REPUBLIC OF SOUTH AFRICA

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

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

17 JULY 2023 **FHD VAN OOSTEN**

CASE NO: 206205/2013

In the matter between

NGUBANE ZEELIE INC	**PLAINTIFF**
and	
LABAT AFIRCA LTD	**FIRST DEFENDANT**
SOUTH AFRICAN MICRO ELECTRONIC SYSTEMS (PTY) LTD	**SECOND DEFENDANT**
SAMES PROPERTIES (PTY) LTD	**THIRD DEFENDANT**
BRIAN VAN ROOYEN	**FOURTH DEFENDANT**

J U D G M E N T

VAN OOSTEN J:

INTRODUCTION

[1] On 12 June 2013 the plaintiff issued summons against the defendants claiming, in claim 1, payment of the amount of R152 129.26, and in claim 2, payment of the amount

of R890 168.16, in respect of accounting, auditing and additional services rendered to the first, second and third defendants, during the periods 11 August 2010 to and until 4 July 2011, and 11 July 2011 to and until 2013 respectively.

[2] The fourth defendant, during all material times, was the managing director of the first defendant and a director of the second and third defendants, who is sued in his capacity as surety and co-principal debtor to the first, second and third defendants, in favour of the plaintiff, in terms of suretyship clause contained in the audit agreement concluded on 4 July 2011.

[3] The defendants have pleaded several defences to the plaintiff's claims, but these have significantly narrowed down during the course of the trial. I shall revert to the eventual defences relied upon when dealing with the issues between the parties requiring determination.

[4] The plaintiff called two witnesses to testify at the trial: Mr Petrus Zeelie, the chief executive officer and partner of the plaintiff, and Ms Trudie Botha, a senior audit manager, who dealt with, and on grassroots level, oversaw the defendants' portfolio at the plaintiff. In their evidence they extensively dealt with, in summary, the business relationship between the plaintiff and the defendants, the conclusion of two written audit agreements between the plaintiff and the first, second and third defendants, on 11 August 2010 and 4 July 2011 respectively, the performance of their accounting and auditing duties pursuant thereto, the rendition of additional professional services (the services) and fees charged in respect thereof.

[5] At the close of the plaintiff's case, counsel for the defendants applied for absolution from the instance. Heads of argument, as well as supplementary heads of argument requested by me, were filed by both counsel. Having heard and considered the arguments, I dismissed the application and reserved costs for determination at the end of the trial, in respect of which I handed down written reasons.

[6] The trial resumed and counsel for the defendants closed the defendants' case without calling witnesses. Both counsel undertook to file heads of argument on the matter as a whole. Counsel for the plaintiff filed heads of argument, but counsel for the defendants at the final hearing of the matter, indicated that only the arguments raised

in the heads of argument on absolution were persisted with and no further arguments on behalf of the defendants were presented.

THE ISSUES

[7] There are three issues for my determination: first, the plaintiff's reliance on the cornerstone provision in the audit agreements, second, whether the correspondence I shall presently deal with, constitute proof of an admission by the defendants of their liability to the plaintiff, and if so, for what amount, and third, the validity of the suretyship clause on which the fourth defendant's liability is based.

[8] In the determination of the issues, the evidence of the plaintiff's witnesses including the documents referred to by them, stands uncontested. I do not consider it necessary to traverse the evidence in any detail, save to refer to such evidence as and when necessary for the determination of the issues.

[9] I turn now to consider and decide the issues, each under a separate heading.

PLAINTIFFS MAIN CLAIM: THE CORNERSTONE PROVISION

[10] The plaintiff's main claims against the first, second and third defendants (the defendants), are premised on the provisions of the two audit agreements, the conclusion of which is common cause between the parties.

[11] Each of the audit agreements, containing the exact same content, was concluded by way of an engagement letter addressed by Mr Zeelie, on behalf of the plaintiff, to the defendants, setting out a description of the services to be rendered, the terms and conditions relating thereto and the fee structure regarding services rendered. The 11 August 2010 engagement letter was signed by Mr Robinson, and the 4 July 2011 engagement letter, containing the suretyship clause relied upon by the plaintiff, by the fourth defendant, both acting on behalf of the defendants. The defendants *inter se* in addition, bound themselves as sureties and co-principal debtors in favour of the plaintiff.

