Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON LOCAL DIVISION)

Case No: EL 1000/08
ECD 2400/08
Date Heard: 25/10/11
Order Delivered: 26/10/11
Reasons Available: 27/10/11

In the matter between

GRANT THORNTON Plaintiff

and

FLEET AFRICA EASTERN CAPE (PTY) LTD Defendant

REASONS FOR JUDGMENT

REVELAS J

[1] The plaintiff issued summons against the defendant for payment of an amount of R184 735.29 and interest thereon, which it contends is the balance of fees incurred for rendering additional accounting services to the defendant in terms of an agreement between them. It is common cause between the parties that the defendant has already paid R204 579.09 for fees on the presentation of an invoice by the plaintiff.

[2] The issue between the parties is whether the defendant is liable for payment of fees in respect of additional auditing time spent by the plaintiff over and above the work specified in the agreement between the parties. The issues pertaining to the merits of the matter (i.e. liability), was separated from those issues pertaining to quantum, by agreement.

[3] At the end of the plaintiff's case, the defendant applied for absolution from the instance. Both parties were *ad idem* that the trite test for absolution should apply, namely whether a court, based on the evidence presented, could reasonably find for the plaintiff. If not, the absolution should be granted.

[4] The following facts are relevant to the application for absolution:

The defendant had engaged the services of the plaintiff, a firm of chartered accounts, for purposes of verifying, and quantifying a claim made by the defendant against the Eastern Cape Provincial Government ("ECPG"). The defendant, a provider of vehicles and transport services, was awarded the total fleet outsourcing contract for the ECPG vehicle fleet for a five year period which was to come to an end in 2008. The defendant claimed certain sums of money from the ECPG, resulting in a dispute between them. The defendant then invited quotations to be submitted for an assignment, in terms whereof an independent audit would be conducted regarding the quantification of the defendant's claims against the ECPG. The purpose of the quantification, seen from the defendant's perspective, was to resolve the existing dispute between itself and the ECPG. The plaintiff's quotation was accepted. The parties then entered into oral negotiations which culminated in an agreement which was reduced to writing in a letter of engagement, dated 14 January 2008.

[5] Both parties regarded this letter headed "Terms of engagement" as the contract which regulated their relationship regarding the assignment in terms whereof the plaintiff would conduct an audit which would cover quantification of the claims against the ECPG in respect of the following: outstanding rental, interest on late payments, outstanding abuse claims, and outstanding rentals on buses.

[6] The plaintiff's case as pleaded was that on 26 February 2008, the plaintiff and the defendant entered into a further agreement where it was accepted by the defendant, that the estimated budget for completing the assignment was inadequate, by reason of the fact that incomplete or inaccurate information was furnished to the plaintiff. The plaintiff's declaration also states that it was agreed between the parties that the plaintiff should proceed with the assignment as expeditiously as possible, and that such fees as would be required, if incurred, would be paid by the defendant as being additional fees or costs, over and above "*the estimate of R244 047.00 in accordance with the agreed tariff*". Subsequently, because "pervasive errors" in the documentation provided were identified and required correction, there was an increase in the audit time spent by the plaintiff's staff on the assignment and therefore, a concomitant increase in fees. According to the plaintiff, after the work had to be repeated in many instances, the fee came to R562 003.75. Thereof, R195 379.25 was written off by the plaintiff. Since the defendant had already paid R204 576.00, the balance of R162 048.50 plus Value Added Tax, totalling R184 735.29 (the amount sued for) remained outstanding. That is what is claimed.

[7] The defendant admitted that a meeting was held between the parties on 26 February 2007, but denied that any binding agreement was reached with regard to the charging of additional fees at that meeting.

[8] In support of its case, the plaintiff called one witness namely Mr Thys de Beer, a partner of the plaintiff's firm who attended the meeting on 26 February 2008, and was involved in the assignment with which this case its concerned. According to Mr de Beer, the aforesaid meeting of 26 February took place at the plaintiff's offices in Vincent Park, East London. He and another partner of the plaintiff represented the plaintiff, and the defendant was represented by Mr Oupa Ramaswiela, Mr Korkie and Ms Fortuin. Mr de Beer conceded that there was no agreement which

provided for a specific increase in fees, but the parties were in agreement that there would be extra work which, as I understood him, meant more billable hours. Because the expeditious completion or finalisation of the assignment enjoyed such high priority, according to Mr de Beer, the parties agreed that the quantification of extra fees which would be necessarily, but reasonably incurred, would stand over until after the completion of the assignment, which was targeted to be at the end of March 2008.

