THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 592/2017

In the matter between:

PREMIER ATTRACTION 300 CC
t/a PREMIER SECURITY **Appellant**

and

CITY OF CAPE TOWN **Respondent**

Neutral citation: *Premier Attraction 300 CC t/a Premier Security v City Of Cape Town*, (592/2017) [2018] ZASCA 69 (29 May 2018)

Coram: Majiedt, Swain and Mbha JJA and D Pillay and Schippers AJJA
Heard: 7 May 2018
Delivered: 29 May 2018

Summary: Contract – interpretation – application to recover claims for security services – appellant electing to abide – invoicing on respondent's calculations of price escalations– not communicating objection to alleged short payment – defences of waiver and prescription upheld.

ORDER:

On appeal from: High Court of South Africa, Western Cape Division, (Davis J sitting as court of first instance):
The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

D Pillay AJA (Majiedt, Swain and Mbha JJA and Schippers AJA concurring):

[1] This is an appeal against the judgment of Davis J in the High Court, Western Cape Division, in which he dismissed the claim of the appellant, Premier Attraction CC t/a Premier Security (Premier) for payment of R16 469 681.94 (the claim) but upheld the claim for payment of R 2 339 296.27 (the additional claim) against the respondent, the City of Cape Town (the City). The dispute turns on the interpretation of a contract to determine the prices for security services that Premier rendered to the City. Relying upon the defences of waiver and prescription the City resisted the claim. The appeal in respect of the claim is with the leave of this court. The City did not cross-appeal against the award of the additional claim.

[2] Turning to the facts, Premier tendered successfully to render security services to the City for six years from 1 October 2008 to 30 September 2014. The contract prices for the first two years were agreed. No dispute arose in relation to the pricing for that period. Price increases

for subsequent years depended on whether the Minister of Labour issued sectoral determinations for the security industry as contemplated in the Labour Relations Act 66 of 1995. If there were increases Premier could apply to the City for a variation of the prices.

[3] The first period of the contract expired in September 2010. Triggered by increases in the applicable sectoral determination, Premier applied for an increase for the second phase, being October 2010 to September 2012. It submitted invoices based on its interpretation of the contract and calculation of the increases. The City disagreed with Premier's calculations and rejected its invoices. Believing that the City would not pay any amount if it claimed payment on the basis of its own calculations, Premier submitted invoices based on the City's calculations. Although Premier disagreed with the City's calculations, it did not communicate its disagreement to the City.

[4] Notwithstanding Premier's dissatisfaction this state of affairs persisted in the next phase of the contract until September 2014. The third phase of the contract commenced on 1 October 2014. No dispute in relation to that phase arises in the appeal. However, as the size of the contract diminished by more than two-thirds of the previous contracts, Premier faced the difficulties and risks of retrenching two-thirds of its workforce. Consequently, Premier found itself in dire financial straits.

[5] After the contract expired in September 2014, Premier communicated to the City its intention to claim the alleged shortfall for the first time at a meeting on 9 December 2014. On 14 January 2015 it demanded payment. By letter of 18 February 2015 the City gave its reasons for denying liability for any amounts.

[6] On 24 June 2015 Premier notified the City of its claims in terms of The Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). In the notice it conceded that it was 'not sent within six months of the debt becoming due.' It explained that it had been in discussions with the City 'in an attempt to avoid litigation'; that the City was apprised of the facts; that the dispute turned on a contractual interpretation; and consequently, that the City was not prejudiced.

[7] On 25 June 2015 Premier applied urgently to the high court for payment of both claims. On 30 June 2015 it obtained an order enrolling the dispute on the semi-urgent roll for 27 October 2015.

[8] The high court dismissed the claim, holding that those amounts that fell due between 1 September 2010 and 25 June 2012 had prescribed. It also found that Premier had waived its right to claim payment of the shortfall. It reasoned that in the founding affidavit Premier attested to generating invoices for amounts it believed to be incorrect 'for a considerable period without demur and certainly without any attempt to invoke rights which it might have enjoyed … in particular … the arbitration clause.' Having 'waived unequivocally whatever rights it might have enjoyed' the high court saw no point in 'engaging further' to determine whether Premier had a claim for payment of any shortfall.

