Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6532/2014

Before: The Hon. Mr Justice Binns-Ward
Hearing: 21-23, 27 and 29 November 2017
Judgment: 12 December 2017

In the matter between:

DOTCOM TRADING 118 (PTY) LTD Plaintiff

and

HOBBS SINCLAIR ADVISORY (PTY) LTD Defendant

JUDGMENT

BINNS-WARD J:

[1] The plaintiff company is claiming payment of the balance it alleges is due and owing to it by the defendant company in respect of consultancy services rendered in respect of the operations of Wilenri Appliance Services (Pty) Ltd t/a Mastercare ('Wilenri') while the latter company was in business rescue. The claim is predicated on the enforcement of a contract that the plaintiff alleges was concluded orally with the defendant in May, alternatively in late July or early August, 2012. Mr Mark Mans represented the plaintiff in concluding the

agreement. He transacted with Mr Neill Hobbs, who is alleged to have acted on behalf of the defendant.

[2] Pursuant to an order in terms of rule 33(4) made in chambers by the Judge President, the issues separated for decision in the stage of the action tried before me were limited to (i) the standing of the plaintiff to sue on the contract; (ii) whether the defendant was party to the contract; and (iii) the terms of the contract. Only two witnesses testified at the hearing; Mr Mans for the plaintiff and Mr Hobbs for the defendant. To the extent that their evidence gave rise to two mutually conflicting versions of the facts, the proper approach to deciding which to prefer is that described in the oft cited analysis by Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie SA and others* 2003 (1) SA 11 (SCA), at para. 5.[1] (See also e.g. *Dreyer and another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at para 30 and *National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-H.)

[3] It was common ground that Mr Hobbs, a practising chartered accountant who had been appointed as business rescue practitioner to Wilenri on 21 May 2012, had invited Mr Mans - to whom he had at that time (through the vehicle of the defendant company) provided tax advice for several years - to become involved in the business rescue by providing the consultancy services required. Mr Hobbs confirmed in his oral evidence that he had appreciated when Mr Mans had agreed to be engaged that he would use a corporate entity for the purpose of the agreement. He also conceded that Mr Mans had chosen the plaintiff as the vehicle concerned, and acknowledged that the plaintiff company had, in consequence, been the contracting party. The upshot of that concession was that the pleaded dispute in respect

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[1] *The technique generally employed by courts in resolving factual disputes of this nature* [i.e. where there are two irreconcilable versions] *may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.*

of the first of the aforementioned issues separated for determination at this stage fell away; the plaintiff's standing to claim enforcement of the contract, which had been contested, was thereby admitted. [2]

[4] The plaintiff's counsel argued, however, that the lateness of the concession was a matter that fell to be taken into account in the assessment of Mr Hobbs' credibility. There is something in this, because in his affidavit on behalf of the defendant in opposition to the plaintiff's application for summary judgment Mr Hobbs had alleged that the contract had been between Wilenri and Mr Mans acting personally. He averred (at para. 14.2) that 'Mr Mans should have issued the invoices in his own name. For some undisclosed reason the invoices were made out in the name of the Plaintiff. …'.

[5] It also became apparent during the trial that there was little that was substantially in dispute concerning the terms of the agreement. Indeed, the only question requiring determination in that regard was the plaintiff's allegation that the contract had entitled it to charge a 10% administration fee. That is an issue that can be disposed of shortly. Mr Hobbs denied that there had been any discussion about such a fee, and the plaintiff's conduct during the execution of the contract did not support the existence of such a provision in the agreement. None of the invoices rendered by it reflected such a fee. In the circumstances, notwithstanding Mr Mans' evidence as to the existence of an objectively plausible commercial rationale for the plaintiff to have raised such a fee, the question falls to be determined adversely to the plaintiff.

[6] The focus of the contestation at the trial was the second of the aforementioned separated issues; namely whether the plaintiff's contract was with the defendant or some other counterparty. The defendant had pleaded that the plaintiff's claim (if any) lay against Wilenri, not the defendant. The contention that Wilenri in business rescue had been the entity with which the plaintiff had contracted derived support from the plaintiff's conduct in invoicing Wilenri for the consultancy services provided at the outset of the contract work in June 2012. From the beginning of August 2012, however, the plaintiff directed its invoices (including those in respect of the consultancy services rendered during July 2012) to 'Hobbs Sinclair Business Rescue Services'.

