IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO: 58/2013

In the matter between:

RED ALERT TSS (PTY) LTD t/a EL GUARDING **Plaintiff**

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR
THE DEPARTMENT OF HEALTH, EASTERN CAPE PROVINCE **Defendant**

JUDGMENT

STRETCH J:

1. On 7 February 2013 the plaintiff instituted action against the defendant (also referred to as "the Department") for payment of the sum of R6 698 180,67, by way of a simple summons which was served on the defendant on 4 March 2013. The plaintiff's cause of action arose from the defendant's alleged failure to fully compensate it for services rendered, despite having been issued with an itemised statement demanding payment in the aforesaid amount, and urging the defendant to contact the plaintiff, as payment was overdue.

2. The defendant failed to enter an appearance to defend in terms of the uniform rules of this court. On 19 April 2013 the plaintiff served an application for default judgment on the defendant which had been set down for 9 May 2013. On 7 May

2013 the defendant delivered notice of its intention to oppose the application. On 9 May 2013 the application was withdrawn and the issue of costs was reserved.

3. On 15 October 2013 the defendant delivered a notice of intention to defend the action. On 27 January 2014 the plaintiff filed its declaration followed by a notice of bar on 26 March 2014. The defendant pleaded on 2 April 2014. The plea was accompanied by a special plea in response to which the plaintiff delivered a notice of exception on 14 May 2014.

4. On 7 July 2014 the plaintiff gave notice of its intention to amend its declaration and to increase the quantum of its claim to R7 423 375,21. The amendments were duly effected on 26 August 2014 and on 2 October 2014 the plaintiff served a second notice of bar on the defendant in consequence of the defendant's failure to plead to the amended declaration. On 8 October 2014 the defendant filed a notice in terms of rule 23(1) excepting to the plaintiff's amended declaration as being vague, embarrassing and lacking in averments necessary to sustain a cause of action, and granting the plaintiff 15 days to remove the causes of complaint.

5. On 30 October 2014 the plaintiff delivered a further notice of intention to amend which amended pages were filed on 19 November 2014. The plaintiff served further notices of bar on the defendant on 2 December 2014 and on 18 March 2015.

6. This prompted the defendant, on 23 March 2015, to issue a notice in terms of rule 30A(1) stating that the plaintiff's most recent amendment had failed to comply with the rules of this court, in that the plaintiff had introduced new allegations in its amended pages which were not predicated by a rule 28 notice, and extending a counter-invitation to the plaintiff to remove the cause of complaint within ten days, failing which the defendant would move an application for the plaintiff's claim to be struck out. Having received no response from the plaintiff, the defendant set the application down to be heard on 30 June 2015. This was met with a notice of opposition from the plaintiff. On 30 June 2015 the application was removed from the roll. Costs were once again reserved.

7. The plaintiff subsequently served a third notice of bar on the defendant on 19 January 2016 and set the defendant's application down for hearing on 28 January 2016. It also duly delivered heads of argument in support of its prayer for dismissal of the application together with the requisite notice that the matter would be proceeding. On 25 January 2016 the defendant withdrew the application with an appropriate costs tender. On 28 January 2016 the withdrawal was reflected in a court order.

8. On 29 February 2016 the plaintiff served a fourth notice of bar on the defendant. On 8 March 2016 the defendant pleaded to the plaintiff's amended declaration, claiming from the Department payment of the sum of R7 423 375,21 plus interest.

9. The matter was set down for trial which trial proceeded to finality before me after the parties had agreed at a pre-trial conference held on 10 September 2018 that the only issue in dispute at the trial would be the quantum of the plaintiff's claim for price increases.

The plaintiff's claim

10. During 2008 the plaintiff was awarded a contract to provide security services at the defendant's Mthatha Hospital Complex commencing on 1 February 2009. The parties entered into a service level agreement, setting out the terms and the conditions of the contract. In terms of this agreement incorporating a subsequent first amendment to the contract price, the plaintiff was entitled to payment of the total sum of R15 282 744 over 24 months at R636 780 per month, with effect from February 2009. Payment in terms of monthly invoices was due within 30 days of receipt of the invoices.

