REPUBLIC OF SOUTH AFRICA

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

APPEAL CASE NO: A5024/17
CASE NO: 2013/12184

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

24/08/2018
DATE

Mabesele
SIGNATURE

In the matter between:

FLI-AFRIKA TRAVEL (PTY) LIMITED Appellant

and

SOUTH AFRICAN FOOTBALL ASSOCIATION Respondent

CORAM: CARELSE J, MABESELE J AND MALUNGANA AJ

J U D G M E N T

MABESELE, J:

[1] This appeal arises from the decision of the court below, dated 09 February 2017, dismissing with costs, the appellant's claim for damages on

account of breach of contract and upholding the respondent's defence that the '*full and final settlement agreement*' concluded by the parties extinguished obligations that existed in terms of the '*service level agreement*' which the appellant relies on for its claim.

[2] This '*service level agreement*' was concluded in preparation for a World Cup Soccer Tournament which was to be hosted by the respondent in 2010 under the auspices of the Federation of International Football Association (FIFA).

[3] The contention by the appellant is that the intention of the parties in concluding the '*full and final settlement agreement*' was not to '*wipe the slate clean*' or extinguish all obligations but merely to terminate the parties' obligations to acquire and provide tickets and that only obligations for the period after 16 April 2010 were implicated.

[4] This appeal seeks to determine three issues, namely; (i) a proper interpretation of '*full and final settlement agreement*'; (ii) whether upon a proper interpretation of a '*full and final settlement', only obligations for the period after 16 April 2010 were implicated*, and (iii) *whether the appellant has suffered damages*.

[5] It is evident from the Particulars of Claim that the appellant and respondent concluded a written '*service level agreement*' dated 23 January 2009.

[6] The rights and obligations of the parties are set out in clauses 3 and 4 thereof. In terms of clause 3.1 the appellant was obliged to source and supply 2 500 Football World Cup 2010 packages per week, for and on behalf of the respondent. The packages included accommodation in various host cities, tickets to football cup games, return transport from accommodation provided to the stadium where the games were played.

[7] In terms of clauses 3.3 and 3.3.1, respectively, the respondent undertook to supply the appellant with 2 500 tickets per week to various world cup games and to make payment to the respondent of the balance of any weekly unsold packages in the event that the appellant was unable to sell 2 500 packages per week.

[8] In terms of clause 4 the appellant would be responsible for the day-to-day running of its finance and administrative affairs, and as such would implement travel arrangements and ensure that necessary costs of such travel arrangements are submitted to the respondent, who in turn would arrange for payment of same in terms of the current payment structure. In addition, the appellant would pay the respondent 10% of any benefits '*which may accrue after inception of the partnership, net after payment of all expenses relating to the FIFA World Cup*'.

[9] The appellant alleges that on a proper interpretation of clauses 3.2 and 4 of the agreement, the appellant would lay out money for all travel

arrangements, including accommodation and would be reimbursed therefor on the submission of the expenditure to the respondent; alternatively, it was a tacit term of the agreement that, in complying with its obligations in terms of clause 3.2 of the agreement, the appellant would lay out money for hotel accommodation and would, as contemplated by clause 4, be reimbursed by the respondent for the costs of all travel arrangements.

[10] The appellant further alleges that during the period 29 January 2009 until 31 December 2009, it procured hotel accommodation in compliance with its contractual obligations to the respondent and incurred other expenses, including travel, in terms of the agreement.

[11] Despite the '*service level agreement*' the appellant was unable to market and sell 2 500 packages per week in terms of clause 3.1 of the agreement. It was not able to sell any packages at all. The respondent could not supply tickets to the appellant. Because the tickets could not be supplied the appellant was unable to utilise the accommodation and perform in terms of clause 3.1 of the agreement. The costs of cancellation to the appellant amounted to R27,698,839.26.

[12] The appellant alleges that on 16 April 2010, the parties agreed in writing that from that date the respondent had no further commitments for the provision of tickets to the appellant. On a proper interpretation thereof, only obligations for the period after 16 April 2010 were affected. All obligations which arose before that date remained unaffected.