[7] All of the invoiced amounts that were paid were settled by means of transfers from an account operated by the defendant with Mercantile Bank. The source of payment is a neutral

[2] The defendant's counsel (who were not the authors of the defendant's special plea) had not directed any cross-examination on the issue when Mr Mans testified.

factor in my view, however, because it was evident that the defendant's bank account had at all material times been used exclusively as the transactional account for Wilenri's business while the company was in business rescue. Mr Hobbs explained that this had been because Wilenri had been unable to operate its own existing bank accounts or obtain new banking facilities while it was in business rescue.

[8] That said, the fact that the credit balance in the bank account was, understandably, characterised by Mr Hobbs as being 'Wilenri's money' is neither here nor there. The business rescue practitioner would have been entitled to pay his expenses by drawing on the account, for those expenses would be a charge against the company. It was implicit in the plaintiff's case that the business rescue operation was conducted by Hobbs through the defendant and its charges for the consultancy services were expenses incurred by the defendant in that operation. It is therefore also not determinative one way or the other that the consultancy fees that the plaintiff contends were due to it by the defendant were paid out of the same bank account as the director's fees that it admits were payable by Wilenri.[3] Moreover, from a commercial perspective, it seems axiomatic that the parties would have expected the operations of Wilenri to generate the funding to pay for the consultancy services rendered by the plaintiff irrespective of whether the latter's contract were with Wilenri itself, or the business rescue practitioner. It would have been unbusinesslike to undertake or continue with the business rescue operation if it had been evident that Wilenri's revenue would be unable ultimately to pay for what Mr Hobbs called the plaintiff's 'operational intervention'.[4]

[9] The evidence established that Mr Hobbs and his business partner, one Grieg Sinclair, had acquired a shelf company earlier in 2012 through which they intended conducting a business rescue directed business. They named the company Hobbs Sinclair Business Rescue Services (Pty) Ltd. It was apparent, however, that for whatever reason Mr Hobbs conducted the business rescue of Wilenri not through the recently acquired company, but using the vehicle of the defendant company. The business rescue plan prepared by him in terms of s 150 of the Companies Act 2008, and all the correspondence directed by him as business

[3] See note 8 below.

[4] In my judgment, it is this consideration, and not a belief that plaintiff's debtor was Wilenri, that explains Mans' agreement, during the conduct of the business rescue, that recovery of the fees incurred for consultancy services rendered by him under the contract with the plaintiff should be limited to R50 000 per month until such time as Wilenri's cashflow had improved to the extent that it could finance payment of the accrued unpaid balance.

rescue practitioner to which reference was made in the course of the evidence was issued in the defendant's name using 'Hobbs Sinclair Business Rescue Services' as a trading name. Letters written by Mr Hobbs in his capacity as the business rescue practitioner were on stationery with a letterhead bearing the title 'Hobbs Sinclair Business Rescue Services' in capital letters, with the defendant's company name and VAT and company registration particulars printed in a small font size at the foot of the page. Mr Hobbs conceded that it was common business practice for companies to use stationery discretely reflecting their trading names and formal identity in the manner described.[5]

[10] Mr Hobbs initially claimed that the format of the stationery that he had used had come about because of a mistake in his office concerning the design of stationery. Under cross-examination, he was driven by the weight of the evidence concerning his consistent use - commencing with his letter to the directors of Wilenri confirming his appointment as business rescue practitioner and his fee structure[6] - of stationery identifying its authorship with the defendant company to concede that it was difficult, if not impossible, for him to say that it had been in error. The letter from Mr Hobbs to Mr Mans recording the termination of the plaintiff's contract in August 2013 was also written on the defendant company's stationery. The probabilities support the conclusion in the circumstances that Mr Hobbs' concession accorded with the reality of the state of affairs. The defendant was indeed the

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[5] Section 32 of the Companies Act provides, insofar as currently relevant, as follows:

1) A company or external company must—
(a) …
(b) not misstate its name or registration number in a manner likely to mislead or deceive any person.
2) …
3) A person must not –
(a) use the name or registration number of a company in a manner likely to convey an impression that the person is acting or communicating on behalf of that company, unless the company has authorised that person to do so; or
(b) use a form of name for any purpose if, in the circumstances, the use of that form of name is likely to convey a false impression that the name is the name of a company.
4) Every company must have its name and registration number mentioned in legible characters in all notices and other official publications of the company, including such notices and publications in electronic format as contemplated in the Electronic Communications and Transactions Act, and in all bills of exchange, promissory notes, cheques and orders for money or goods and in all letters, delivery notes, invoices, receipts and letters of credit of the company.
5) Contravention of subsection (1), (2), (3) or (4) is an offence.