11. The contract was extended from time to time by the bid adjudication committee ("BAC") and the defendant's authorised representatives. It ultimately lapsed after 53 months on 30 June 2013. During this period the plaintiff had rendered uninterrupted services to the defendant in terms of the agreement. In turn, the defendant had paid the plaintiff R636 780,00 per month over the extended period of 53 months.

12. As with the first amendment to the contract price, the plaintiff was constrained to annually update the tender price to allow for and absorb increased salaries for employees in the security sector, as published in the Government Gazette from time to time, and as regulated by the Private Security Industry Regulatory Authority ("PSIRA"). Indeed, the service level agreement makes specific provision for this, stating that the contractor shall ensure compliance with all applicable prescripts and shall align the salaries of its personnel with PSIRA rates as may be prescribed from time to time by the Minister of the Department of Labour.

13. The first update (which I have already alluded to) was conveyed by the plaintiff to the defendant by way of a motivation in writing (addressed to the Department's Mr Sean Frachet and one Advocate Nzuzo) dated 30 April 2009. It reads as follows:

'**REQUEST FOR ABNORMAL PRICE INCREASE**

We were awarded the bid for provision of security and related services at the Department's Mthatha Hospital Complex and commenced in February 2009.

We are requesting an abnormal price increase on this bid as there has been a legislated change in regions and also in the legislated change in monthly salary rates of Grade B, C and D Guards who are required on this contract.

At the time of submitting our tender our total direct costs, share of overheads, rate submitted and share of overhead percentage and once-off costs were as follows: …..
Once-Off Costs ….. R310 431.00.
With the legislated changes we now request an abnormal increase in line with the legislated changes applicable as follows: …..
Price for 24 Months to 31 Jan 2011 ….. R13 095 484.80.

Please note that we have not changed the amount of overheads.

In summary our request for the abnormal increase is as follows:

Amount for 24 Months to end January 2011	13 095 484.80
Once-Off Costs	310 431.00
	13 405 915.80
Add VAT	1 876 828.21
TOTAL	**R15 282 744.01**

Please note that the legislated monthly salary rates for guards are only applicable to August 2009 and wage negotiations are currently underway. New rates will be applicable from 1st September 2009 hence we must advise that we will be motivating an abnormal increase to cover that change once it has been legislated and will make further submissions in that regard in due course.

We attach a letter from our Auditors regarding the above.

Trusting our request will receive your favourable consideration.

Yours sincerely

(Sgd)

MARK S BENKENSTEIN
CORPORATE SERVICES DIRECTOR'

14. On 26 June 2009 the respondent replied to the motivation as follows:

'Be pleased to take note that the Department (on 28 June 2009) considered and approved your request for an abnormal price increase to a total bid amount of R15 282 744,01.

This decision shall take effect from the effective date of the afore-mentioned contract and shall be binding between the parties for the duration of the said contract, provided that there is no new rate prescribed by PSIRA during the currency of this contract.

It remains your responsibility to advise the Department when the new rates have been prescribed.

Kindly find attached hereto an addendum making the necessary amendments to the principal agreement. Please do sign same and revert it back to our offices within 48 hours on receipt of this correspondence.

Yours in Health

(sgd)

ACTING GENERAL MANAGER
SUPPLY CHAIN MANAGEMENT'

15. On 2 September 2009 (in a letter addressed to the Department's Mr Sean Frachet) the plaintiff motivated its predicted second price increase as follows:

'REQUEST FOR ABNORMAL PRICE INCREASE

We were awarded the bid for provision of security and related services at the Department's Mthatha Hospital Complex and commenced in February 2009.

We are requesting an abnormal price increase on this bid as there has been a legislated increase in monthly salary rates of Grade B, C and D Guards who are required on this contract. The relevant Government Gazette is dated 25th August 2009 (No. 32524) and is effective from 1st September 2009.

In our previous "Request for Abnormal Price Increase" which was sent to yourself on 30th April 2009 (refer annexure I), the applicable costs and contract price requested was as follows: …..**TOTAL R15 282 744.01**.

We are attaching the "Illustrative Contract Pricing Structure" for the period ended 31st August 2009 (Annexure 2) and for the period commencing 1 September 2009 (Annexure 3).