[9] As Premier succeeded partially in obtaining an order for the payment of the additional claim, the high court awarded it 30 per cent of the costs incurred in respect of the main and additional claims, such costs to include 30 per cent of the costs of two counsel.

[10] In this court Premier contended that the high court erred on the law and facts in concluding that it had by its conduct waived its right to claim the contract prices it contended for; that it had not with full knowledge of its right abandoned it expressly or by conduct; and that the City failed to plead and prove waiver. The contract 'entitled but did not oblige Premier to raise a dispute when it arose.' Instead 'faced with the City's breach of the contract, it elected to abide by it.' It insisted that without full knowledge of its rights until it received its counsel's opinion in March 2015, it could not have waived its rights. Hence the high court had erred in finding that it had waived its rights to claim the increases in the contract price according to its own calculations. Regarding prescription, Premier contended that in accordance with the common law it was entitled to allocate payments to the oldest outstanding debt.

[11] Waiver is a defence on a point of law that can be raised on the facts, provided that whenever it is invoked the other side has a fair opportunity to respond.[1] All that the City had to do was to set out the facts adequately. It did so as follows in the answering affidavit:

'18. Throughout the duration of the contract period, Premier at various intervals applied for and received price increases in accordance with the conditions of contract.

19. Premier, at all relevant times accepted the price escalations offered by the City.

20. If Premier was aggrieved by the price escalation to which the City was prepared to agree, it ought to have declared a dispute as provided for in the contract. It chose not to do so.

21. By accepting the amounts paid to it by the City throughout the duration of the

[1] Erasmus Superior Court Practice rule 6(5)(d)(ii) B1-45.

contract period, Premier signalled its acceptance of the amended price escalations. It is therefore not open Premier now to allege that it did not agree to the price escalations. Premier at no point issued a notice of breach to the City, nor did it declare a dispute or take such dispute to arbitration as provided for the contract.'

[12] In reply Premier admitted these averments but persisted that although it received price increases from the City periodically, they were not in line with its interpretation of the contract. That notwithstanding, Premier insisted that it had no option but to accept the price escalations offered by the City; but there was no agreement about this. Premier continued to submit invoices in accordance with the City's interpretation believing that had it submitted invoices for amounts it contended for, the City would not have authorised payment to Premier.

[13] Manifestly on these facts Premier had a fair opportunity to respond to the waiver defence. The City gave clear[2] and proper[3] notice of its intention in its affidavits to raise the defence of waiver.[4] No express waiver was necessary once such inference could reasonably be drawn.[5]

[14] An intention to waive must be inferred reasonably; no one can be presumed to have waived rights without clear proof.[6] The test for such intention is objective. Some outward manifestation in the form of words or conduct is required; silence and inaction will do when a positive duty to act or speak arises. Mental reservations not communicated have no

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[2] *Borstlap v Sbangenberg en andere* 1974 (3) SA 695 (A) at 704 F-H.
[3] *Linton v Corser* 1952 (3) 685 at 696B.
[4] *Laws v Rutherfurd* 1924 AD 261 p263; Amler's Precedents of Pleadings 8th edition p 384, relying on *Montesse Township & Investments Corp (Pty) Ltd & another v Gouws NO & another* 1965 (4) SA 373(A); *Greathead v SA Commercial Catering and Allied Workers Union* 2001 (3) SA 464 para 17.
[5] *Laws v Rutherfurd* at 264.
[6] *Road Accident Fund v Mothupi* 2000 (4) SA 38 SCA para 15, 16,18 and 19.

legal effect.[7] These elements of the test for waiver coalesced in Premier's reply.