In terms of s 11(3)(c), a private company's name has to end with the words 'Proprietary Limited' or the abbreviation thereof expressed as 'Pty Ltd'.

[6] The letter called upon the directors of Wilenri to countersign the document in acceptance of the remuneration to which the business rescue practitioner would be entitled. The letter, according to is tenor, was written by Hobbs as business rescue practitioner speaking through the vehicle of Hobbs Sinclair Advisory (Pty) Ltd (i.e. the defendant).

entity through which he carried out his business rescue practitioner function in respect of Wilenri. My attention was not directed to a single document signed by Mr Hobbs as business rescue practitioner under a Hobbs Sinclair Business Rescue Services (Pty) Ltd letterhead. Mr Hobbs' conduct in holding out to the world that the business rescue was being conducted by him under the auspices of the defendant company was impossible to reconcile with his claim to have done so under the umbrella of Hobbs Sinclair Business Rescue Services (Pty) Ltd. Indeed, the use of the name of the latter company as the trading name of the defendant was enigmatic. Mr Hobbs' repeated emphasis that the business of the defendant was the furnishing of tax advice, not business rescue, was inconsistent with his conduct. It is also significant that Mr Hobbs' conduct in this respect cannot have escaped notice by his business partner in and co-director of the defendant company, Mr Sinclair.

[11] Mr Mans was taken in cross-examination to certain invoices rendered to Wilenri by Hobbs Sinclair Business Rescue Services annexed to the replying papers in separate proceedings under case no. 14190/13, referred to below, which showed two charges s.v. '*Professional Services*'; namely for '*To our fee for time spent as follows:*' or '*To our fee as follows:*' '*Business Rescue Consulting Fees for period xxx-xxx R xxx*', '*Disbursement to HS Advisory for the period xxx-xxx R xxx*'. Inasmuch as these documents professed to be VAT invoices and indicated 'vat reg. no pending', it appears that they were probably issued by Hobbs Sinclair Business Rescue Services (Pty) Ltd – although the company's designation as a private company and its incorporation number were not reflected. Mr Hobbs explained the invoices on the basis that Hobbs Sinclair Business Rescue Services (Pty) Ltd had contracted with the defendant company ('HS Advisory') to provide accounting and financial services to Wilenri. Mr Hobbs admitted that these invoices were internal documents in the sense that they would not have been distributed to the 'outside world', but only within the Hobbs Sinclair stable. In its pleadings, however, the defendant admitted that when the plaintiff had addressed invoices to '*Hobbs Sinclair Business Rescue Services*' it had been using the defendant's trading name – see para. 3.2 of the defendant's rejoinder. The defendant pleaded that the plaintiff had submitted such invoices to the defendant to obtain payment by the defendant out of funds held on Wilenri's behalf in an account operated by the defendant. Para. 3.2.4 of the rejoinder, which was amended during the trial, had originally been drafted, confessedly on Mr Hobbs' instructions, to read as follows concerning such invoices: '*Those invoices which the Plaintiff had made out and <u>on which the Defendant's name was inserted</u> were intended and understood to have been submitted to the Defendant*

because the latter was attending to making payments on behalf of Wilenri.' (Underlining supplied.)

[12] Mr Hobbs sought to explain that the amendment had been effected because 'Hobbs Sinclair Business Rescue Services' had never been the defendant's name and the implication to the contrary in the pleading as originally framed had been incorrect. I find it improbable, having regard to the question most centrally in issue concerning the defendant's disputed liability, that such an error could have been made by the defendant's then legal representatives, or, if it had been, that it could have been overlooked by Mr Hobbs at the time. On the contrary, the admission is wholly consistent with Hobbs' undeviating use, over a prolonged period, of documentation reflecting 'Hobbs Sinclair Business Rescue Services' as the defendant's trading name.