[12] Clause 11 of the 11 August 2010, and the equivalent clause 10 of the 4 July 2011 auditing agreements (the fees clause) provide that fees in respect of audit and

accounting services are based on the time spent on the affairs of the defendants, by the partner and staff of the plaintiff, and on the levels of skill and responsibility involved. It is further provided:

'Our fees for services are calculated either:

- On an hourly basis at charge-out rates applicable to the person undertaking the work. Stringent reporting requirements or deadline imposed by you might require work to be carried out at a higher level or in extreme cases outside normal working hours. This will result in increased costs. Our maximum and minimum rates for normal work within normal working hours applicable from time to time, may be obtained on request; or
- On a tariff basis for taxation or company secretarial services. These rates are presently below the rates prescribed by the SA Institute of Chartered Accountants and are available on request at the time matters are specifically referred to us.'

[13] The fees clause further provides for normal rates as prescribed by the SA Institute of Chartered Accountants, in respect of time spent on the telephone. Outlay on travel expenses, photocopies, stationery, and postages, if of a material nature, are recoverable at cost at the plaintiff's pre-determined rates.

[14] Then follows what has been referred to during the trial as 'the cornerstone provision' in the fees clause. It reads as follows:

'We (the plaintiff) will be entitled to raise fees upon delivery as set-out above. In the event that you are not in agreement with any fee raised, you will notify us in writing of the objection within 21 working days of our dispatch of the fee note. Failure to do so will constitute acceptance of the fee. Approval of the Financial Statements or minutes reflecting our fees will constitute acceptance of the fees, including any under provision that does not warrant redrawing of the Financial Statements.'

[15] The proper interpretation of the cornerstone provision has crystalised into the pivotal dispute between the parties. It arises from the evidence of Mr Zeelie and scrutiny of copies of some 45 invoices in the court bundle (also referred to as fee notes), which were rendered to the first and third defendants in the period from 2009 to 2012, in the bulk of which, by way of example, information given as to the services performed, was limited to a one liner description, such as 'Interim Audit Fee – 2009',

'Audit Fee 2009 – Final Fee', 'Audit interim fee (second) – 2010', 'Consultation with Pieter Zeelie regards Mann Ferro Staal', 'JSE query', 'Reporting on Reportable Irregularities' and 'Meeting with Dawood with regard to assets held for sale'. One single, seemingly substantial amount, appears opposite these entries in the column under the sub-heading 'nett price'.

[16] Only a few exceptions to the general practice of furnishing minimal details are inbetween. One example will suffice. In an invoice addressed to the fist defendant the description reads 'Audit fees as per attached schedule'. The schedule is in the form of a statement of account in respect of the first, second and third defendants, and contains a schedule of audits from July 2011 to November 2011 as well as the amounts charged in respect of each thereof, and a time sheet setting out the names of some 25 members of the plaintiff's staff having conducted consultations in a total sum of hours, at a rate per hour, and the amount invoiced to date. The difference between the amount already invoiced and the 'feeable' amount, described as 'Fee to be raised', is indicated as the first defendant's portion of the total amount, which is the amount of the invoice, *ie* R95 765.63. Seemingly absent from the invoice and schedule are the dates on which consultations were held, and a description of the business dealt with thereat, or in connection with what it was held.

[17] Mr Zeelie readily conceded that the invoices indeed contained scarce information.

[18] Counsel for the defendants, in support of the main ground for asking absolution from the instance, submitted that upon a proper interpretation of the cornerstone provision, the plaintiff's invoices, in order to trigger the cornerstone provision, should have contained as the very minimum, a description pertaining to the rendition of the work, and the rate charged for each component of the work, to which the fee note related. The only basis on which the plaintiff could have claimed the fees, counsel further contended, was by way of adducing expert evidence that the fees charged by plaintiff were fair and reasonable, which the plaintiff consciously elected not to do.

Analysis

[19] Clause 10 provides for the 'raising of fees', the lodging of an objection in the event of disagreement with 'any fee raised', and the dispatch of a fee note. It does not

provide for simply stating a balance of account by way a of one single amount entry, or a globular amount in respect of work comprising numerous components, such as, 'Audit fee – 2009', which is nothing but a bottom line total of fees raised, and in itself does not constitute the 'raising' of a fee. The raising of fees which lies at the heart of the cornerstone provision, clearly conveys the notion of a fee regarding each component of the work to be incorporated into the fee note.

[20] No formalities regarding the contents of fee notes are prescribed in the clause. In interpreting the cornerstone provision, the court is empowered to have regard to the surrounding circumstances, or as it was put by the Constitutional Court in **University of Johannesburg v Auckland Park Theological Seminary** 2021 (6) SA 1 (CC) para [46], to put it in context. Secondly, as correctly argued by counsel for the defendants, due regard must be had to the purpose of the cornerstone provision, which is to grant the debtor the opportunity to object to the content thereof within 21 days after dispatch of the fee note, which as a matter of logic must have provided sufficient information regarding the nature of the work delivered and the price pertaining thereto.

