

SOUTH AFRICA / JUDGMENT

NTGR Engineering Projects CC v Bakubung Minerals (Pty) Ltd (M320/2020) [2021] ZANWHC 62 (27 August 2021)

[2021] ZANWHC 62**COURT**

North West High Court, Mafikeng

BEFORE

Nonyane

CASE / FILE NUMBER

M320/2020

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CASE

NO: M320/2020

In

the matter between:

NTGR

ENGINEERING PROJECTS

CC

APPLICANT

REGISTRATION

NUMBER: 2005/182772/23

And

BAKUBUNG

MINERALS (PTY) LTD

RESPONDENT

REGISTRATION

NUMBER: 2002/017306/07

JUDGMENT

NONYANEAJ

INTRODUCTION

- [1] The applicant launched the present application for an order declaring an agreement between itself and the respondent valid and binding.

BACKGROUND

- [2] The respondent approached the applicant during September 2019 requesting the applicant to submit a quotation for the supply, sale and delivery of two (2) LP Haul Dumpers. The applicant furnished the respondent with a quotation for the supply, sale and delivery of the aforementioned goods on 16 September 2019.
- [3] On the 7th October 2019 the respondent requested a revised/discounted quotation. The applicant then, on the same day, provided the respondent with a revised discounted quotation. The respondent upon receiving the revised and discounted quotation indicated that it would prepare a contract for consideration by the applicant. On the 8th October 2019 the respondent's procurement manager, Mr Mthethwa, informed the applicant that they are busy compiling the applicant's contract and they will share the draft before 12h00 on the 9th October 2019. He further requested the applicant to provide them with copies of its BEE Certificate and Tax Clearance Certificate. The applicant furnished the respondent with copies of the BEE and Tax Clearance certificates.
- [4] On the 9th October 2019 the applicant received the draft agreement. On the 10th October 2019 the applicant considered the agreement and proposed amendments to certain paragraphs in the draft agreement dealing with the period of delivery and the method of payment. The respondent accepted the applicant's proposal regarding the period of delivery and rejected the applicant's proposal regarding the method and/or terms of payment. On 14 October 2019 the applicant was invited to the respondent's offices to negotiate and/or peruse the written agreement and more specifically to discuss the method and/ or the terms of payment.
- [5] On 15 October 2019 the applicant attended at the offices of the respondent to peruse the respondent's method and/or terms of payment, which the applicant accepted and proceeded to sign the agreement. The

applicant was informed that the person who is authorised to sign on behalf of the respondent is not available and would sign the

agreement when he becomes available.

[6] On 16 October 2019 the applicant emailed to the respondent a copy of its invoice. The respondent did not respond to the invoice and the applicant sent an email on 21 October 2019 following up on the status

of the purchase order. On 23 October 2019 the respondent addressed a letter to the applicant informing the applicant that its authorised

person did not countersign the agreement due to price reconsideration and as a result the agreement is void ab initio.

[6.1] It is on the basis of the aforementioned letter that the applicant brings this application in an endeavor to hold the respondent to the contract.

SUBMISSIONS

[7] The applicant contends that the parties concluded a valid and enforceable agreement. In support of this contention, the applicant's counsel submitted that once the parties had reached consensus on the material terms of the contract, a legally binding contract with rights and obligations was concluded. He supported his submission on the fact that the respondent's representatives invited the applicant to provide a quotation for the purchase, sale and delivery of the goods; that the parties negotiated and reached agreement on the merx and the purchase price; and that the applicant was invited to come sign the agreement.

[8] The applicant's counsel further submitted that the signing of the written contract by Mr Li was not, hitherto the respondent's repudiation, a condition precedent to the conclusion of the purchase and sale agreement and that the respondent's dissensus was never declared to the applicant and contrary to that, there has always been a common understanding that the parties are ad idem. He further submitted that the letter of repudiation alludes to signature and reconsideration as a basis for the respondent's resilement and not dissensus.

[9] The respondent's counsel submitted that there was no final agreement reached between the parties because the insertion of a contract number to the draft agreement was not an indication that a final and binding agreement had been reached. He further submitted that the respondent's representative, who had negotiated the agreement with Mr

Mkhari, at no point suggested to Mr Mkhari that the agreement was a done deal and that signature by the authorised person (Mr Li) was a mere formality.

ISSUES

FOR DETERMINATION

[10] The crisp issue for determination is whether a valid and binding contract had been concluded between the parties.