[13] Mr Mans explained the abovementioned change from the plaintiff having invoiced Wilenri for the consultancy services to invoicing Hobbs Business Rescue Services[7] in the context of his having become 'discomforted', after considering the provisions of chapter VI of the Companies Act 2008, about the plaintiff being reliant on payment from Wilenri in the event of the business rescue failing and that company being wound up. Mr Mans had had regard to the Companies Act after having been provided with a pocket book publication of the statute by Mr Hobbs.[8] It was implicit in Mr Mans' evidence, and subsequently acknowledged by Mr Hobbs when he gave evidence, that Mans was reluctant to have the plaintiff continue with the consultancy services in respect of Wilenri's business rescue on the basis of such downside exposure. Mr Mans' description of the parlous state of Wilenri's business at the inception of business rescue justified his concern about the plaintiff's exposure if its contractual claim for remuneration were to lie against the company. Mr Mans testified that Mr Hobbs had accepted his concern and advised him to 'bill me'. The import of the words 'bill me' is the key issue in this part of the case. Mans understood them to convey that the plaintiff should render its accounts to the entity through which Mr Hobbs was conducting the business rescue, and an acceptance by Hobbs that that entity, not Wilenri, would be the party contractually liable to the plaintiff.

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[7] See paragraph [6] above.

[8] Mr Mans had been appointed as an executive member of the board of Wilenri by Mr Hobbs during June 2012. It was in the context of that appointment that Mr Hobbs had given him and the other persons appointed to the board at the same time copies of the Act so that they could apprise themselves of the statutory provisions regulating business rescue. Business rescue was a novel concept at that stage. It was introduced when the 2008 Companies Act came into operation in May 2011, only just over 13 months before Mr Mans became involved as a director of Wilenri.

[14] The content of an email sent on 1 August 2012 by Mr Mans' accountant to the person appointed by Mr Hobbs as managing director of Wilenri during the business rescue, Mr Richard Saner bore out Mans' evidence that a change in the identity of the party to which the plaintiff would look to for payment in terms of its consultancy services agreement had been agreed. The email read in relevant part as follows:

> **Subject**: M Mans and Mastercare – July consultancy
> Hi Richard,
> I believe you are in JHB on business and I need to invoice out the charges for Mark and his team for July consultancy. Mark has advised that I need to invoice Neil (sic) Hobbs and Associates, and therefore I require your billing details, including the VAT number.
> …
> Kind regards
> **Der-Anne Dods**
> **Financial Accountant – M Mans Holdings Group**

Ms Dods addressed a further email to Mr Mans, whom it would appear must also have been in Johannesburg at the time, later in the afternoon of 1 August 2012. That email read:

> Subject: Neil (sic) Hobbs & Association (sic) invoice details
> Hi Mark,
> Just a reminder that if you see Richard to ask him to please forward me the invoicing details for the Mastercare consultancy fee & expenses.
> Thanks
> **Der-Anne Dods**
> **Financial Accountant – M Mans Holdings Group**

'Hobbs and Associates' was a name under which Mr Hobbs carried on certain business in his personal capacity. Despite Mr Mans' evidence that he had understood from his conversation with Mr Hobbs that by 'bill me' Hobbs had meant the defendant company, the tenor of the emails suggests that he must initially have understood Hobbs to mean Hobbs and Associates. But the subsequent conduct of the parties indicates that any such understanding by Mans was transient.

[15] There was no direct evidence concerning the content of the billing details given in response to the enquiry being pursued by Ms Dods. The parties' conduct in respect of the subsequent rendering and payment of invoices for the consultancy services supports the inference that 'Hobbs Sinclair Business Rescue Services' must have been given as the party

to whom they should be rendered. As described, that was the name under which Hobbs was conducting the business rescue through the vehicle of the defendant company.[9]

[16] The probability is that Mr Saner provided the billing details, as claimed by Mr Mans. As the business rescue practitioner-appointed managing director of Wilenri, Saner would have had no authority to bind the defendant company to the plaintiff. It is clear, however, that Saner worked under the close direction of Mr Hobbs and it is likely, in the context of the conversation between Mans and Hobbs just described, that the billing details would have been provided by Saner on Hobbs' instruction. The inference that that was so is supported by the fact that invoices directed to 'Hobbs Sinclair Business Rescue Services' were thereafter accepted without demur. Mr Hobbs' denial that he had authorised the furnishing of the billing details is not supported by the probabilities.