[9] On 7 April 2008, Mr de Beer wrote a letter to the defendant, addressed to Mr Ramaswiela which was headed: "Request for extension of budget for the above assignment", and in it he set out a breakdown of the work in progress up to 31 March 2008, and the factors on which he based his request for the increased budget. Incidentally, this letter does not refer to any agreement previously reached, or that in principle it was agreed that there would be an increase in the budget. One would have expected mention thereof if there was indeed such an agreement.

[10] In clause 4 of the contract or letter of engagement headed "Fees", it is recorded that the plaintiff's fees are based on the time spent by its staff and on the level of their skills and responsibility. Further under this fees clause, it is stipulated that the plaintiff's fees would be presented monthly and were payable on presentation of the invoices. The second paragraph of clause 4 reads as follows:

> "Our fees (*sic*) this assignment will be R244 047.00 inclusive of VAT and disbursements. GTEL [the plaintiff] have (*sic*) taken cognisance of background information presented by FAEC [the defendant]. Should this information decrease, the audit time spent on the assignment by our staff, the savings, and the savings will be passed onto the client".

[11] Notably, there is no provision made under this heading, for the eventuality of an increase in the information and audit time spent on the

assignment. The defendant's counsel submitted during cross-examination of the plaintiff's witness, Mr de Beer, that such variation would just be part of the job (the assignment) and did not affect the fixed fee set for the assignment as stipulated in this clause.

[12] There are two terms in the letter of engagement which are highly relevant in the determination of this application for absolution:

The first is clause 8, which provides that the terms of the agreement will remain effective until the contract is replaced or renewed by amendment or otherwise, in which case there has to be agreement between the parties. This is a non-variation clause. Clause 9, headed "Agreement of terms" contains the other relevant term which reads:

> "This letter sets out the entire agreement and understanding between the company, you and our firm and, once it has been agreed, this letter will remain effective until it is terminated, amended or superseded".

[13] It is not open to the plaintiff in my view, to rely on the agreement on 14 January 2008 (the letter of engagement) to support its claim for additional fees. Mr de Beer, in his testimony recognized that the fee referred to in clause 4 ("Fees") of the letter of engagement or the contract between the parties, was not a budgeted fee (or "estimate" as it was referred to in the plaintiff's declaration), but a fixed fee which had already been paid by the defendant.

[14] That leaves the part of the claim which according to the plaintiff, arises from the meeting of 26 February 2008. There were indications in Mr de Beer's evidence which could support the assertion that some form of agreement was reached with regard to additional work that had to be done. However, Mr de Beer also conceded that the earlier agreement of 14 January 2008 was not terminated. That letter then constitutes the

only contract between them and there was also no variation of that contract. No new contract was reduced to writing. The question of additional fees payable would then hinge on the terms of the earlier agreement and the non-variation clause contained therein.

[15] The defendant relied on the trite principle applicable to non-variation clauses in written contract, as formulated in *S.A. Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere* 1964 (4) 761, which binds contracting parties to a non-variation clause in their written agreement to the effect that no variation thereof shall be binding unless agreed to in writing and signed by both parties.

[16] The plaintiff's opposition to the application for absolution is premised on the second paragraph of clause 9 of the contract which reads:

> "If any additional services are to be rendered, or if the terms of our engagement are not in accordance with your understanding, please contact the engaging partner, Thys de Beer, directly. We will then arrange for an additional meeting to discuss the terms of our engagement in order to avoid misunderstandings or to discuss additional services that we may render for you".

[17] The aforesaid clause does not assist the plaintiff. It clearly contemplates that additional work or any other aspects must be taken up prior to consensus being reached. This did not happen and therefore the letter of engagement became the entire agreement between the parties and that agreement contains a non-variation clause. Any amendment or variation thereto would have had to be by consent in accordance with the principle formulated in *Shifren*, which it was not. In the absence of a written variation to the agreement or a new agreement, which the plaintiff was unable to prove, the additional work or repetition thereof, remains part of the assignment for which the defendant has already paid

the plaintiff.

[18] That being the evidence, and faced with the applicable principle formulated in *Shifren*, I am not able to reasonably find for the plaintiff. In the circumstances, the defendant is absolved from the instance with costs.

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E REVELAS
Judge of the High Court

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