THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 95187 / 2015

DATE OF HEARING: 24 OCTOBER 2016

DATE OF JUDGMENT: 9 NOVEMBER 2016

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

9-11-2016
DATE

SIGNATURE

In the matter between:

DIKALA PLANT HIRE CC Applicant

and

BELA BELA LOCAL MUNICIPALITY First Respondent

BALIMI BARUI TRADING (PTY) LTD Second Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

[1] The Applicant applied on motion for the following relief:

[1.1] declaring that clause 10 of the Service Level Agreement between the Applicant and the First Respondent dated 4 August 2014 is void for vagueness.

[1.2] declaring that the Service Level Agreement between the Applicant and the First Respondent dated 4 August 2014 is of full force and effect, and has not in law been cancelled by the actions of the First Respondent.

[1.3] directing the First Respondent to comply with all its obligations in terms of the Service Level Agreement concerned, in particular by making payment of the amount of R8 673 359.88 to the Applicant, together with interest at a rate of 9% per annum a tempore morae and making payment of all amounts that will in future fall due in terms of the said agreement to the Applicant into the bank account nominated for that purpose by the Applicant.

[1.4] an order confirming the cancellation of the Joint Venture Agreement between the Applicant and the Second Respondent.

[1.5] that the costs of the application be paid by the First Respondent and the Second Respondent jointly and severally, the one to pay the other to be absolved.

[2] The application relates to two written agreements. Firstly, a Service Level Agreement concluded between the Applicant and the First Respondent and secondly a Joint Venture Agreement concluded between the Applicant and the Second Respondent.

[3] Both agreements contain so-called "whole agreement" clauses and provide that the sole record of the agreement between the respective parties is the agreements themselves.

[4] The Respondents, in their papers, sought to import new terms into the Service Level Agreement, contending that as a result of the Joint Venture Agreement between the Applicant and the Second Respondent, the Applicant and the Second Respondent as a joint venture, is in fact, the First Respondent's counterpart to the Service Level Agreement, and that the Applicant is not the counterpart concerned on its own. In support of this contention, only the First Respondent brought an application for the rectification of the Service Level Agreement. The Second Respondent did not apply for rectification of the Service Level Agreement or the Joint Venture Agreement. It is noteworthy that the Second Respondent did not support the claim for rectification during the argument of this application.

[5] It is trite that a claim for rectification can only succeed if the party seeking rectification is able to show from the document sought to be rectified, that the parties thereto had the intention to be bound to the document, as rectified. In this case, the First Respondent would have to show that with reference to the

Joint Venture Agreement, that the Applicant and the Second Respondent had intended to act as joint venture partners in the Service Level Agreement.

[6] It was thus contended by the First and the Second Respondents that the existence of the Joint Venture Agreement results from the Applicant and the Second Respondent being joint parties to the Service Level Agreement, and not the Applicant alone, as appears from the Service Level Agreement, this despite the terms of the Service Level Agreement and the Joint Venture Agreement clearly reflecting the parties to each agreement.

[7] The Service Level Agreement provides that the Applicant shall supply to the First Respondent full maintenance lease for the municipal pool vehicles. The Service Level Agreement provides for two components of remuneration that is payable to the Applicant, namely firstly, payment for the supply of the pool of vehicles themselves and secondly, payment for the administrative services rendered in terms of the Service Level Agreement (hereinafter referred to as "the SLA").

[8] The Joint Venture Agreement (hereinafter referred to as "the JV") expressly provides that the Applicant would supply the entire fleet of vehicles, that the vehicles would remain the property of the Applicant and the Applicant would be paid the amount due by the First Respondent for the supply of the vehicles (i.e. the first component of remuneration referred to above). The Applicant and the Second Respondent would together administer the fleet and would equally

share the administration fees (i.e. the second component of the remuneration referred to above).