[17] It was put to Mr Mans in cross-examination that the addressing of the plaintiff's invoices to 'Hobbs Sinclair Business Rescue Services' indicated that the company of that name, and *not* the defendant company, was treated by it as its debtor. Mans' evidence was that he had understood at the time that 'Hobbs Sinclair Business Rescue Services' was a trading name of the defendant company. He said that he was unaware then of the existence of a separate company of that name. He was taxed in cross-examination over his claim to have become aware of the existence of a separate company called Hobbs Sinclair Business Rescue Services (Pty) Ltd only during the discovery process in the lead up to the trial in the current matter being contradicted by his earlier acknowledgment of the existence of that company when he made a supporting affidavit in motion proceedings instituted by Nedi

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[9] Mr Mans was taxed in cross-examination with averments that he had made on affidavit in an application brought by Nedi Investments (Pty) Ltd and M Mans Holdings (Pty) Ltd (which was a creditor of Wilenri) under case no. 14190/13 - in which, amongst other things, an order removing Mr Hobbs from office as Wilenri's business rescue practitioner had been sought - that were amenable to being understood as having identified Wilenri as the plaintiff's creditor. So, for example, in para. 222.19 of the replying affidavit (*jurat* 8 October 2013) that he made in those proceedings, Mans had stated:

> *When I was however "fired" by Hobbs, Dotcom* [i.e. the plaintiff company] *(which it is entitled to do) invoiced Wilenri to date for the outstanding consultancy fees which presently amounts to Rxxx plus VAT in the amount of Rxxx. I point out that Dotcom accordingly, since the inception of business rescue proceedings, has only been paid a total amount of Rxxx, excluding VAT, for my services.*

and had included the amounts therein referred to in a 'Summary of accounts outstanding for Wilenri Appliance Services (Pty) Ltd' attached to the affidavit as annexure 'MM20'. It was suggested that these averments were incongruent with his claim that the defendant company, not Wilenri, was the plaintiff's debtor. In his evidence at the trial Mr Mans stated that his evidence in the paragraph cited had been incorrect in two material respects: the plaintiff had not invoiced Wilenri and the amounts referred to as allegedly owed to Dotcom had been incorrect. The objective evidence bore him out in the first of these respects. The plaintiff did not invoice Wilenri for any of the consultancy services rendered after 1 July 2012, it invoiced 'Hobbs Sinclair Business Rescue Services'. What amount, if any, remains owing to the plaintiff for the consultancy services is a matter in contention, to be tried in the second stage of this action.

Investments (Pty) Ltd and M Mans Holdings (Pty) Ltd[10] for removal of Mr Hobbs as business rescue practitioner of Wilenri.[11] Hobbs Sinclair Business Rescue Services (Pty) Ltd was cited as the fourth respondent in those proceedings, which were instituted at the end of August 2013. Mans' evidence as to precisely when he first became aware of the separate existence of Hobbs Sinclair Business Rescue Services (Pty) Ltd was unreliable. However, in my judgment his knowledge in this respect was not relevant. In the context of Hobbs' conduct of the business rescue using the name as the defendant's trading name, there is nothing to support the notion that the plaintiff was actually invoicing a separate company that happened to have that name. There is also nothing to support a conclusion that by causing the plaintiff to be furnished with the billing details used with effect from its invoice dated 31 July 2012, Hobbs had intended Hobbs Sinclair Business Rescue Services (Pty) Ltd to be charged for the consultancy services rendered under the plaintiff's auspices.

[18] Whilst, Mr Mans' evidence as to when he first became aware of the existence of a separate company by the name Hobbs Sinclair Business Rescue Services (Pty) Ltd was vague and unreliable, I nevertheless have no reason to reject his evidence that he was unaware of it when he had his conversation with Hobbs in 2012. There had admittedly been dinner table discussions in or about May 2012 about the establishment of a dedicated business rescue enterprise in which Mans might invest or participate, but there is nothing to show that these discussions were taken anywhere as far as Mr Mans would know. He was given a business card with the name 'Hobbs Sinclair Business Rescue Services' on it, but the card did not associate the name with an identified company. Mr Saner was also issued with such a card. Mr Hobbs explained the issue of the business card to Saner as being '(b)ecause at that stage we were contemplating putting together a team that would have an on-going business rescue activity'. He admitted that the circumstances in which Saner had been given the card were indistinguishable from those in which Mans obtained his card. As far as one can tell by the evidence, Mr Hobbs was doing nothing to show the face of Hobbs Sinclair Business Rescue Services (Pty) Ltd to the outside world, including Mr Mans.

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[10] M Mans Holdings (Pty) Ltd is a company controlled by Mr Mans. It emerged in evidence that that company was a secured loan creditor of Wilenri and had also leased certain fixed property to Wilenri.

