the loan.*'⁸

15. Further relevant terms included the following:

15.1. In terms of clause 3.3, '*All payments to be made by VBS in respect of this Agreement shall be made as per purchase order received directly [from Leratadima's supplier's] to the Borrower's [Leratadima] supplier's bank account as set out in the purchase order;*

15.2. In terms of clause 5.2, during the currency of the facility agreement, VBS 'shall have the right of overall management of the Revolving Credit Financing Facility account';

15.3. In terms of clause 5.6, Leratadima undertook that for as long as there were funds/monies outstanding in favour of VBS, 'the Borrower shall not change the banking details in clause 1.2.9 unless consent in writing is obtained from VBS';

⁶ See clause 1.2.9 of the facility agreement.

⁷ See addendum concluded between VBS and Leratadima, annexure 'FA8' to the founding affidavit. The addendum provided, *inter alia*, that the duration of the facility agreement would be extended by a further 3 months and that all other terms of the facility agreement would remain binding and enforceable on both parties.

⁸ Clause 4.1.2 of the facility agreement.

15.4. Clause 5.7 provides that 'Should VBS incur any losses as a result of performing in terms of the facility agreement, the losses incurred shall be recoverable from the Borrower and the surety of Leratadima';⁹

15.5. In terms of clause 6.1, 'All payments of proceeds by USAASA will be made by electronic transfer to the Revolving Credit Financing Facility account';

15.6. Clause 6.3 provides that 'It is specifically recorded that VBS shall not be under any obligation to pay any amounts out of [the VBS account] if it does not receive payment from USAASA of the amounts that are overdue, owing and payable in terms of the USAASA contract';

15.7. In terms of clause 6.4, VBS 'shall not withdraw or allow the withdrawal of any portion of the Fund (together with any interest thereon) until receipt of proceeds from USAASA as contemplated in clause 6.1';

15.8. In terms of clause 9.1, the facility agreement would terminate by effluxion of time on the termination date.

16. It is common cause that the suspensive condition mentioned above was fulfilled. On 18 January 2016, a letter containing a payment undertaking was addressed by the then CEO of USAASA, one Zami Nkosi, to the CEO of VBS, one Andile Ramavhunga, the contents of which are set out later in the judgment. Suffice it to say at this juncture that USAASA therein acknowledged Leratadima's new banking details, being the VBS account, and undertook to make all payments under the supply contract into the VBS account.

17. On 19 April 2016, Leratadima addressed a letter to USAASA instructing it to make payment under the supply contract into its account held at VBS.

18. During the period commencing on 6 May 2016 until 22 February 2022, USAASA made 13 payments into the agreed VBS account in respect of STD's

⁹ Clause 4.1.6 provided that Mr I Mafoko and Mr M Memela shall stand as personal surety and co-principal debtor in their individual capacities to the obligations of Leratadima, should VBS bank incur any losses as a result of performing its obligations under the facility agreement.

delivered by Leratadima to USAASA under the supply contract.¹⁰ The aggregate total amount paid by USAASA into the VBS account was the sum of R175 326 405.06.

19. On 7 February 2017, Leratadima addressed a letter to USAASA wherein it instructed USAASA to make payment under the supply contract into its account held at Absa Bank (the 'Absa account').

20. During the period commencing on 9 October 2017 until 17 April 2018, USAASA made 14 payments¹¹ into Leratadima's Absa account in respect of STD's delivered by Leratadima to USAASA under the supply contract. The aggregate total amount paid by USAASA into the Absa bank account was the sum R102 546 219.74.

21. On 10 March 2018 VBS was placed under curatorship by the Minister of Finance. A firm known as SizweNtsalubaGobodo, represented by Anooshkumar Rooplal (Mr Rooplal), the deponent to the applicant's affidavits, was appointed as curator to VBS by the Minister of Finance.¹² Pursuant to his appointment as curator, Mr Rooplal obtained knowledge of USAASA's payment undertaking. He noticed that no further payments had been made by USAASA into the VBS account after 22 February 2018, which he says was concerning to him, given the extent of Leratadima's outstanding liability under the facility agreement to VBS at the time. Whilst VBS was under curatorship, Leratadima requested VBS to advance further funding to it, which request was refused. According to Mr Rooplal, Leratadima advised VBS that it would be sourcing funding elsewhere to continue with the supply contract.

22. On the instructions of Mr Rooplal, VBS's attorneys, Werksmans, addressed a letter to USAASA on 2 August 2018, therein calling upon USAASA to comply with its undertaking to pay all amounts owing to Leratadima under the supply contract into Leratadima's VBS account and to refrain from making any future payments in

¹⁰ A schedule of these payments appears at p 001-16 to 001-17 of the papers read with annexure 'FA10' to the founding affidavit.