[9] It must follow that if rectification of the SLA were to be granted it would lead to untenable and irreconcilable differences between the Service Level Agreement and the Joint Venture Agreement. The simple reason is that each agreement has a different aim in mind and the rights and obligations of the parties to the one agreement are not necessarily equal to the rights and obligations of the parties to the other agreement. This being the case it must further follow that no rights and obligations arose between the First Respondent and the Second Respondent and the only relationship between them was through the Applicant.

[10] That being the case it is questionable whether the First Respondent may refuse to make payment of the contract price to the Applicant, by insisting that the payment should be made to the Applicant and the Second Respondent jointly. This much was contended by the First Respondent in its papers.

[11] On 30 July 2015, the First Respondent sought to terminate the SLA by relying on the provisions of clause 10 thereof, such termination purporting to take effect on 31 January 2016. Clause 10 appears to be inchoate and cannot reasonably be interpreted and after consideration, it is my view that such clause is indeed void for vagueness. It must follow that the First Respondent's attempt to terminate the SLA by relaying on clause 10 is of no force and effect. This being the case, the Applicant would accordingly be entitled to the relief

sought in prayers 1 and 2 of the Notice of Motion. I will deal with this more fully hereunder.

[12] The Applicant contended further that from the common cause facts contained in the various affidavits, the Second Respondent arrogated to itself the position of a partner to the Service Level Agreement, whereas the Second Respondent has no rights and obligations arising from that agreement, and its rights and obligations instead arise from the JV alone. The Applicant contended further that, by arrogating to itself the rights of a partner to the SLA, instead of limiting itself to the provisions of the JV, the Second Respondent unequivocally declared through its words and actions that it did not regard itself bound by the terms and provisions of the JV, and thus repudiated the JV.

[13] In doing so, the Second Respondent caused damage to the Applicant resulting, *inter alia*, in the First Respondent's unlawful refusal to make payment of the contract price to the Applicant. The Applicant terminated the Joint Venture Agreement on 7 October 2015 (accepted the repudiation) and contended that it was entitled to do so because of the Second Respondent's conduct.

[14] The First Respondent's submissions were aimed at illustrating that the First Respondent view was that the Applicant's bid was a bid together with the Second Respondent. This submission is in conflict with the Second Respondent's submission that it does not support the argument on the rectification. The documents before me are quite clear and each party's role

therein appears to be similarly clear. It would seem to be that the discourse between the parties arose because of strife in the distribution of the monies emanating from the First Respondent and that the Second Respondent took it upon itself to approach the First Respondent to pay all monies payable under the SLA to the Second Respondent. This in my view would be incorrect. The mere fact that the Applicant submitted a tender in its own name and disclosed therein the joint venture with the Second Respondent (for specific purpose) does not detract from what the documents themselves state. The Applicant has different rights and obligations in the SLA and the JV holds different rights and obligations for the Applicant and the Second Respondent.

[15] For the Second Respondent to have approached the First Respondent on the basis that it did is, in my view, arrogating to itself rights which it does not have. The fact that the Applicant's papers include reference to the Second Respondent is of no consequence. The JV was clearly limited to the administration portion of the tender. In my view the First Respondent was incorrect to have adopted the stance it did and its purported cancellation was nothing short of *mala fide*. I do not further agree with the First Respondent's contention that clause 10 is also not void for vagueness. The relevant agreement provides for the breach by either party in addition to clause 10. The First Respondent relied on the decision in CTP Ltd v Argus Holdings Ltd 1995 (4) SA 774 (A) at 787 E – G wherein Nienaber JA stated that:

"Three, a conclusion of invalidity will only be reached as a last resort (cf Haviland Estates (Pty) Ltd & Another v McMaster 1969 (2) SA 312 (A) at 337H; Lewis v Oneanate (Pty) Ltd 1992 (4) SA 811 (A) at 819 E – J);

[16] On this basis the First Respondent suggested that I should overlook certain words in clause 10 (in other words regard them as *pro non scripto*) in order to make sense thereof. I do not agree with this approach. The First Respondent submitted that it was placed in an invidious position by the fact that it appears that a dispute has now arisen between the Applicant and the Second Respondent as to the exact terms and/or existence of the joint venture. This should not have been of any significance to the First Respondent. It was, and is bound to the SLA. In my view the First Respondent was not entitled to hold back monies as it contended that it was entitled to do.