[11] The witnesses were referred during the trial to selected passages in the papers in the application brought by Nedi Investments (Pty) Ltd and M Mans Holdings (Pty) Ltd under case no. 14190/13 in which Hobbs Sinclair Business Rescue Services (Pty) Ltd was cited as the fourth respondent. The court was not, however, required to read the entire set of papers. It was not apparent from the passages to which reference was made or the relief sought in the notice of motion why the fourth respondent had been joined in that matter.

[19] The probability is that when Mr Hobbs said 'bill me' he would have meant the entity through which he was conducting the business rescue. It did not redound to Mr Hobbs' credit that, having caused the defendant to plead that that Mr Mans had contracted with Wilenri, he sought during his evidence to suggest variously that the plaintiff's contract had been with him (Hobbs) in his personal capacity or with Hobbs Sinclair Business Rescue Services (Pty) Ltd. As the plaintiff's counsel stressed in argument, on the pleaded case only two 'candidates' were presented as the plaintiff's counterparty, Wilenri or the defendant.

[20] It was demonstrated to Mr Mans during cross-examination that the plaintiff had also addressed some invoices to 'Hobbs Sinclair Business Rescue Services' in respect of matters such as his monthly directors' fee and a software licence for a program called HEAT, which he had admitted were Wilenri's liability, and not that of the defendant. Mans expressed puzzlement over that and conjectured that the invoices in question must have been addressed in that way on request or by mistake. It was suggested to Mans that the plaintiff's conduct in this respect showed that when it invoiced 'Hobbs Sinclair Business Rescue Services' it was doing so in respect of Wilenri's liability. Mans denied the proposition. In my view, the proposition might have had some force were it not for the fact that it failed to address the effect of the arrangement specially put in place after Mans' conversation with Mans in early August 2012 about his discomfort about the plaintiff's exposure to Wilenri in respect of its claim for consultancy services. Mans had special reason for concern in this regard because of the plaintiff's liability to pay the individuals the plaintiff had independently contracted to provide these services.

[21] Mr Hobbs professed to lack any independent recollection of the conversation with Mr Mans, but admitted to not being able to deny that it had taken place. He did confess to remembering a conversation with Mans that had centred around s 143 of the (2008) Companies Act. He also conceded that he could not deny having uttered the words 'bill me' and was constrained to admit that any such statement by him would have been directed at addressing Mans' concern about the plaintiff's exposure to the effect of Wilenri's potential liquidation. These concessions forced Mr Hobbs to allow that Mans' concern could hardly have been addressed if Wilenri had remained as the debtor to which the plaintiff was expected to look for the redemption of its claims. His attempts under cross-examination to suggest that Mans' concern had been left 'unresolved', alternatively that he had offered himself personally as the substituted debtor, were singularly unconvincing. Mans did not give the impression of being a businessman who would be easily fobbed off with a nebulous

response to the issue that he had raised, and it is most improbable that Hobbs would have agreed to expose himself to unlimited personal liability.

[22] The evidence suggests that it is probable that Mr Hobbs would have been especially keen to keep Mr Mans involved in the business rescue because of his wide experience and proven competence in areas critically relevant to salvaging Wilenri's business.[12] It was for that reason that he had especially sought out Mr Mans' assistance in what he at the outset had appreciated would be a seriously challenging business rescue operation. This would explain a willingness on his part to accommodate Mans' expressed concern.

[23] The only pertinence that s 143 of the Companies Act could conceivably have had in the context was an understanding that if the plaintiff's charges were treated as an expense of the business rescue practitioner, Mr Hobbs or the company through which he conducted the business rescue would be entitled to recover them as a first charge against Wilenri in liquidation.[13] On that approach, by agreeing that the defendant should be liable to pay for the consultancy services, Hobbs would have been undertaking a limited risk in return for assuaging Mans' concerns and ensuring that the plaintiff's services remained retained.[14] In evidence, Mr Hobbs voiced the opinion that the plaintiff would have enjoyed some form of

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[12] Mans testified that he had previously been involved through the plaintiff company in supplying operational support to large corporates such as Woolworths, Foschini, Makro and Game.

[13] Section 143 provides as follows insofar as currently relevant:

(1) *The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (6).*

...

(5) *To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.*

(6) *The Minister may make regulations prescribing a tariff of fees and expenses for the purpose of subsection (1).*

Regulation 128(3) of the Companies Regulations, 2011, provides:
In addition to the remuneration determined in accordance with section 143 (1) to (4), and this regulation, a practitioner is entitled to be reimbursed for the actual cost of any disbursement made by the practitioner, or expenses incurred by the practitioner to the extent reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings.