[13] In order to mitigate its loss, the appellant sold 6 418 bed nights at hotels at a cost of R13,709,346.48 over the period June to July 2010.

[14] Accordingly, the appellant alleges to have suffered loss and damages in the sum of R13,989,452.78, being the difference between the sum of R27,698,839.26 and R13,709,346.48, such loss flowing directly from the respondent's breach, alternatively; were within the contemplation of the parties as a probable result of breach of contract on the part of the respondent when the agreement was entered into and the agreement was entered into on the basis thereof.

[15] It is common cause that the parties concluded a '*Memorandum of Understanding*' which was subsequently replaced by the '*service level agreement*'.

[16] The reason for the parties to conclude the '*full and final settlement agreement*' was that the respondent was unable to meet its obligations, as contemplated by clause 3.3 of the '*service level agreement*', to provide tickets to the appellant because the respondent was prohibited to do so, in terms of the policy of FIFA.

[17] Subsequent to the conclusion of the '*full and final settlement agreement*' the appellant concluded an agreement with a company known as

Match to enable the appellant to receive tickets from FIFA. The agreement is dated 16 March 2010.

[18] It is common cause that the appellant on the one hand was represented by its managing director, Mr Camaroodeen, when both the '*service level agreement*' and the '*full and final settlement agreement*' were concluded and the respondent on the other hand was represented by its President, Dr Oliphant, when the '*service level agreement*' was concluded and Mr Sedibe, its Chief Executive Officer, when the '*full and final settlement agreement*' was concluded.

[19] Mr Camaroodeen testified that there was a legal obligation on the side of the respondent to provide tickets to the appellant. The source of that obligation was in the '*Memorandum of Understanding*' and the '*service level agreement*'. In that context he stated that it was always his understanding that the respondent would provide the tickets as stipulated in clause 3. He made Mr Sedibe aware of the '*service level agreement*' when Mr Sedibe wanted to find out whether the appellant had already paid for the hotel accommodation.

[20] He had no queries with regard to the agreement which the appellant concluded with Match because Match was a ticket agent.

[21] He stated that subsequent to the conclusion of the '*service level agreement*' he began to book and pay various hotels throughout the country

to secure accommodation. The total amount of money paid was R27,804,671.67 as evident in '*exhibit A*', volume 9 of 11 of the record and annexure 'POC2' to the pleadings.

[22] He stated that in order to mitigate his loss, due to the failure by the respondent to provide tickets, he sold bed nights at hotels at a cost of R13,7 million and suffered loss in the amount of R13,989,452.78, being the difference between the total amount of R27,804,671.67 and R13,7 million. All these occurred before the parties concluded a '*full and final settlement agreement*'.

[23] He was unable to sell any packages after the appellant had concluded an agreement with Match because it was already late to advertise them. He received tickets from Match four weeks before the World Cup but was unable to sell any packages with the tickets. He sold the tickets to people who needed them.

[24] He stated that he would not have concluded the '*full and final settlement agreement*' with the respondent had that agreement intended to terminate the '*service level agreement*'.

[25] Before he concluded the '*service level agreement*' he was not made aware that such an agreement was in conflict with the policy of FIFA in so far as it relates to the tickets.

[26] During cross-examination he disputed the proposition that he procured accommodation to comply with the obligations imposed by Match. He was adamant that the accommodation was booked subsequent to the conclusion of the '*service level agreement*'.

[27] Mr Mokhari referred him to paragraph 15 of the Particulars of Claim wherein it is stated, *inter alia*, that the costs of cancellation for the plaintiff amounted to R27 million and asked him when did he cancel the accommodation. He responded that he never cancelled the accommodation.

[28] That question resulted to an objection raised by Mr Pauw on the basis that a witness cannot be cross-examined on a Pleading which he did not draw. However, the court decided in favour of Mr Mokhari and allowed that line of cross-examination which was intended to demonstrate discrepancies between the witness' evidence and pleadings.