¹¹ A schedule of these payments appears at p 001-17 to 001-18 of the papers.

¹² It is not in dispute between the parties that VBS was the target of large scale fraud perpetrated on VBS by members of its executive, senior management and various accomplices.

respect of Leratadima to any bank or bank account, other than the VBS account. At the time, Mr Rooplal was unaware that USAASA had already made payments into Leratadima's Absa account in discharge of its payment obligations under the supply contract, which USAASA also failed to disclose to him in its first response to the Werksmans letter on 4 October 2018.¹³

23. Sometime later during 2018, VBS was placed under final winding-up by order of court pursuant to which Mr Rooplal was appointed as the liquidator of VBS by the Master of the High Court.

24. On 11 December 2018, Leratadima was placed under final winding-up by order of court at the behest of VBS.

25. Subsequent to the winding-up of Leratadima, USAASA demanded performance by Leratadima of its remaining obligations under the supply contract. Leratadima, represented by its appointed liquidators, procured the manufacture the STB's and delivered same to USAASA. A total amount of R100,624,033.08 (one million six hundred and twenty-four thousand thirty-three rand and eight cents) was paid by USAASA to the liquidators of Leratadima in respect thereof.

26. In May 2021, the attorneys representing the liquidator of VBS sent a letter to USAASA in which payment of the sum of R102 546 219.74 was demanded from USAASA, being the sum paid by USAASA into Leratadima's Absa bank account, in breach of USAASA's undertaking to VBS to make *all* payments due under the supply contract into the VBS account for the duration of the supply contract. It was further alleged that breach by USAASA of its payment undertaking to VBS would, to the knowledge of USAASA, cause VBS to suffer damages.¹⁴

¹³ In a second response to the Werksmans letter, dated 29 October 2018, USAASA provided a hearsay account of an oral agreement allegedly concluded between VBS's 'ex CEO' and Leratadima to the effect that Leratadima could receive payments from USAASA into an account held by it at a bank other than VBS. It comes as no surprise that the alleged oral agreement was disputed by VBS in its replying affidavit, given the inadmissible hearsay nature of the allegations, and given the non-variation clause contained in the facility agreement (see clauses 14.1, 14.2 and 14.4. of the facility agreement at p 001-19 to 001-91 of the papers).

¹⁴ No mention is made in the papers to USAASA's response to the letter of demand, if any. Significantly VBS has not pursued a claim for damages in these proceedings. Rather, it seeks specific performance of USAASA's payment undertaking as a result of its alleged breach by USAASA

Submissions on behalf of VBS

27. VBS submits that on a proper construction of the payment undertaking, read within the context of the agreements referred to above - which agreements are contended to have created inter-linking obligations between the various parties, culminating in the provision of the payment undertaking in favour of VBS - USAASA incurred two separate obligations: First, an obligation to its supplier (Leratadima) to make payment of the purchase price in respect of STD's supplied by Leratadima to it under the supply contract; and second, an obligation to VBS in terms of its payment undertaking to effect payment into the VBS account for the duration of the supply contract.

28. VBS alleges that the purpose of the payment undertaking was to secure Leratadima's payment obligations to VBS under the facility agreement. The payment undertaking constituted security to VBS for the advances it made to Leratadima by ensuring that those advances would be covered by payments made by USAASA into the VBS account. VBS argues that USAASA must have known what was contained in the facility agreement and could not plausibly have been unaware of it, otherwise, why would USAASA have given the payment undertaking and why would it have honoured its obligations thereunder, albeit that same were breached thereafter?

29. VBS alleges that it indeed relied upon USAASA's payment undertaking as security against which it advanced funds to Leratadima. It alleges that USAASA implemented and complied with the payment undertaking up to February 2018, where after USAASA breached same by 'diverting' payments to Leratadima's Absa account. It further alleges that the payment undertaking remains extant since it has not been cancelled.

Submissions on behalf of USAASA

30. USAASA submits that on a proper construction, the payment undertaking created no legal or contractual relationship between USAASA and VBS and also

created no enforceable obligation on the part of USAASA to pay VBS for the following reasons:

30.1. USAASA's obligation has always been to pay its supplier (Leratadima) any amounts due owing and payable to it under the supply contract by way of electronic transfer of funds into Leratadima's nominated account;

30.2. In terms of the payment undertaking, all payments to be made by USAASA were still to be made to Leratadima, not VBS;

30.3. There was no cession of the right or entitlement to payment under the supply contract from Leratadima to VBS, therefore USAASA remained at all relevant times under the obligation to make payment to Leratadima and no one else; and

30.4. The nomination of a particular bank account into which USAASA's payments had to be made cannot create a legal relationship, contract or enforceable obligation against USAASA.