[14] Mr Hobbs' testimony gave me to understand that his appreciation of the relevant import of s 143 accorded with the interpretation reportedly advanced on behalf of the business rescue practitioner in *Diener N.O. v Minister of Justice and Others* [2017] ZASCA 180, a case in which judgment was delivered 2 days after the hearing in the current matter was concluded. In *Diener*, the appeal court – not for the first time – noted the uncertainty to which some of the provisions in chapter 6 of the Act have given rise, but after a thorough contextual analysis of the effect of s 143, read with s 135 of the Act and the relevant provisions of the Insolvency Act 24 of 1936, held that those provisions could not be read to afford any preference in respect of the rescue practitioner's unpaid fees and expenses in the event of the company under business rescue going into liquidation.

preferent claim against Wilenri upon the latter's liquidation in any event. I am not aware, however, of any statutory basis for that belief, nor was attention directed to any by counsel.

[24] The defendant's counsel argued that it would not have been legally permissible for Hobbs to contract with the plaintiff for the provision of the consultancy services. They did not elaborate on the basis for that contention. I gathered it to be implicit in the argument that the business recue practitioner could not competently have incurred the cost of engaging the plaintiff as a recoverable expense. I agree with the plaintiff's counsel's submission that the contention was without merit.

[25] In the commentary on s 143 of the Act in (Delport *et al*) *Henochsberg on the Companies Act 71 of 2008*, the ambit of the rescue practitioner's 'expenses' is explained with reference to the provisions of Companies Act Regulation 128(3), which speaks of '*expenses incurred by the practitioner to the extent reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings*'. One has to be circumspect about interpreting a statute with the aid of the regulations made under it (see e.g. *Moodley and Others v Minister of Education and Culture, House of Delegates and Another* [1989] ZASCA 45; 1989 (3) SA 221 (A) at 233D-G, and *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at para 24), but I find nothing in the regulation that is inconsistent with the evident import of the section in the statute from which it derives.[15]

[26] It was clearly established in Mr Hobbs' evidence that the consultancy services enlisted under the aegis of Mr Mans were considered necessary by him to carry out his functions and enable an effective business rescue. It could hardly be contended in such circumstances that it was outside the scope of Hobbs' remit as the business rescue practitioner to incur expenses in respect of the engagement of the consultancy services. Indeed, the defendant's counsel's contention in this respect was inconsistent with Hobbs' explanation that he had contracted with the defendant company to provide accounting services to Wilenri. On Mr Hobbs's version the cost of those services was charged to Wilenri by Hobbs Sinclair Business Rescue Services (Pty) Ltd as expenses of the business rescue practitioner.

[27] In all these circumstances I have been satisfied that the plaintiff has succeeded in proving on a balance of probabilities that it had a contract with the defendant company.

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[15] See note 13 above for the relevant text of s 143 and regulation 128(3).

[28] The claim was originally formulated on the basis that the plaintiff had contracted with the defendant from the outset; that is from the time that Mr Hobbs had agreed with Mr Mans in May 2012 that the latter would provide the required consultancy services. Mr Mans also sought to advance that case in his testimony. I do not think that the contention is sustainable. It is inconsistent with the plaintiff's conduct in submitting its invoices for consultancy services rendered during June 2012 to Wilenri. It is also inconsistent with Mr Mans' described discomfiture; there would be no reason for it if he had not thought at that time that the plaintiff's contract was with Wilenri.

[29] An appreciation by the plaintiff's counsel of the weakness of Mr Mans' evidence in this regard no doubt inspired the application made immediately after the completion of his testimony to amend the plaintiff's particulars of claim by inserting late July or early August 2012 as an alternative time for the alleged conclusion of the contract. The application to amend the pleading was granted in the face of opposition by the defendant.

[30] The plaintiff's counsel argued in support of the proposed amendment that it was merely to bring the pleadings into line with the evidence that had been adduced. The inherent soundness of that contention, which was supported by counsel's indication in his address in support of the application that the plaintiff did not intend to call any further evidence, commended itself to me. I was also not persuaded that the amendment raised any cognisable prejudice to the defendant – none was obviously evident – that could not be fairly accommodated. The defendant's counsel would have been at liberty to cross-examine Mr Mans further if they wished, and could also have sought other forms of procedural relief such as a postponement if their client would be embarrassed in the conduct of its case as a consequence of the amendment being allowed.