THE LAW

- [11] The basis of a contract is the meeting of minds or the mutual understanding between two or more persons with the subjective intention to create an obligation, or obligations, between them. The essentialia is that there must be an offer and acceptance of that offer. The agreement need not be reduced to writing for its validity unless there is sufficient proof that the parties intended that a written document should embody the agreement for obligations to arise or the agreement is required by law to be in writing.[1]
- [12] As alluded to above, the formation of a contract is the conscious agreement between parties, through one making an offer and the other accepting the offer. Our jurisprudence recognises three theories for the formation of a contract, viz the will, the declaration and the doctrine of quasi-mutual assent.[2]
- [13] Quasi-mutual assent is also known as the reliance theory with its origins from English law and was formulated in *Freeman v Cooke*[3]. This doctrine was popularised by the following pronouncement by Blackburne J in *Smith v Hughes*[4]:

"I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v Cooke*. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

- [14] However *Hutchison*, as approved by the Supreme Court of Appeal in *Van Huyssteen N.O. and another v Milla Investment and Holding Company*[5], holds the following view:

"In contrast to estoppel, the doctrine of quasi-mutual assent or (direct) reliance theory is a basis for an actual rather than a fictitious contract. From a South African perspective, the doctrine argues that for contractual liability to arise in the absence of consensus requires a reasonable belief on the part of one party (the contract assertor) induced by the other party (the contract denier) that the latter had agreed to the contract in question."[6]

- [15] The test for the application of the quasi mutual assent has been clearly expressed by Majiedt JA, as he then was, in *Van Huyssteen* as formulated in *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis*[7]:

"[22] In *Sonap* this court, in dealing with the law relating to unilateral mistake, confirmed that as a general rule, the law concerns itself with the external manifestations and not the workings of the minds of the parties to a contract. In the case of alleged dissensus, the law has regard to other considerations. In such cases, resort must be had to the reliance theory in order to determine whether a contract has come into being. This court stated as follows:

...(T)he decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?... To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly who made that representation: and thirdly, was the other party misled thereby?... The last question postulates two possibilities: Was he actually misled and would a reasonably man have been misled?..." (footnotes omitted; own emphasis)

[16] In *Pillay and Another v Shaik and Others*[8] Farlam JA held the following:

"I do not agree with the court a quo's conclusion that there could be no binding contracts between the parties unless each was signed by or on behalf of the buyers and the sellers. In my opinion it is clear from *Goldblatt v Freemantle*, supra, and the authorities cited therein that, in the absence of a statute which prescribes writing signed by the parties or their authorised representatives as an essential requisite for the creation of a contractual obligation (something that does not apply here), an agreement between parties which satisfies all the other requirements for contractual validity will be held not to have given rise to contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract can come into existence. That this is so is clear, for example, from CW Decker's annotation on Van Leeuwen's Commentaries on Roman Dutch Law 4.2 s 1 (note 2 as Innes CJ says at

129) where he pointed out (Kotze's translation 2 ed vol 2 p 12) that we no longer uphold the distinction drawn in Roman law between real, verbal, literal and consensual contracts because all contracts with us are made with consent."

[17] Intention is a subjective element. It often happens that a party may have a different intention from the other contracting party but fails to clearly communicate this intention. The essence of the doctrine of quasi mutual assent is to protect a party who would not be able to dispute the other contracting party's denial of their intention, where there is dissensus and the latter party acted contrary to his/her intention.[9] Majiedt JA, as he then was, in *Van Huyssteen N.O.* opined that "... the doctrine of quasi-mutual assent constitutes an application of the reliance theory in cases of dissent ... the doctrine enables the 'contract asserter' to contend that the 'contract denier' misled him or her into the reasonable belief that the contract denier had actually assented to the contractual terms in question"[10] . I am in agreement with the application of this doctrine but same should not be readily available to parties who fail to comply with

self-imposed formalities for the conclusion of a contract. Having said that, the trite requirements for the formation of a contract

still remains the meeting of minds on offer and acceptance.

ANALYSIS

- [18] Turning to the matter, the applicant asserts that a contract between it and the respondent was concluded on the basis that all the material terms to the contract were agreed upon, the material terms were reduced in writing for memorialising the agreement and that the appending of signatures to the written contract was a mere formality as the parties had been *ad idem* on the material terms of the agreement.
- [19] The respondent contends that a final agreement was not concluded between the parties and that the respondent's representatives who negotiated the contract with Mr Mkhari lacked the necessary authority to contractually bind the respondent.
- [20] I briefly want to deal with the issue of authority, or lack thereof, as contended by the respondent's counsel. I was referred to the case of *Makate v Vodacom (Pty) Ltd*[11] by the respondent's counsel and distinguished its facts from the present in that 'in *Makate* the parties had actually acted upon the impugned agreement. On that score alone, I find difficulty in following this contention as the applicant had, in fact, acted on the alleged agreement by sending the respondent an invoice and subsequent correspondence enquiring about the purchase order.[12]
- [21] Furthermore, relying on *Makate*, at no point did the respondent's representatives advise Mr Mkhari that they are not clothed with the necessary authority in negotiating the terms of the agreement. Therefore, a reasonable man would perceive that the respondent's representatives are duly authorised to negotiate and conclude contracts on behalf of the respondent. This conclusion is further amplified by the positions that they occupied within the respondent. I therefore find that the impression given to Mr Mkhari was that the respondent's representatives were clothed with the necessary authority to bind the respondent.
- [22] The respondent's counsel further submitted that signing the written agreement would have signified the assumption of contractual obligations. As deduced from the papers filed, there seems to be no proof to sustain this argument. Referral to clause 20 of the terms and conditions only relates to variation of the contract and that is not relevant to the present case. There is clearly no evidence of there being an agreement that the mutual agreement between the parties would only be operable once their agreement had been reduced in writing and signed by the parties.
- [23] Regarding the respondent's contention that the contract was not final and that it was subject to further discussions, the following facts are germane in rebuttal to this contention:

23.1 The applicant was invited by the respondent to submit a quotation for goods. The applicant provided the respondent with a quotation.

23.2 The respondent requested a revised and discounted quotation from the applicant.[13] The applicant effected the revised and discounted amount and provided the respondent with a discounted quotation. The applicant thought this as its acceptance of the revised and discounted offer from the respondent. The respondent compiled a draft contract. This draft contract was subject to negotiations regarding the time frames for delivery of the goods and the method of payment.

23.3 The negotiations culminated in what the respondent termed a "final version" of the contract and invited the applicant to its offices for execution. The parties met and further deliberated about

the method and or terms of payment. These deliberations resulted in a final contract which the respondent attached to it as "Goods

Supply Agreement Number". The applicant was allowed to sign the agreement and thereafter was informed that the person who was authorised to sign on behalf of the respondent was not available and would sign the contract as soon as he becomes available. It is apposite to state that Mr Mkhari was not informed that the contract he signed would be subject to further scrutiny and/ or consideration by the authorised person.

[24] Having regard to the abovementioned, a reasonable person would be of the view that contract which he/she had signed was a final and binding contract. It is therefore unsustainable to argue that the contract that Mr Mkhari was allowed by Mr Mthethwa to sign was a contract susceptible to further considerations.

[25] It is apt to note that in order to uphold the application of the quasi-mutual assent doctrine, the conclusion must be based on the strength of the contract assenter's case in proving that he/she/it was misled into believing that the other contracting party (the contract denier) had actually assented to the contractual terms.

[26] Ex facie, there were deliberations between the parties in regard to the material terms of the agreement and culminated, in the respondent's words, to a "final version for execution".[14] The respondent's use of the phrase "final version for execution" would lead a reasonable man to the conclusion that the parties have reached consensus on all the material terms of the agreement. The respondent's conduct, as represented by Mr Mthethwa, did not at any stage of the negotiations suggest that Mr Mthethwa is not vested with the authority to negotiate and reach consensus on the material terms of the agreement with Mr Mkhari. Relying on the impression given by Mr Mthethwa, as to the meeting of minds on the agreement for the supply, sale and delivery of the goods, Mr Mkhari submitted his invoice to the applicant as per the written contract. The respondent did not reply thereto and only upon the applicant's further enquiry was the applicant informed that the respondent had reconsidered its position.

[27] I am of the view that having considered the conspectus of the facts herein, Mr Mthethwa created the impression that the contracting parties are ad idem on the material terms of the agreement. As alluded to above, the parties did not suggest and agree that their agreement would not operate in the absence of a document embodying their terms of agreement.

CONCLUSION

[28] In the light of the aforesaid and having considered the facts in this matter, I find that a reasonable person would have been induced in believing that the agreement between the parties was perfecta and that signature by the respondent's authorised representative was a mere formality.

[29] It is trite that costs should follow the result.

ORDER

[30] Accordingly the following order is made:

1. The agreement for the supply, sale, purchase and delivery of two LP 10.0 Load Haul Dumpers entered into by the applicant and the respondent is declared valid, binding and enforceable between the parties.
2. The respondent is ordered to pay the costs on a party and party scale.

NONYANE AJ

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

HEARD ON

: 04 FEBRUARY 2021

DELIVERED ON : 27 AUGUST 2021

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[1] Goldblatt v Fremantle 1920 AD 123.

[2] D Hutchison et al, The Law of Contract in South Africa, 2nd Ed (2012) at 16.

[3]

(1848) 2 Ex 654.

[4]

(1871) LR 6 QB 597 at 607.

[5] (593/16) (2017] ZASCA 84 (2 June 2017) at par 21.

[6] Hutchison, op cit at 95.

[7] 1992 (3) SA 234 (A).

[8] 2009 (4) SA 74 (SCA) at par 50.

[9] Ivan and Johnson (SA) Ltd v Kaplaan 1940 CPD 647.

[10] Van Huyssteen op cit at para 23.

[11]

[2016] ZACC 13.

[12] Annexures AM 8 - 10 of the Founding Affidavit.

[13] Annexure AM 2 of the Founding Affidavit.

[14] Annexure RA 4 of the Replying Affidavit.

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