31. USAASA contends that the payment undertaking is at best akin to letter of comfort by USAASA that it would pay all amounts due and owing to Leratadima into the agreed VBS account in terms of the supply contract.

32. USAASA has fully discharged its payment obligations to Leratadima, and therefore cannot be made to pay again for what it has already paid in full.

33. In any event, the facility agreement terminated by effluxion of time on 26 April 2017. Thus, at the time payments were made by USAASA into Leratadima's Absa account on the written instruction of Leratadima from 9 October 2017 to 22 February 2018, the facility agreement was no longer in existence.

Discussion

34. For convenience, I set out the relevant contents of the payment undertaking mentioned in USAASA's letter to VBS, dated 18 January 2016:

"ABOUT THE UNDERTAKING TO PAY

1. We refer to the bid no/agreement no. USAASA/DTT/09/2014-15 dated 7/11/2015 ("the Contract") between Leratadima Marketing Solutions (Pty) Ltd ("The Supplier") and ourselves in terms of which the Supplier shall supply and deliver Digital Terrestrial Television (DTT) Set Top Boxes, **and we shall make payment therefore in accordance with clause 12 of the Contract.**¹⁵
2. We hereby state that the sum of R344 630 000 for the Purchase Order of 500 000 Set Top Boxes has been allocated to honour the above-mentioned undertaking in full.
3. Notwithstanding anything to the contrary contained in the Contract, **we irrevocably undertake to make payment to the Supplier within 30 days** of our receipt of a signed delivery note and receipt.
4. We hereby acknowledge the New Banking Details for Leratima (sic) Marketing Solutions (Pty) Ltd and we undertake to make all payments regarding this contract into this account.

Name: Leratadima Marketing Solutions (Pty) Ltd

Bank: VBS Mutual Bank

Account Number: [...]

Branch Code: [...]

Swift Code: VBSMZAJJ

..."

(emphasis added)

¹⁵ Clause 12 of the supply contract reads as follows:

"12.1. In consideration for the Services and/or equipment, USAASA shall pay the Service Provider the fees as set out In the Purchase Order for the Services rendered and/or equipment delivered within thirty (30) days of receipt of [an] accepted and signed delivery note; the invoice and all the documents listed in Clause 8.2. The pricing shall be as per the relevant Purchase Order. The Project Manager of USAASA must confirm by signature that the said task has been completed and that s/he is satisfied with the delivery thereof, before the Invoice is paid.

12.2. USAASA shall pay an amount not exceeding the amount set out in the relevant Purchase Order.

12.3. The Service Provider shall not be entitled to any other payment or reimbursement for carrying out its obligations in terms of this Agreement, save as provided for herein."

35. As was pointed out in *Ekurhuleni supra*, regard should be had to the true import of the undertaking within the full context of the circumstances in which it is given. For convenience, the relevant circumstances are summarised below.

36. It will be recalled that the purchase price payable under the supply contract in relation to the purchase order drawn by USAASA for the supply and delivery of 500 000 STD's by Leratadima, was the sum of R344 630 000.¹⁶

37. In terms of clause 10.2 of the supply contract, USAASA agreed and undertook to make payment of monies due and payable to Leratadima by electronic transfer to the nominated bank account of Leratadima held at Absa bank, Sandton.

38. In terms of clause 6.1 of the facility agreement, Leratadima agreed that all payments of proceeds by USAASA would be made by electronic transfer to the Revolving Credit Financing Facility account (the VBS account), details of which were provided in clause 1.2.9 thereof, and in terms of clause 5.6, Leratadima undertook that for as long as there were funds/monies outstanding in favour of VBS, it 'shall not' change the banking details set out in clause 1.2.9 (i.e., the VBS account details) unless consent in writing was obtained from VBS.

39. The condition precedent in clause 4.1.2 of the facility agreement placed an obligation on Leratadima to obtain USAASA's written confirmation: (i) of the change of banking details (from Leratadima's Absa account, as set out in the supply contract) to Leratadima's VBS account (as set out in the facility agreement) and (ii) that the new banking details would remain unchanged for the duration of the loan.¹⁷ In discharge of this obligation, Leratadima procured a letter from USAASA, wherein USAASA acknowledged the new banking details for Leratadima and undertook to make all payments due to Leratadima under the supply contract, into Leratadima's VBS account (per paragraph 4 of the letter).