[31] I was unpersuaded by the defendant's counsel's argument that any further cross-examination of Mr Mans would be of little or no worth because of the timing of the amendment at the conclusion of his evidence. The evidence that Mans had already given had nailed his colours to mast as far as his version of the relevant facts was concerned and, if it were so minded, it remained open to the defendant to further attack or rebut it. As it was, the cross-examination of Mans that had already occurred had proceeded on the basis of a concession by the defendant that the July-August conversation between Mans and Hobbs described by the witness had taken place. The allegedly related subsequent email correspondence and change in invoicing, on which the plaintiff relied, had been objectively established by the documentary evidence. All that remained was what inferences and

conclusions fell to be drawn from that evidence. In the circumstances it came as no surprise to me that the defendant did not ask for Mans' recall or seek a postponement when leave to effect the amendment was granted.

[32] I reserved the costs of the plaintiff's application to amend its particulars of claim for later determination. The defendant's opposition to the application was not so unreasonable as to justify visiting it with an adverse costs order. The plaintiff will be ordered to pay the defendant's costs in the application as if it had been an unopposed application; in other words, the defendant will have to bear its own costs arising out of its opposition.

[33] Inasmuch as the parties' conduct indicates that the change in billing occurred and was accepted with effect from the plaintiff's invoicing for consultancy services provided during July 2012, it falls to be inferred that the agreement concluded in late July or early August 2012 between Messrs Hobbs and Mans, representing their respective principals, must have contained a term making it retrospective in effect from 1 July 2012. The contextual effect of the alternative introduced by the amendment was to imply that the agreement reached between Mans and Hobbs in late July or early August 2012 substituted that which had been concluded in May. The defendant's counsel argued at the end of the trial that if that had been the plaintiff's intention, the implication should have been expressly pleaded. Even if there is some merit in the argument, I do not consider that the plaintiff's failure to expressly plead or expatiate on the implication stands in the way of a determination of the issue on the evidence that was adduced; cf. *Shill v Milner* 1937 AD 101 at 105. The implication was obvious and the relevant facts were fully ventilated in the evidence.

[34] Both sides were represented at the hearing by senior counsel. For the guidance of the taxing master, I should mention that in my view the relative complexity of the matter justified the engagement of senior counsel.

[35] The following order is made:

1. It is declared that the agreement relied on by the plaintiff in the particulars of claim ('the agreement') was concluded between the plaintiff, represented by Mr Mark Mans, and the defendant, represented by Mr Neill Hobbs, in late July, alternatively, early August 2012.
2. The pertinent terms of the agreement (as subsequently amended in the respect reflected in para. 2.6 below) were as follows:
    2.1. The plaintiff was appointed by the defendant, with retrospective effect from 1 July 2012, to render certain consultancy services concerning the restructuring of the

operational activities of Wilenri Appliance Services (Pty) Ltd ('Wilenri') under business rescue.

2.2. The plaintiff would appoint appropriate personnel to effect the restructuring of the operational activities of Wilenri.

2.3. The plaintiff would at all times in the execution of the restructuring of the operational activities of Wilenri be subject to the management and control of the business rescue practitioner, who was carrying out his functions through the vehicle of the defendant company.

2.4. The plaintiff would be remunerated on the basis of time spent and the plaintiff's employees and / or consultants, certain of whom were contracted on an *ad hoc* basis, would be charged out by the plaintiff at rates that were reasonable.

2.5. Save as set out in para. 2.6 below, the plaintiff would submit its invoices to the defendant at the end of each month and the defendant would make payment in respect thereof at the end of the following month.

2.6. With effect from February 2013, the plaintiff would provide the defendant with pro forma invoices, in respect of which:

2.6.1. of the consultancy fees payable for Mr Mans' hours, any amount up to R50 000 would be payable as set out in para. 2.5 above, and any amount exceeding R50 000 would be accrued and paid when funds became available to pay such accrued balance or the business rescue was terminated, whichever occurred first;

2.6.2. the balance of the consultancy fees, aside from the hours of Mr Mans, would be payable as set out in para. 2.5 above.

3. Save that the plaintiff shall pay the defendant's costs occasioned by the application to amend the particulars of claim on the basis as if such application had not been opposed, the defendant shall otherwise pay the plaintiff's costs of suit in respect of the trial of the separated issues.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

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