[15] The reply fortifies the finding that by accepting the price escalations offered by the City Premier signalled its intention to waive its rights to claim payment on its own interpretation and calculations of the contract prices. First, Premier had full knowledge of its rights but failed to act positively to enforce them.[8] It knew that it had claims for price increases whenever the sectoral determinations increased remuneration for the security industry. Promulgation of the determinations alerted it to the amounts of the increases and enabled it to calculate its claims. Furthermore the claims were for the alleged underpayment of invoices. So Premier knew that the payments were not what they should have been; that its claim lay against the City; and that importantly, it could contest the City's interpretation by invoking the dispute resolution mechanisms in the contract. These circumstances imposed a positive duty upon Premier to act to dispel any inference of acquiescence that its silence might suggest. Premier did not act.

[16] Second, Premier's financial circumstances compelled it to act to enforce its rights. Premier knew that such increases that the City paid were insufficient to ensure compliance with the sectoral determinations and private security industry laws; that if the City did not pay its claims it would have to absorb the shortfall; that if it did not meet the shortfall it would not only run into financial difficulties but also risk criminal prosecution for violating provisions of the sectoral determinations.

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[7] Ibid.
[8] *Laws v Rutherfurd* p263; *Mohamed v President of the RSA (Society for the Abolition of the Death Penalty in South Africa intervening)* 2001 (3) SA 893 (CC) para 61-67; *Greathead v SA Commercial Catering and Allied Workers Union* para 17.

[17] Counsel informed the court from the Bar that initially the losses were about R1 million, an amount not so significant in the nature of such contracts that Premier could not carry the shortfall. Premier also allegedly waited for the forthcoming sectoral determinations to assess whether the shortfall could be accommodated. These submissions are inconsistent with Premier approaching the high court for urgent relief on the basis that it would have met 'its financial demise long before a trial can take place.' Instead, they confirm Premier's election to abide by the City's offer and to carry the debt. If the alleged shortfalls had not been onerous initially, then subsequently it became increasingly so. Premier lamented its inability to pay its taxes and other statutory commitments. As a business it had to act and to act quickly to stop the haemorrhage.

[18] Two cases that Premier referred to in order to disavow knowledge of its rights do not assist it. In *Mohamed*[9] the appellant was unaware of his right to claim protection against the death penalty and did not have access to legal advice. By contrast, Premier knew its rights and had access to lawyers if it wanted legal advice. In *Greathead*, abandoning a law point when counsel and client had not considered the point until the appeal, was construed not to be a waiver of rights.[10] Rendering invoices on Premier's calculations was as conscious and deliberate an act as depositing a cheque was in *Collen v Rietfontein Engineering Works.* [11] In both instances acceptance of the other sides' offers was by conduct.

[19] Third, when faced with options – to contest or abide – Premier

[9] *Mohamed & another v President of the RSA (Society for the Abolition of the Death Penalty in South Africa intervening)* 2001 (3) SA 893 (CC) para 61-67.
[10] *Greathead v SA Commercial Catering and Allied Workers Union* para 17.
[11] *Collen v Rietfontein Engineering Works* 1948 (1) 413 at 429-430.

elected to abide by the City's calculations of the contract prices. Such election between bipolar options is a waiver.[12] Premier waived one right by choosing another right that was inconsistent with the former.[13] Having approbated it could not thereafter reprobate.[14] Its intention was manifestly inconsistent with the continuance of the right, an inference the Court can reasonably draw from the nature of the conduct proved. [15]

[20] In these circumstances I find that the City discharged its onus of proving on a balance of probability that Premier waived its right to claim prices on its interpretation and calculations of the contract.[16] This finding disposes of the appeal. For the sake of completeness I deal with the defence of prescription.

[21] The facts that support the waiver defence also support the case for prescription. The debts became due as soon as Premier raised and submitted invoices in accordance with the payment procedures prescribed in the contract. Those procedures had been concluded for claims arising from 1 October 2010 to 25 June 2012. Accordingly those claims had expired by the time Premier served its application in June 2015.

[22] By electing to abide by the City's alleged breach Premier made a deliberate choice from which it must be inferred that it was aware of its legal options. The Constitutional Court held in *Mtokonya v Minster of Police* [17] that the degree of knowledge required under s 12(3) of the

[12] *Moyce v Estate Taylor* 1948 (3) SA 822 (A) 829.
[13] *Feinstein v Niggli & another* 1981(2)SA 684(A) at 698G-H.
[14] *Administrator, Orange Free State & others v Mokopanele & another* 1990 (3) SA 780 AD at 787 G-H.
[15] *Hepner v Roodeport-Maraisburg Town Council* 1962 (4) AD 772 at 778H.
[16] Ibid.
[17] *Mtokonya v Minster of Police* 2017 (11) BCLR 1443 CC para 62.