¹⁶ This amount was calculated at the fixed price of R689.26 per unit.

¹⁷ It is noteworthy that the facility agreement expired by effluxion of time on 25 April 2017 (after its extension) whilst the supply contract was only due to expire sometime in 2018- in terms of clause 4.5 of the supply contract, it was to remain in force for a period of 36 months from the effective date (being the date signed by the party who does so last in time), unless cancelled at an earlier date. The supply contract was signed sometime in 2015, the precise date being unknown as the copy thereof in annexure "FA5" to the founding affidavit does not contain the date on which it was signed.

40. As USAASA was not a party to the facility agreement, it incurred no obligations to either Leratadima or VBS thereunder.¹⁸ Nor is there any allegation by VBS in its papers or by UCAASA in its letter of 18 January 2016 that USAASA consented to be bound to any term in the facility agreement.

41. On 19 April 2016, the CEO of Leratadima addressed a letter to the CFO of USAASA¹⁹ in terms of which it advised as follows:

“This letter is to inform USAASA that Leratadima...has changed banking details that were initially on the contract. We have changed from Absa bank to VBS Mutual bank.

Our new banking details are as follows:

Leratadima Marketing Solutions

Bank: VBS Mutual Bank

Account Number: [....]

Branch Code:[....]

...”

42. Although it is plausible that USAASA would have had sight of the facility agreement at the time it addressed the letter of 18 January 2016, as argued on behalf of VBS, that is not the point. The point is that USAASA’s letter neither referred to the facility agreement, nor did USAASA consent therein to be bound to any of the terms of the facility agreement. Moreover payments by USAASA into the VBS account commenced only after receipt of VBS’s written instruction on 19 April 2016 to USAASA to make payment under the supply contract into Leratadima’s new VBS bank account.

¹⁸ It goes without saying that VBS was not a party to the supply contract, and thus VBS could not incur any rights (or obligations) thereunder. The doctrine of privity of contract still forms part of our law. See: Van Huyssteen *Contract Law in South Africa* (2017) 146; *Cullinan v Noordkaaplandse Aartappelkenroerkekers Koöperasie Bpk* 1972 (1) SA 761 (A); *Barclays National Bank Ltd v HJ de Vos Boerdery Ondernemings (Edms) Bpk* 1980 (4) SA 475 (A); *Minister of Public works and Land Affairs v Group Five Building Ltd* 1999 (4) SA 12 (SCA). The doctrine espouses the rule that a litigant has no contractual cause of action against another person who is an outsider to the contract. Since a contract is a matter between the parties thereto, no one other than the contracting parties can incur any liability or derive any benefit from its terms. Known exceptions to the rule are *agency* and *stipulation alteri*, neither of which are applicable in *casu*.

¹⁹ See Annexure ‘AA7’ at p010-67 of the papers.

43. In terms of the supply contract read with the purchase order drawn by USAASA on Leratadima, an indebtedness of some R344 million was incurred by USAASA, as debtor, to Leratadima, as creditor, subject to the supply and delivery of STD's by Leratadima at the behest of USAASA²⁰ and to the satisfaction of USAASA. The parties (USAASA and Leratadima) provided for the manner in which payment of the debt was to be made, initially, by way of electronic transfer into Leratadima's Absa bank account (as per the supply contract) and later by way of electronic transfer into Leratadima's VBS bank account (as per Leratadima's written instruction to USAASA on 19 April 2016).

44. VBS alleges that it concluded an *agreement* with USAASA on 18 January 2016 (as embodied in the payment undertaking) in terms of which USAASA would make all payments due to Leratadima, to VBS.²¹

45. USAASA on the other hand avers that the payment undertaking did not and could not create any enforceable contract or other legal relationship between VBS and USAASA, as the payments to be made in terms of the payment undertaking were still to be made to Leratadima and not VBS, and in the absence of a cession by Leratadima to VBS of the right or entitlement to payment from USAASA, USAASA remained at all relevant times under the obligation to make payment to Leratadima and no-one else.²²

46. When interpreting the import of the payment undertaking, I am guided by the approach propounded in *Endumeni*,²³ as more recently elucidated upon by Unterhalter AJA in *Capitec Bank Holdings*:²⁴

“... The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*²⁵ offer guidance as to how to approach

²⁰ See clause 4.2 of the supply contract.

²¹ See par 41 of the founding affidavit at p 001-14.

²² See paras 54 & 55 of the answering affidavit at p 010-21.

²³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18

²⁴ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) at paras 25, 26 & 51.

the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself'.²⁶

[26]... *Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.

[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect with that design. For this reason, interpretation begins with the text and its structure. They have gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text." (emphasis added).