[29] It is trite that a witness may not be cross-examined on a Pleading drawn by his or her legal adviser. If a cross-examiner intends to cross-examine a witness on a Pleading, it should first be established whether the witness made statements of fact to his legal adviser.

[30] In this regard, Dowling J, in *Seedat v Tucker's Shoe Co*[1] says the following:

---

[1] 1952 (3) SA 513 (T) at 516H

> *'... It is not, in my opinion, proper to draw conclusions adverse to the credibility of a party merely because there is discrepancy between his evidence and the pleadings which are formulated, not by the party, but by his legal adviser. If it is established that the party made statements of fact to his legal adviser or anyone else in conflict of his trial evidence, this would be a different matter ...'*

[31] In the present matter it was not established whether the witness made statements of fact to his legal adviser. In other words, counsel should have established first, whether the pleadings were drawn from the facts given by the witness. If the answer was in the affirmative, then the witness could be questioned about the contents of the pleadings to demonstrate any discrepancies between his trial evidence and the pleadings.

[32] Since this issue was not established, it cannot be said that the evidence of Mr Camaroodeen is in conflict with the pleadings.

[33] In any event, the respondent, in its amended plea, admitted the contents of paragraph 15 that the agreement was in fact cancelled and also that the appellant was unable to utilise the accommodation and perform in terms of the '*service level agreement*'.

[34] The paragraph reads:

> *'Despite this agreement, the plaintiff was unable to market and sell 2 500 "packages" per week in terms of clause 3.3 of the agreement ("POC1"). In fact, the plaintiff was not able to sell any packages at all. Because the tickets could not be supplied the plaintiff was unable to utilise the accommodation and perform in terms of "POC1". The costs*

of the cancellation to the plaintiff amounted to R27,698,839.26 as reflected on the last page of "POC2".'

[35] In response to paragraph 15, the following was said: (in paragraph 33 of the amended plea)

'AD PARAGRAPH 15

The contents of this paragraph are admitted. The plaintiff is put to the proof thereof.'

[36] When Mr Mokhari was invited by the court to comment on paragraph 33 of the amended plea in so far as it relates to paragraph 15 of the Particulars of Claim, he argued that paragraph 33 should be read with paragraph 34 which denies the contents of paragraph 15 of the Particulars of Claim.

[37] This argument is incorrect, in my view. The reason is that paragraph 34 of the amended plea, addresses the contents of paragraph 16 of the Particulars of Claim which is unrelated to paragraph 15 in so far as it relates to the inability of the appellant to have utilised the accommodation due to the unavailability of tickets, and the costs of the cancellation to the appellant in the said amount.

[38] In any event the witness, in his undisputed evidence, demonstrated the loss suffered by the appellant.

[39] The reasoning by the court *a quo* that the witness booked the hotel accommodation on the basis of the history of his long relationship with the respondent and the Memorandum of Understanding, is incorrect. The witness stated, clearly, that subsequent to the conclusion of the '*service level agreement*' he began to book and pay hotels to secure accommodation. Although the witness referred to the Memorandum of Understanding he stated that it was always his understanding that the respondent would provide the tickets as contemplated in clause 3 (of the '*service level agreement*').

[40] It is again incorrect for the court *a quo* to conclude that the hotel accommodation was secured in order for the appellant to comply with the terms and conditions of the letter of appointment of the appellant by Match, as a tour operator. The main purpose of that letter was to confirm reservation, for the benefit of the appellant, for the tickets for the 2010 FIFA World Cup and inform the appellant of his inclusion in the tour operation programme. The letter was dated 23 November 2008. On 23 January 2009 (before FIFA provided the tickets to the appellant) the appellant and respondent concluded the '*service level agreement*' in terms of which the respondent undertook to supply the appellant with tickets and required the appellant to secure hotel accommodation which was part of the '*package*' to be marketed and sold. The respondent undertook to reimburse the appellant for unsold packages.