The percentage increase in overheads and the new requested amount for overheads is calculated by multiplying the previous amount for overheads by the percentage increase in overheads as follows: …..

The total direct costs have increased as follows: …..

Therefore we request that the total contract price be increased as follows:

For the period from 1st February 2009 to 31st August 2009 the monthly amount is unchanged as per the previous request for abnormal price increase (Annexure I) as follows: ….. Price for 7 Months ….. 3 819 516.40.

For the period from 1st September 2009 to 31st January 2011 the amounts change in line with the gazetted increases (calculated above) as follows: ….. Price for 17 Months ….. 10 322 552.15.

Contract Price for 24 months (7 Months and 17 Months) above	**14 142 068.55**
Once off cost (unchanged)	**310 431.00**
	14 452 499.55
Add VAT	**2 023 349.94**
Total revised contract price	
Requested for 24 months to 31st January 2011	**16 475 849.49**

Trusting our request will receive your favourable consideration.

Yours sincerely

(sgd)

MARK S. BENKENSTEIN

CORPORATE SERVICES DIRECTOR'

16. I digress to point out that these illustrative contract pricing structures upon which the plaintiff relied from time to time have the following in common:

a. They were all issued and regulated by PSIRA.

b. They applied to an average period of 12 months at a time.

c. They were based on an average month of nightly 12 hour shifts on site.

d. They provided for a total direct cost and a share in the overheads for each graded security officer.

e. The pricing structures, illustrating the total cost per month for employers with respect to security officers employed by them in the private security industry did not make allowance for profit or VAT.[1]

17. On 28 September 2012 the plaintiff's branch manager forwarded the customary motivation to the Department. It reads as follows:

'**REQUEST FOR THE STATUTORY INCREASE (2012 TO 2013)**

Due to the fact that the security industry has an annual increase effective 1st September 2012, and with the Department of Labour trying to bridge the financial gap between the different grades and areas, this is the result of us requesting an increase of 8.5%.

See herewith price changes as stipulated on the table below:

For the period 01 September 2010 to 31 August 2011 the prices were as follows: ….. Total Price Per Month ….. Grand Total ….. R639 780.99

[1] It is not in dispute that the plaintiff is a registered VAT vendor and is accordingly obliged by law to charge VAT.

For the period 01 September 2011 to 31 August 2012 the prices were as follows: ….. Total Price Per Month ….. Grand Total ….. R744 516.45

For the period 01 September 2012 to 31 August 2013 the prices were as follows: ….. Total Price Per Month ….. Grand Total ….. R807 800.35

For your perusal, we herewith attach the new government gazetted PSIRA rates effective from 01 September 2012 to 31 August 2013.

We have however strived to keep this to the minimum.

We value your business and would be happy to discuss your increase should you have any queries.'

18. On 5 October 2012 Mthatha Hospital acknowledged receipt of this correspondence.

19. On 4 June 2013, the Department's senior manager for contract management wrote the following letter to the plaintiff:

'**SCMU3-06/07-0212: PROVISION OF SECURITY SERVICES AT MTHATHA HOSPITAL COMPLEX – PRICE INCREASE**

1. The above matter bears reference.

2. Please be advised that the Department has approved a price increase of 8% for 2011/12, which increases the monthly amount due to R744 516.46 and 8.5% for 2012/13, which increases the monthly amount due to R807 800.35 respectively.

3. Please be further advised that the increase for 2011/12 is valid from 1st September 2011 to 31st August 2012, and the 2012/13 increase is valid from 1st September 2012 to 30th June 2013.'

20. On 12 December 2012 the plaintiff's attorneys formally served on the Department an itemised statement claiming the sum of R6 698 180,67 urging the Department to contact the plaintiff as payment was overdue. The covering letter reads as follows:

'We act on the instructions of Red Alert TSS (Pty) Ltd t/a EL Guarding of East London.

We have been instructed to demand from you, as we hereby do, payment of the sum of R6 698 180,67 being the sum/balance due to our client for security and related services together with interest at 15.5% per annum a tempore morae from date of service of this letter of demand to date of payment.

A copy of the original Service Level Agreement, marked "MM1", is attached hereto together with related contract documentation for your reference in order to enable you to investigate this matter.