[17] The Second Respondent submitted that it does not oppose the relief sought against the First Respondent and only opposes the relief sought against it, namely the confirmation of the cancellation of the JV. The Second Respondent submitted that before the conduct of the Second Respondent can be scrutinized and before it can be said to have constituted a repudiation of the JV agreement, one must consider the submission that the JV is the party to the SLA and not the Applicant alone. I find this difficult to comprehend because if it is as easy as contended the parties would not have contracted on the basis that they did. This submission begs the question why the Applicant would have tendered for the contract alone with specific rights and obligations and the JV would provide specific services, not necessarily

included in the SLA. The Second Respondent submitted that the court cannot decide the legal question whether the Second Respondent's conduct constitutes a repudiation of the JV before the factual question has been decided in the Applicant's favour. I do not agree with this submission. The two agreements have two very different aims in mind. The Second Respondent can by no stretch of the imagination contend that it would provide the services contemplated by the SLA.

[18] The Second Respondent submitted that the dispute about it being a partner in the SLA cannot properly be decided on the affidavits having regard to the existence of material factual disputes in that regard. I do not agree. Despite contending that the joint venture was intended and understood by all three parties to be the service provider in terms of the SLA the First Respondent did not support the First Respondent's application for rectification and argued instead that the court cannot properly find that the conduct of the Second Respondent complained of by the Applicant, constituted a repudiation of the JV, entitling the Applicant to cancel the JV.

[19] It would seem to be that the submissions of both Respondents are aimed at creating a diversion intended to distract the court's attention from the main issue at hand. The real issues are quite simple. The Applicant referred me to the decision of Highveld 7 Properties v Bailes 1999 (4) SA 1307 (SCA) where in the court stated the following on this point:

"*the question to be decided is whether this attitude adopted by the respondent constituted a repudiation. The test to determine whether conduct amounts to a repudiation is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound* (see O K Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd 1993 (3) SA 471 (A) at 480I - 481A).

[20] In my view it is clear that the Second Respondent's conduct as reflected in the various affidavits can hardly be said not to constitute a repudiation of the JV. Consequently, in my view, the JV was properly cancelled by the Applicant by the acceptance the Second Respondent's repudiation of the JV. In the premises I make the following order:

[20.1] It is declared that clause 10 of the Service Level Agreement between the Applicant and the First Respondent dated 4 August 2014 is void for vagueness.

[20.2] It is declared that the Service Level Agreement between the Applicant and the First Respondent dated 4 August 2014 is of full force and effect, and has not in law been cancelled by the actions of the First Respondent.

[20.3] The First Respondent is directed to comply with all its obligations in terms of the Service Level Agreement concerned, in particular by forthwith making payment of the amount of R8 673 359.88 to the Applicant, together with interest at a rate of 9% per annum a tempore morae and making payment of all amounts that will in

future fall due in terms of the said agreement to the Applicant into the bank account nominated for that purpose by the Applicant.

[20.4] The cancellation of the Joint Venture Agreement between the Applicant and the Second Respondent is hereby confirmed.

[20.5] The First and Second Respondents are ordered to pay the costs of this application, jointly and severally, the one paying, the other to be absolved.

G. T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE: 9 NOVEMBER 2016

Representation for Applicant:

Counsel:	S. G. Wagener S. C.
Instructed by:	Geyser Van Rooyen Attorneys

Representation for First Respondent:

Counsel:	M. M. Rip SC
Instructed by:	Moloto Attorneys

Representation for Second Respondent:

Counsel:	N. G. D. Maritz SC
Instructed by:	Van Heerden and Krugel Attorneys