[21] The cornerstone provision contains a waiver by the defendants of their right to dispute the fees charged for the work to which the fee note related, if no objection is raised after the lapse of 21 working days from dispatch of the fee note. It is common cause that no such objections were lodged.

[22] Thirdly, when there is an agreement to do work for remuneration and the amount thereof is not specified, as is the case here, the Law provides that it should be reasonable (per Nicholas AJA (as he then was) with reference to **Chamotte (Pty) Ltd v Carl-Coetzee (Pty) Ltd** 1973 (1) SA 644 (A) at p.649 C-D, citing *inter alia* **Middleton v Carr** 1949(2) SA 374 (A). See also **Inkin v Borehole Drillers** 1949 (2) SA 366 (A)), in **Genac Properties (Pty) Ltd v NBC Administrators CC** 1992 (1) SA 566 (A) 578A).

[23] Against this background it is plainly inconceivable that an invoice or fee note lacking the vital information I have referred to, can trigger the cornerstone provision. Acceptance resulting in a waiver, is never assumed and for it to operate, satisfactory proof of the party against whom it operates having been fully apprised of its rights, is necessary. In **Coppermoon Trading 13 (Pty) Ltd v Government of the Province of**

the Eastern Cape and Another (1949/05) [2019] ZAECBHC 16; 2020 (3) SA 391 (ECB) (18 June 2019), D van Zyl DJP dealt with the principles regarding waiver as follows:

'Further, being a matter of intention, election or waiver can only occur when the party concerned had full knowledge of the legal right which he is said to have waived, and of the facts under which, or from which, the right arose. (*Ex parte Sussens* 1941 TPD 15 at 20; *The Road Accident Fund v Mothupi supra* at para [17]; and *Borstlap v Spagenberg* 1974 (3) SA 695 (A) at 704). As stated by Steyn CJ in *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) 772 (A) at 778H-779A:

'In the ordinary case of waiver, the *facta probanda* would be full knowledge of the rights in question and express waiver or waiver by plainly inconsistent conduct, i.e. knowledge of a particular kind and surrender of the right in a particular manner.'

In the case of an election, in the sense of a choice between rights, it means that the person making the election must similarly have knowledge of both the facts giving rise to the election, and of the rights (*Feinstein v Niggli and Another* supra 698A – 699B and *Pretorius v Greyling* 1947 (1) SA 171 (W) at 177). The required knowledge as an ingredient of the required intention must necessarily also include knowledge of the existence of a choice between, what are alternative and inconsistent rights.'

Applied to the present matter, the invoices did not apprise the defendants of the nature of each component of the work performed, nor the rate charged for each component to which the fee note related, and therefore could not and did not trigger the cornerstone provision.

[24] The duty rested on the plaintiff to ensure that the fee notes contained sufficient information to enable the defendants to consider the options provided for in the cornerstone provision, by either raising an objection thereto within the prescribed time limit, or be bound by the waiver of their right to objection. None of the fee notes, or financial statements, complied with this requirement and it follows that the cornerstone provision was never triggered.

[25] In the absence of evidence regarding the reasonable needed work to be done and the fair and reasonable fee in regard thereto, the plaintiff's main claim cannot be sustained.

PLAINTIFF'S ALTERNATIVE CLAIM: ACKNOWLEDGEMENT OF DEBT

[26] The correspondence I have referred to above, comprises emails and a letter, of which all but one, were written by the fourth defendant on behalf of the first, second and third defendants, during the period from 30 September 2010 to 13 January 2012.

[27] The first thereof is an email dated 30 September 2010 emanating from one Fazel Bhana of Aurora Empowerment System, and is addressed to Mr Zeelie of the plaintiff. It states:

'At the outset on behalf of Labat Africa Ltd and Aurora Empowerment Systems (Pty) Ltd allow me to thank you for your impeccable service as well as efficient and professional work ethics. We wish to inform you that the Board of Directors accept your invoice and in this regard the amount of ZAR900 000 (Nine Hundred Thousand) will be paid in two payments. The first payment being on 15th October 2010 and the next on the 5th November 2010.
We would again like to thank you for your co-operation and look forward to a long and mutually beneficial relationship.'