We also enclose herewith, marked "MM2", a statement showing all the outstanding invoices together with copies thereof as well as a detailed statement, marked "MM3", showing all payments made.

We await your response within one month from date hereof.

Kindly note that this letter is written in compliance with the Provisions of Section 3 of the Institution of Legal Proceedings against certain Organs of State Act, No 40 of 2002.'

21. In the absence of a response, the plaintiff instituted the claim which I have already referred to, the quantum of which was subsequently amended to R7 423 375,21 to allow for certain price increases which were not taken into account when the November 2012 statement was served on the defendant in December 2012.

The defendant's plea

22. In its plea, the Department admitted that the parties had entered into a service level agreement, entitling the plaintiff to payment of R15 282 744,01, which incorporated the first request for a price hike which I have already referred to. The terms and conditions of the service level agreement are not in dispute.

23. What has been disputed on the pleadings, is that the defendant is liable for VAT, despite the fact that the illustrative contract pricing structures which the plaintiff had been using as a benchmark, specifically and categorically exclude VAT.

24. The Department, in its plea, has also alleged that some invoices had been paid, that there was a price discrepancy with respect to certain invoices, and that some of them had been duplicated. It was furthermore alleged that R971 540,31 of the claim had already been paid.

25. As I have said, pursuant to the close of pleadings, the parties agreed that the only issue in dispute was the quantum of the plaintiff's claim for price increases. As it turns out, this agreement has been of no assistance whatsoever in narrowing the *lis* between the parties.

The evidence

26. The plaintiff and the defendant each called one witness. The plaintiff relied on the evidence of Mr Mark Benkenstein, who is its corporate services director, and who has been with the company since 1999. The defendant presented the evidence of Mr Sean Frachet, who is the Department's chief director in its finance component.

27. In a nutshell, Benkenstein's evidence was that during the duration of the contract the plaintiff paid the PSIRA rate increases to its employees out of its own pocket and then claimed what it had absorbed towards the end of the contract.

28. In support of his evidence Bekenstein referred to spreadsheets which had been prepared by the plaintiff in order to compare the plaintiff's contract price increases with the recommended PSIRA direct cost or rate increases.

29. These tables illustrate:

a. That for the duration of the mutually extended contract period, the plaintiff increased its prices by 11,02 per cent, 5,98 per cent, 13,28 per cent and 8,5 per cent annually.
b. That these price increases were either below or on a par with the illustrative PSIRA rate increases.

30. According to Benkenstein the defendant had indeed paid a portion of the amount claimed, reducing the total amount outstanding to R6 910 317,14. During cross examination it was put to him that in terms of the defendant's calculations, the defendant only owed the plaintiff R2 489 961,16 with respect to price increases of which R513 580,08 had already been paid, reducing the amount due by the defendant to the plaintiff to R2 391 142,00 plus interest. It seems that this contention was to some extent founded on a different construction of the Department's letter of approval signed on 4 June 2013, to be read to have included VAT in its computation of the monthly amounts due for the 2011/12 and 2012/13 years respectively, whereas the plaintiff's calculations excluded VAT.

31. I do not understand this contention. As I have said, the documented PSIRA illustrative monthly contract pricing structures made it clear that VAT and profit were excluded.[2] The plaintiff had also consistently in the past reflected VAT as a separate add-on in its accounts and invoices to the Department. Despite the fact that Benkenstein was rarely if ever cross-examined on this aspect, he nevertheless went to inordinate lengths to explain this when he testified in chief. I have given careful consideration to his explanation in conjunction with the pleadings and the spread-sheets which the plaintiff has relied on to present its evidence. I find the evidence to be both logical and consistent with the agreement with the Department, considered in conjunction with the PSIRA illustrative VAT exclusive pricing structures. If I am correct in this regard, the foundation of the defendant's pleaded *lis* with the plaintiff falls away. This is so because it is the extent of the Department's liability to the

[2] This is for obvious reasons. As pointed out by the Department's counsel, not all employers are VAT vendors.

plaintiff which is in issue; not the fact thereof. It has not been contended that the plaintiff was not entitled to apply the PSIRA's illustrative contract pricing structures as published from time to time when it rendered accounts to the Department for services rendered. Indeed, the plaintiff's written requests for statutory increases seem to me to have been compliant with the Department's missive dated 26 June 2009 (which I have already referred to) in two material respects:

a. They served to advise the Department of the new prescribed rates (as called upon to do) annexing the relevant contract pricing structures (which *ex facie* the structures themselves excluded profit and VAT);
b. They served as requests for statutory increases which were either consistent with or below the relevant contract pricing structures.