[41] To my understanding of the witness's evidence, he provided FIFA with proof of hotel accommodation which was not secured by him, but people who

bought tickets from him after they were received late from FIFA and could no longer be sold as part of the package.

[42] In addition, it is evident in the pleadings that the issue about hotel accommodation revolves around the '*service level agreement*' and not the letter of appointment of the appellant by Match, as a tour operator.

[43] The reasoning by the court *a quo* that the '*service level agreement*' did not require the appellant to book hotels is again incorrect. Clause 3.1 of the '*service level agreement*' required the appellant to service and supply '*packages*' which included hotel accommodation.

[44] In light of the above, it is evident that the appellant suffered loss and damages, as pleaded.

[45] The question now is whether on a proper interpretation of clauses 3.2 and 4 of the '*service level agreement*' the appellant would lay out money for all travel arrangements, including accommodation and would be reimbursed thereof on submission of the expenditure to the respondent, and/or whether it was a tacit term of the agreement that, in complying with its obligations in terms of clause 3.2, the appellant would lay out money for hotel accommodation and would, as contemplated by clause 4, be reimbursed by the respondent for the costs of all travel arrangements. If the answer is in the affirmative then the question that follows is whether the '*full and final settlement agreement*' substituted the '*service level agreement*' in its entirety.

[46] The answer to these questions lie on a proper interpretation of an agreement or contract, as demonstrated below.

[47] In the interpretation of a contract the general rule is that the court should determine what the true intention of the parties was. This intention is to be gathered from their language and it is the duty of the court to give to the language used by the parties its ordinary grammatical meaning. The first step in interpretation should therefore be to determine what the ordinary grammatical meaning of the words used by the parties is[2].

[48] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] the Supreme Court of Appeal held that:

> '*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provision in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.*'

---

[2] *Jonnes v Anglo-African Shipping Co (1936) LTD* 1972 (2) SA 827 (AD) at 834D; see also, *Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA) at 281.

[3] 2012 (4) SA 593 (SCA) at 603.

[49] The court stated that a sensible meaning is to be preferred to the one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document, and that the temptation should be guarded against, to substitute what is regarded as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The court emphasised that the '*inevitable point of departure is the language of the provision itself*,'[4] read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[50] Clause 3.2 of the '*service level agreement*' reads:

> '*These Football World Cup 2010 packages are to include accommodation in various host cities, tickets to various Football World Cup Games, and return transport from the accommodation provided in terms of the package to the Stadium where the games are played.*'

[51] Clause 4 reads:

> '*FLI-AFRIKA TRAVEL will be responsible for the day-to-day running of its finance and administrative affairs, and as such will implement travel arrangements, and ensure that the necessary costs of such travel arrangements are submitted to the Association, who in turn will arrange for payment of same in terms of the current payment structure.*'

---

[4] The importance of the words used was stressed in *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011 (3) SA 148 (SCA) at 155-156

[52] Clauses 3.2 and 4, read in context, to my mind, implies that it was a tacit term of the agreement that in complying with its obligations in terms of clause 3.2, the appellant would lay out money for hotel accommodation and would, as contemplated by clause 4, be reimbursed by the respondent for the costs of all travel arrangements. In addition, in terms of clause 3.3.1 the respondent irrevocably undertook to make payment to the appellant of the balance of any weekly unsold packages in the event that the appellant was not able to sell 2 500 packages per week.

[53] Therefore, the argument by Mr Mokhari that the respondent is in breach of the agreement only by not providing tickets to the appellant and not obliged, in terms of the agreement, to reimburse the appellant for the loss suffered in securing hotel accommodation, is misplaced.

[54] It is common cause that the parties concluded the *'full and final settlement agreement'* because the respondent was prohibited by the policy of FIFA to provide tickets to the appellant. In my view, it should be against this background that this agreement is interpreted.