[28] On 3 May 2011 the fourth respondent wrote in an email with subject, *re* Audit Fees, to Mr Zeelie:

'We undertake to do this year's review, 28 February 2011, on a 'pay as you go basis'. We will have prepared accounts (with full back-up documents) to be reviewed next week. These will need to be reviewed by 20 May so that we can prepare for publication by 27 May. You will prepare a quote for this work which will be paid in full before the release of the accounts. This review will enable you to prepare a detailed quote for the annual audit, for both Labat and Sames which we will pay on the same basis. Dawood will be in touch.
With regard to *the outstanding 2010 fees*, we undertook to make monthly payments of R100k per month until the balance is paid off. You indicated that it would be acceptable if Labat were to issue shares in lieu of payment for the arrears. I also asked you to look favourably on the possibility of cancelling the interest charges.'

[29] In response, Mr Zeelie wrote on 4 May 2021:

'I need to clarify something though. When we discussed issue of shares, we cannot accept an issue to us as it would impact on our independence. I meant an issue to another party for

cash, to enable you *to settle our account*. Your view is not clear in your letter, so I felt it would be important to mention this. Please comment whether this is your view as well.'

[30] In a letter dated 19 September 2011, faxed to the plaintiff on 20 September 2011, the fourth respondent, indicating in his capacity as Chief Executive Officer of the first defendant, wrote to Mr Zeelie, under the heading Remaining Audit Fees:

'I have now had the chance to review where we are with the remaining audit fees and want to make the following proposal for settlement of *the outstanding principal amount*: My calculation, based on *your statement of 31/08/2011* is that there was a balance outstanding of R725 758.17. We made payment of R250 000.00 on12/09/2011, leaving a balance of R475 758.17, made up of the principal amount of R313 336.14 and interest of R162 392.03. With regard to the principal amount, I propose that we settle this in three equal instalments payable on 15 October 2011, 15 November 2011, and 15 December 2011. If you are agreeable to this I propose that we give you 3 post-dated cheques in settlement. Then at least we can say that the amount is paid. We will be able to pay these amounts from cash flow. We have had several conversations about the interest charges and I would like to propose that we pay a percentage (to be agreed) of the amounts to be funded out of the proceeds of the first corporate action which we close (most probably the placement of 10m shares at 36c). I trust this will be agreeable to you.'

[31] In an email dated 21 September 2011, Mr Zeelie indicated to the fourth respondent that he had not received the fourth respondent's promised letter regarding *'non-payment of long overdue fees'*. He then proceeded to once again demand payment of 'at least R500k' from the Labat group, together with a fixed and acceptable offer with regards to *'payment of the remaining arrears'*. As regards interest on the arrears, Mr Zeelie indicated that the interest rate referred to in the audit agreements remains extant.

[32] Almost immediately thereafter, the fourth respondent replied as follows:

'Further to your note regarding fees and to our conversation just now where I proposed the following schedule:

Payment now from Labat and Sames	R300 000.00
Payment end October	R200 000.00
Payment of account end November	R284 979.18

Trust that this will meet with your requirements. Please confirm.'

[33] On 30 November 2011, the fourth defendant requested Mr Zeelie, in an email:

'...please hold back on the cheque dated today, 30 November. As explained, we are experiencing cash flow difficulties, however the sale of the property will be completed early next year and we will be in a position *to settle the account*. We will be preparing new post-dated cheques and will deliver to [you] early next week.'

[34] On 5 December 2011, Mr Zeelie confirmed in an email to the fourth respondent that the cheque had been returned due to insufficient funds and requested a replacement cheque without delay, as well as a cheque for the *'remaining part of the fees'*.

[35] The final letter requiring consideration is an email by the fourth respondent to Mr Zeelie, dated 13 January 2012, *Re Audit Fees and Account*, in which he stated as follows:

'I trust that you had a good break. I had a long break and this gave me the opportunity to review several issues, including your *Audit fees and account*.
We really have a problem with the quantum of the fees being charged by Ngubane Zeelie for what is essentially the audit of a very small business. *Our billings for the 2011 audit totalled R738 098.70.*
Even more disturbing is the fact that once again the budget has exceeded by some 68.17%. without any discussion or approval. Surely this cannot be correct. Being an ex-auditor myself I am well aware that normal practice is to get prior approval before such large overruns are approved. Quite frankly, I cannot understand what extra work was required in order to complete this small audit. At this stage I consider that all of these overruns have not been motivated or approved. You will recall that we raised the same issue of overruns with you last year when the audit fees reached almost R1 million. This business is its present form cannot support this level of fees and in future we must consider competitive quotes aimed at reducing costs.
With regard to payment *of the account*, I want to confirm what was agreed in the audit committee meeting on 25 November, *ie* we had sold one of the SAMES properties for R3,5 million and these funds would be used to *pay all outstanding SAMES and Labat liabilities including audit fees*. I can confirm that a deposit of R1 million was paid by the purchaser to

our conveyancing attorneys, Messrs Hugo and Cronje, on 22 November 2011, and the process is well in hand.
I suggest that we meet in the near future to resolve these outstanding issues.'