47. The letter containing the payment undertaking records, in paragraph 1, under the heading '*About the undertaking to pay*', that USAASA had contracted with Leratadima, (the latter who is referred to as 'the supplier' therein and who, as indicated earlier, was also ACAASA's creditor under the supply contract) and *inter*

²⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18.

²⁶ *Endumeni*, par 18.

alia contains a statement affirming USAAS's payment obligations to Leratadima in terms of clause 12 of the supply contract.²⁷ In paragraph 3, USAASA provides an *irrevocable undertaking* to pay the supplier within 30 days of receipt by it of a signed delivery note and receipt. The 'irrevocable undertaking' relates to the timing of USAASA's payment to Leratadima, which is in accordance with USAASA's payment obligations under clause 10.1 of the supply contract, i.e., in compliance with its existing contractual obligations to its supplier. It is essentially a statement by USAASA of its existing obligations to Leratadima under the supply contract.

48. USAASA did not agree or undertake to VBS to pay VBS in the letter in question. Nowhere in USAASA's letter does it say that it accepts any obligation to pay VBS and no new contract was either created substituting VBS as USAASA's creditor. Hence USAASA and Leratadima remained bound as between themselves to the supply contract, which they could vary as they chose by written mutual consent. VBS was not a party to that contract and acquired no rights under it. Rather, USAASA irrevocably undertook to pay Leratadima (per paragraph 3) under their existing supply contract into the new banking account designated by Leratadima as accepted and acknowledged by USAASA in writing (per paragraph 4). For as long as the VBS account was the designated account for payments that were to be made to Leratadima under the supply contract, all payments due and owing to Leratadima were to be made into that account. This interpretation is corroborated by the term disallowing cession (save by consent) in the supply contract. USAASA did not want to pay anyone other than its supplier and did not agree to do so after the conclusion of the supply contract.

49. I therefore agree with USAASA's submission that the 'payment undertaking' provided in USAASA's letter was akin to a letter of comfort to VBS, providing the bank with no more than an assurance that funds were in place to meet USAASA's payment obligations to Leratadima under the supply contract and that that all payments to be made under the supply contract would be paid into the VBS account in accordance with the acknowledged and accepted change of account details.

50. The fact that USAASA complied with par 4 of its letter by making payments into the VBS account is of no assistance to VBS. It did so under instruction from Leratadima under their existing supply contract. The fact that Leratadima breached its obligations to VBS under the facility agreement does not detract from the conclusion to which I have arrived above. Nor does the fact that VBS wanted security for amounts it loaned and advanced to Leratadima by seeking to ensure that such advances would be covered by payments made by USAASA into the VBS account detract therefrom. This is fortified by the provisions of clause 6.3 of the facility agreement, in terms whereof VBS was not obliged to pay any amounts out of the VBS account in the absence of USAASA's payments under the supply contract being deposited into that account. What was contemplated in the facility agreement appears to me to be the following: whenever VBS was to pay Leratadima's suppliers,²⁸ there would be money to cover the payment,²⁹ and so Leratadima's indebtedness to VBS would be reduced exponentially over time. However, in a situation where funds from USAASA were not received into the VBS account, VBS was not obliged to pay any amounts from the VBS account, in which event the account would not have been debited and the bank's exposure would be curtailed.³⁰

51. For all the reasons given, the respondent's main defence must succeed. This carries the consequence that that the application falls to be dismissed. The general rule is that costs follow the result. I am not persuaded that there are any facts militating against the application of the general rule. Both parties were represented by senior and junior counsel in these proceedings. In my view, the complexity of the matter warranted the retention of two counsel on each side.

52. Accordingly, the following order is granted:

²⁸ It will be recalled that in terms of clause 3.3: 'All payments to be made by VBS in respect of this agreement shall be made as per purchase order received directly to the Borrower's supplier's bank account as set out in the purchase order'.

²⁹ That is, by USAASA making payment of amounts owed to Leratadima into the VBS account.

³⁰ This should be read with: clause 5.4 which provides that "for so long as there is a positive balance in the approved Facility amount, the Borrower shall be obliged to use such available amount in fulfilling the (sic) USAASA's requirements in terms of the awarded contract' and clause 5.7 which provides: "Should the Revolving credit Financing Facility Bank incur losses as a result of performing in terms of this Agreement, the losses incurred shall be recoverable from the Borrower and the surety of Leratadima.'

ORDER:

1 The application is dismissed with costs, including the costs attendant upon the employment of two counsel.

**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing:	13 May 2022
Judgment delivered	12 August 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 12 August 2022.

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