32. To my mind these requests were not, and were never intended to be VAT inclusive bids, or tenders or repetitions of awards.

33. It has been conceded on the Department's behalf that as at the date of trial the Department owed the plaintiff R2 391 142,00 plus interest in respect of PSIRA linked price increases.

34. It was apparently to explain this concession and to dispute that it was liable for anything in excess thereof, that the Department called Mr Frachet as its witness. Frachet had prepared his own supporting documentation in response to Benkenstein's evidence and the spread-sheets which he had referred to. Frachet contended that because the original award of R15 282 744,01 was VAT inclusive, any increases in relation to the contract would also have been VAT inclusive. I do not agree. As I have said, it is clear that the PSIRA illustrative contract pricing structures exclude both profit and VAT. Whilst it is so that the final figure of the original award included VAT, the plaintiffs communications with the Department from time to time thereafter were clearly designed to be informative and to comply with the Department's letter of 26 June 2009. The plaintiff has in any event adequately, in my view, illustrated that these requests were not bills or invoices or statements for that matter. If they were, I would imagine that they would also have been formatted in the same fashion as the addendum to the service level agreement which initially

reflected the total increased contract value without making any reference to PSIRA illustrative contract pricing structures and/or proposed percentage increases.

35. It is significant that Frachet agreed that the plaintiff was entitled to apply annual increases of 11,29 per cent, 5,98 per cent, 13,87 per cent and 8,98 per cent in terms of the PSIRA rates. Indeed, he testified that the Department's letter dated 26 June 2009 made it clear that the Department would respect the regulatory authority adjustments "for as long as PSIRA is alive."

36. It is clear then that on the pleadings as supported by the evidence, the issue is not the application of the PSIRA rates. What the Department's contention does seem to be is that these PSIRA percentages were "misapplied" or "incorrectly calculated", based on starting values at the commencement of each spectral calendar which were way in excess of what they ought to have been, resulting in exhorbitant over-billing on the Department's part.

37. Frachet accordingly re-did the maths in a fashion which he was comfortable with, and as I can make out, concluded that the Department was liable to the plaintiff for payment of the sum of R3 362 682,04 based on PSIRA rate increases of 11,29 per cent in September 2009, 5,98 per cent in September 2010, 13,87 per cent in September 2011 and 8,98 per cent in September 2012.

38. Frachet testified (as supported by the Department's disbursement reports) that the Department had in the interim made two further payments of R458 482,23 and R513 058,08, resulting in a balance due of R2 391 142,04[3], plus interest in the sum of R3 278 404,16[4].

39. During cross-examination Frachet unequivocally and repeatedly conceded that he realised for the first time after the trial had commenced, that there was no correlation between the rand values claimed by the plaintiff, and the PSIRA

[3] According to my calculations R3 362 682,04 – (R458 482,23 + R513 058,08) = R2 391 115,04

[4] Frachet said that this interest (which exceeds the capital amount) was calculated by applying loan amortisation schedules based on individual amounts becoming due and payable within 30 days of the PSIRA increases in terms of the Public Finance Management Act.

percentage increases. Simply put, this realisation appears not to have been within the Department's contemplation when it delivered its plea.

40. Despite attempts by the Department's counsel thereafter to suggest via Frachet that it was catered for in the plea, it is apparent from a reading of the Department's plea that the issues addressed therein have no bearing whatsoever on the question of a misapplication of the PSIRA rates as suggested by Frachet. Nor did the evidence ultimately presented on the Department's behalf attempt to adequately (or at all) address the issues purportedly traversed on the pleadings.