[emphases in paras [28] to [31] added]

ANALYSIS

[36] The cumulative effect of the correspondence, beyond any doubt, reveals the golden threat of the defendants' unqualified intention to admit and pay the account of the plaintiff. An acknowledgment of debt by the defendants has accordingly been established. I did not understand counsel for the defendants to challenge the admissions (except for the last email I have referred to), which counsel submitted were discharged by way of payments and the undertaking to pay in three instalments, which eventually was honoured. I am unable to agree. The highlighted portions in the correspondence makes it abundantly clear that the plaintiff's account was addressed, and not specific invoices or amounts. It is my finding that all payments were made in reduction or settlement of the defendants' admitted liability regarding the plaintiff's account.

[37] Counsel for the defendants submitted that the 13 January 2012 email does not contain an admission of liability, but rather reveals a dispute as to their liability. The contention is premised on a misinterpretation of the letter: the letter reveals a lame attempt to put forward an excuse for non-payment of an existing liability in regard to the account. The complaint merely addresses the quantum of the plaintiff's fees, based on a generalised reference to the size of the defendants' business. No defence in respect of liability is raised. Indeed, payment of the account is once again confirmed, and an undertaking made that payment will be effected from the proceeds of the sale of an immovable property, which is irreconcilable with a dispute as to liability for payment of the account, as counsel would have it.

SURETYSHIP

[38] Only one ground of dispute regarding the suretyship clause in the second audit agreement, was persisted with. Counsel for the defendants submitted that the identity of the surety on the deed of suretyship does not appear from the document.

[39] The argument is short-lived. Under the sub-heading Suretyships, the clause provides:

'Each of the listed parties hereby binds itself a surety and co-principal debtor in solidum unto and in favour of ourselves (the plaintiff) for ....

By his/her signature to this engagement letter each and every signatory hereby himself/herself in his/her personal capacity as surety and co-principal debtor in solidum unto and in favour of ourselves for...'

[40] The fourth defendant, as is apparent from the engagement letter, was the only signatory thereto, on behalf of the other defendants. The acceptance of the terms and conditions in the engagement letter by the fourth defendant in that capacity, is common cause between the parties. Moreover, Mr Zeelie testified that the signature was that of the fourth defendant, which was neither challenged nor rebutted (see **Airports Company South Africa v Masiphuze Trading (Pty) Ltd and Others** (1120/2018) [2019] ZASCA 150 (22 November 2019); 2019 JDR 2310 (SCA) para [14]).

[41] The fourth defendant accordingly, is liable, jointly and severally, in solidum, for payment of the amount, interest and costs as set out in the order I propose to make.

CONCLUSION

[42] Counsel for the plaintiff has asked for judgment in the sum of R577 081.89 (calculated as follows: the claim amount of R890 168.20 in claim 1, less amounts to the total of R313 086.27, invoiced after 30 November 2011), plus interest at a rate of 18% per annum, calculated from 30 April 2013 to date of final payment. The amounts claimed have meticulously been set out in the papers before me (Section H, Plaintiff's Trial Bundle, pp 163 and 682). The rate of interest of 18% has always been charged to overdue amounts in terms of the audit agreements.

[43] The audit agreements provide for payment of costs on the attorney and client scale.

ORDER

[44] In the result judgment is granted in favour of the plaintiff against the first, second third and fourth defendants, jointly and severally, in solidum, the one paying the other to be absolved, for:

1. Payment of the amount of R577 081.89.
2. Interest on the amount in paragraph 1 above, at the rate of 18% per annum from 30 April 2013 until the date of final payment, subject to the *in duplum* rule.
3. Costs of suit, including the costs reserved on 21 October 2022, on the scale as between attorney and client.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

COUNSEL FOR PLAINTIFFS	***ADV AR VAN DER MERWE***
PLAINTIFF'S ATTORNEYS	***WYNAND DU PLESSIS ATTORNEYS***
COUNSEL FOR DEFENDANTS	***ADV HB MARAIS SC***
DEFENDANTS' ATTORNEYS	***DOUGLAS BENNETT INC***
DATES OF HEARING	***16, 17, 18 & 19 MAY 2022, 18 JULY, 17 OCTOBER 2022; 13 FEBRUARY 2023, 4 JULY 2023***
DATE OF JUDGMENT	***17 JULY 2023***