Prescription Act 68 of 1969 did not include knowledge of the legal conclusions by the creditor before a debt can be said to be due.[18]

[23] Moreover, Premier's election to abide by the City's calculations and to carry the shortfall are inconsistent with its after the fact construction that it was entitled to allocate payments to the most onerous (long standing) debt. It did not state that it had made these allocations, submitting merely that it was entitled to do so. Prescription extinguished the alleged shortfalls; a debt cannot be revived on the expiry of the prescriptive period. [19]

[24] Counsel for the City urged us to also pronounce on the question of condonation. He submitted that the high court had not granted condonation because it issued no order condoning Premier's non-compliance with the provisions of the Act. Without such order it was not competent for the high court to enter the merits of the claims. Consequently, Premier had no right to any remedy. It was Premier's duty to obtain an order granting condonation to persist with this appeal. And, without an order, the City in turn was frustrated in pursuing a cross-appeal. Counsel concluded by urging that it was incumbent on this court to address every point in issue in order to assist the Constitutional Court if it were to be seized with a further appeal.[20]

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[18] Ibid para 51.
[19] *Protea International (Pty) Ltd v Peat Marwick Mitchell & Co* 1990 (2) SA 566 (A) at 568 I–569 A.
[20] *Serengeti Rise Industries (Pty) Ltd & another v Aboobaker NO & others* (845/2015) [2017] ZASCA 79; 2017 (6) SA 581 (SCA) (2 June 2017); *S v Jordan and others (Sex Workers Education an Advocacy Task Force and Others as Amici Curiae* 2002 (6) 642; 2002 (11)BCLR 1117 para 6 and 21.

[25] Counsel's submission is an attack on the form rather than the substance of the judgment. Although the high court did not expressly issue an order granting condonation, its intention to do so is unmistakable from its judgment; it was 'prepared to grant the necessary condonation.' Any doubt about the high court's decision was clarified in its judgment refusing leave to appeal in which it described its response to the question of condonation as a 'generous interpretation of the facts applied to the law; that is generous to Premier … '

[26] If condonation had not been granted then on the City's contentions, the entire order, including the order in favour of Premier for payment of the additional claim, would also have been open to a cross-appeal. The City did not challenge this part of the order. Had the City genuinely wanted to cross-appeal it could have invoked rule 42(1)(b) of the Superior Court Practice to cure any ambiguity, error or omission. Having failed to adopt a sensible and inexpensive approach, the City cannot now be allowed to unravel the entire judgment of the high court. The City has not cross-appealed. I need say no more about condonation.

[27] Regarding the preparation of the record, rule 8(8) and (9) of the rules of this court require the parties to seriously and genuinely engage each other with a view to agreeing on the issues and portions of the record relevant for the appeal. This requirement is not only a matter of costs and convenience for the court and the litigants; it is also about maximising efficient use of time and other limited resources in the greater interest of dispensing justice. Senior and junior counsel on both sides could not possibly have concluded that judges of this court, with calculator in one hand, a magnifying glass in the other, would trawl through 3764 invoices to determine pricing. The invoices were entirely irrelevant in a case that

turned on the interpretation of a contract. The City's legal representatives were largely at fault in refusing to accede to Premier's legal representatives' efforts to drastically reduce the size of the record. Legal representatives are urged to implement rule 8 properly to avoid the risk of being mulcted with costs.

[28] In the result the following order is granted:

The appeal is dismissed with costs, including costs of two counsel.

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D PILLAY

ACTING JUDGE OF APPEAL

APPEARANCES

Appellant:	S Kirk-Cohen SC
	C Small
Instructed by:	Erasmus Ranchod & Associates: Cape Town
	Lovius Block: Bloemfontein
Respondent:	A Katz SC
	M Adhikari
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