[55] The agreement reads:

> *'BACKGROUND*
>
> *A. Fli-Afrika and SAFA have together been engaged in certain discussions and/or arrangements which include the provision by SAFA to Fli-Afrika of match tickets for the 2010 FIFA World Cup South Africa.*

B. Fli-Afrika and SAFA wish to confirm by the execution of this full and final settlement agreement that no such commitment for the provision of tickets by SAFA to Fli-Afrika are continuing from the date hereof.

THEREFORE

1. *SAFA hereby confirms that Fli-Afrika has no continuing commitment of whatever kind to acquire tickets for the 2010 FIFA World Cup South Africa from or through SAFA.*

2. *Fli-Afrika hereby confirms that SAFA has no continuing commitment of whatever kind to provide tickets for the 2010 FIFA World Cup South Africa to Fli-Afrika.*

3. *The parties therefore release each other from any obligations implied or otherwise that may exist in connection with any such commitments.*'

[56] Plainly interpreted, the agreement releases parties from their obligations in so far as they relate to tickets only. In other words, the parties agreed that from the date of signing of the agreement, being 16 April 2010, the respondent on the one hand has no continuing commitment to provide tickets to the appellant, as contemplated by clause 3.3 of the '*service level agreement*', and the appellant on the other hand has no continuing commitment to acquire tickets from the respondent, as contemplated by clause 3.1. Mr Mokhari seems to agree with this interpretation and that the agreement includes past obligations.

[57] Since the agreement is silent about clauses such as 3.2; 3.3.1 to 4 of the '*service level agreement*', it can be reasonably concluded that the parties never intended to terminate the '*service level agreement*' by concluding the '*full and final settlement agreement*'. Had the parties intended to do so, they

would have simply stated that *'full and final settlement agreement'* extinguishes all obligations arising from the *'service level agreement'* or terminates the *'service level agreement'* instead of them referring to certain clauses of the *'service level agreement'* when concluding the *'full and final settlement agreement'*

[58] In addition, the *'service level agreement'* was about the supply of *'packages'* which are not mentioned in the *'full and final settlement agreement'*. This, again, suggests that the parties never intended to replace the *'service level agreement'* with the *'full and final settlement agreement'*. Had they done so, their actions would clearly have led to unbusinesslike results because the appellant had already suffered loss and damages in an amount of R 13,989,452,78. In addition, Mr Camaroodeen stated that he would not have concluded the *'full and final settlement agreement'* with the respondent had that agreement intended to terminate the *'service level agreement'*.

[59] Therefore the conclusion by the court *a quo* to uphold the respondent's defence that the *'full and final settlement agreement'* concluded between the parties replaced the *'service level agreement'* in its entirety is incorrect.

[60] Therefore the case is made out that the loss suffered flows directly from the respondent's breach of the *'service level agreement'* in respect of obligations which arose before 16 April 2010.

[61] In the result, I propose the following order:

61.1 The appeal succeeds with costs, including the costs consequent upon the employment of two counsel.

61.2 The order of court below is set aside and substituted with the following:

61.2.1 '*The defendant is ordered to make payment to the plaintiff in the sum of R13,989,452.78.*

61.2.2 The defendant is ordered to pay interest on the sum of R13,989,452.78 at the rate of 15,5% from 10 April 2013 until date of payment of the sum of R13,989,452.78.

61.2.3 The defendant is ordered to pay the plaintiff's costs, which shall include the costs consequent upon the employment of two counsel.'

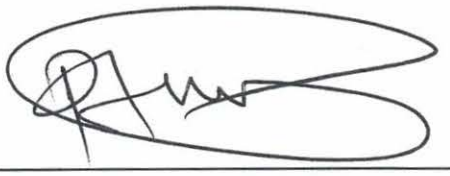
Mabesele

M M MABESELE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree, it is so ordered:

Z CARELSE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree



P MALUNGANA
ACTING JUDG OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing	:	13 June2018
Date of judgment	:	24 August 2018
For the appellant	:	Adv P Pauw
Instructed by	:	Glynnis Cohen Attorney, Johannesburg
For the respondent	:	Adv W Mokhari
Instructed by	:	Dikotope Attorneys, Johannesburg