41. As I have said, I have carefully considered the plaintiff's presentation of the basis upon which it has calculated the Department's liability to it. It is common cause that the Department did not pay the plaintiff in excess of that which had been agreed upon in the addendum to the original service agreement, despite the recommended PSIRA rate increases. Even in this respect, the Department fell in arrears and has, subsequent to the exchange of pleadings, made further payments amounting to R971 540,31.

42. Having said that, it appears that the plaintiff itself has been somewhat dilatory in its accounting to the Department and in claiming that which it was entitled to in terms of the PSIRA rates as an when such entitlement became due. Indeed, it appears to me that the plaintiff's claim against the Department only really crystallised in its finally amended declaration which was delivered on 19 November 2014. The nature and extent of the plaintiff's claim was, in my view, properly and fully set forth in this document. If the Department did not think so, or was of the view that the plaintiff had over-claimed based on miscalculations or incorrect applications of the percentage increases, it ought to have raised this at the very latest when it pleaded. Instead, it raised a special plea which it purportedly abandoned, followed by claims which it barely touched on when it presented its evidence.

43. I am not inclined however, to rule in the plaintiff's favour simply because the defence which the defendant ultimately raised in evidence had no foundation in the pleadings. It is really not difficult to traverse this defence. Mr Frachet's contention is that the plaintiff has raised exhorbitant price increases ranging from 15 to 27 per cent

annually, which are not at all in line with the PSIRA rates. In placing a rand value on these percentages, Frachet did not take into account that the Department had not escalated its payments to the plaintiff in terms of either the PSIRA rates or those ultimately raised by the plaintiff.

44. On the other hand, the plaintiff's table (which Mr Benkenstein adequately explained) speaks to the factual position when attaching a compounded rand value on the percentage increases. In a nutshell, the Department's argument with respect to the quantum of its liability to the plaintiff assumes that the Department had kept up with the increases in its payments to the plaintiff. It is common cause that it has not. The defendant's argument is accordingly flawed. It is flawed because it is based on calculations which repeatedly depart from a factually incorrect base-line liability rand value. There is really no other way of putting it. To quote the plaintiff's counsel, the claim "is what it is".

45. As for the issue of VAT, I have already dealt with the fact that the plaintiff was entitled to, and indeed constrained to add VAT onto the price increases illustrated by PSIRA from time to time.

Interest

46. Based on the evidence before me, the water is somewhat murky with respect to issues such as whether the plaintiff regularly accounted to the defendant, and whether it regularly communicated with the Department with respect to the application and the effect of PSIRA linked contract price increases. In this regard the Department has conceded that:

a. It owes the plaintiff R2 391 142,00;

b. It has calculated that the interest due on this amount exceeds the aforesaid capital amount.[5]

[5] Regard must be had to the in duplum rule which states that the creditor is not entitled to claim interest which exceeds the capital amount.

c. It was presented for the first time with a detailed globular claim when the plaintiff issued its declaration, the final amendment of which was delivered on 19 November 2014.

47. In the premises I am inclined to make an order incorporating the admitted interest equal to the capital amount on the first R2 391 142,00 of the plaintiff's claim, followed by an award for *mora* interest on the balance (taking into account the two further payments of which the Department has furnished proof) calculated from 19 November 2014 to date of payment.

The reserved costs

48. The respective legal representatives have not been in a position to persuasively press for awards in their clients' favour with respect to the reserved costs which depart from the norm. In the premises the parties are of the view that these costs should be in the cause. I agree.

Order

a. The defendant is ordered to make payment to the plaintiff in the sum of R6 451 834,90.
b. The defendant is ordered to pay interest on this amount calculated as follows:

i. R2 391 141,73 on the portion of R2 391 141,73.
ii. Applicable *mora* interest on the balance of R4 060 693,17 calculated from 19 November 2014 to date of payment.

c. The defendant is ordered to pay the costs of the action including the costs which were reserved on 9 May 2013 and 30 June 2015.

_____

I.T. STRETCH **31 January 2019**

Judge of the High Court

Dates heard: 11 & 12 September 2018

Date handed down: 31 January 2019

For the plaintiff:

Mr Cole
Instructed by Matyeshana & Moodley Attorneys
Care of Gravett Schoeman Van Rensburg & Moodley
King Williams Town

For the defendant:

Mr Sishuba
Instructed by The State Attorney