

SOUTH AFRICA / JUDGMENT

Powercem Trading And Manufacturing (Pty) Ltd

T/A Powercem SA v Thobakgale N.O (1391/2012)

[2014] ZANWHC 48 (11 September 2014)

[2014] ZANWHC 48

COURT

North West High Court, Mafikeng

BEFORE

GUTTA

CASE / FILE NUMBER

1391/2012

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“IN THE
HIGH COURT OF SOUTH AFRICA”
NORTH WEST HIGH
COURT, MAHIKENG
CASE
NO. 1391/2012

DATE:

11 SEPTEMBER 2014

In the matter

between:

POWERCEN TRADING
& MANUFACTURING (PTY) LTD.....PLAINTIFF
T/A POWERCEN SA
And
SAMUEL THOBAKGALE
N.O who is cited in his official
Capacity as the
acting head of THE DEPARTMENT
OF PUBLIC WORKS,
ROADS &
TRANSPORT.....DEFENDANT

JUDGMENT

GUTTA J.

A. INTRODUCTION

- [1] The plaintiff issued summons against the defendant for payment in the amount of R2 964 000.00 together with interest at the rate of 15% per annum a tempora morae until date of final payment and costs of the action.

B. PLEADINGS

- [2] The plaintiff's claim arises from a breach of an agreement concluded in and during April 2009 between the plaintiff and the defendant, for the supply of a cement additive product known as powercem ("the product") to be used in the rehabilitation of the D114 road pursuant to a project ("the project"), which was the subject of a contract between the defendant and Tarfix (Pty) Ltd ("Tarfix") as contractor.
- [3] Further and alternatively, the plaintiff claimed that on/or about August 2009, the defendant represented by Tau Pride Projects (Pty) Ltd ("Tau Pride"), instructed their engineers Cool Ideas 41 (Pty) Ltd ("Cool Ideas") to appoint the plaintiff to provide the product as reflected in a cession agreement signed on 25 July 2009. Pursuant thereto, Cool Ideas instructed the plaintiff to supply the product and an oral agreement was concluded between the plaintiff and the defendant on the terms set out in paragraph 2 supra.
- [4] The defendant raised two special pleas, namely, the plaintiff lacks locus standi and the plaintiff's claim has prescribed.
- [5] The defendant, the department of Public Works, Roads & Transport, ("DPW") in its plea raised inter alia the following defences:

5.1 DPW denied that it concluded any contract with the plaintiff and alleged that the agreement was concluded between DPW and Tarfix, and DPW paid Tarfix all debts that were due and payable in terms of the agreement;

5.2 DPW denied that a cession agreement was concluded;

5.3 The cession agreement was subject to the fulfilment of a condition precedent, which was the approval of DPW and DPW did not approve or authorise the cession agreement;

5.4 Tarfix was responsible for payment of its own subcontractor, namely, the plaintiff.

C. FACTS NOT IN DISPUTE

- [6] The following facts are common cause and/or not in dispute:

6.1 the plaintiff supplied the product for use in the project;

6.2 the agreed price of the product was 400 x bags @ R6 500.00 per bag;

6.3 the product was provided and used in the project;

6.4 the instruction for the use of the product in the project came from DPW;

6.5 the blank cession document (Exhibit D) originated from DPW. Representatives of the plaintiff, Mr De Freitas and Mr Marx of Tarfix, signed the cession document in July 2009, and the agreement was then forwarded to Mr Madinyenya of Tau Pride;

6.6 the plaintiff submitted its invoice for the product to DPW, and DPW did not pay the plaintiff. Pursuant thereto, Tarfix submitted an invoice for the product to DPW, and DPW paid Tarfix the sum of R2 667 600.00 on/or about 21 December 2009;

6.7 no amount has been paid by DPW in respect of the retention fee to either the plaintiff or to Tarfix;

6.8 the plaintiff previously instituted application proceedings against Tarfix for payment of the initial sum, and after a referral to evidence, the matter was settled in terms of which Tarfix was ordered to pay the plaintiff the sum of R2 667 600.00;

6.9 Tarfix has subsequently been liquidated and the plaintiff has not received payment from Tarfix.

D. THE ISSUES

[7] The issues in dispute are:

7.1 whether the plaintiff has locus standi and whether the plaintiff's claim has prescribed;

7.2 whether DPW has a contractual obligation to pay the plaintiff. Did Tau Pride have actual or ostensible authority to enter into a contract for the purchase of the product on behalf of DPW?

7.3 whether the deed of cession concluded between the plaintiff and Tarfix is binding on the defendant;

7.4 whether the plaintiff has a claim for retention.

E. THE PLAINTIFF'S CASE

[8] The first witness called for the plaintiff was Mr Tumi Ratshefola ("Mr Ratshefola"), the managing director of Cool Ideas. Cool Ideas is a company consisting of civil engineers who conduct designs and project management on civil engineering projects. Cool Ideas was appointed as the engineers by DPW in a tender that was awarded to Tarfix under Tender No. NWTR 91/08. Their company prepared the tender documents. Tau Pride was the capex managers or consulting agents for DPW. He said in their letter of appointment, DPW clearly stated that communication with DPW should be through Tau Pride. As the consulting engineers, they took their instructions from Tau Pride. Any person wanting to contact DPW, would contact Tau Pride whose contact information was provided in the tender notice, and

the invitation to tender.

- [9] He was referred to an email sent from one Stanford Madinyenya (“Mr Madinyenya”), who works for Tau Pride, addressed to him where he was informed that they intend using the product and that he should allow R3 000 000.00 as a provisional amount for the product. In the email he was requested to engage with the plaintiff’s Mr Victor Gomes de Freitas (“Mr De Freitas”). He confirmed that they provided a provisional sum for the product. He was not personally involved in the project. The engineers, Mr Twandira Mpandaguta (“Mr Mpandaguta”) and Mr Nkatshwa, were involved.
- [10] In cross-examination, he explained that he used the word ‘agent’ in the context of Tau Pride as they were the capex managers, representing DPW.
- [11] The next witness was Mr Mpandaguta, who testified that in 2009 he was the technical director for Cool Ideas and Mr Ratshefola was the managing director, to whom he reported. He was the engineer for the project. He said if any issues arose in the project on behalf of DPW, he would deal with Tau Pride, the capex manager, represented by Mr Madinyenya,.
- [12] Mr Mpandaguta was referred to a letter dated 19 August 2009, addressed to Cool Ideas for his attention from Mr Madinyenya of Tau Pride. The following was read into the record:

“You are hereby informed that the Cession agreements between Tarfix and Powercem for the supply of materials/ plant and equipment for R2.4 million signed on 25 July 2009, has been approved by the Programme Managers. It has been forwarded to the Department for final approval.

We therefore request that you issue an instruction to this company to provide the services as per the cession agreement.”

- [13] He was asked if he was aware of the existence of any cession agreement. He said after Tarfix and the plaintiff signed the cession, it was forwarded, through their offices, to Tau Pride. Thereafter they received the aforesaid letter from Tau Pride. He confirmed that on 24 August 2009, he addressed a letter to the plaintiff attaching the letter dated 19 August 2009 from Tau Pride and instructing their company to supply the product to Tarfix. He said his understanding of the letter from Tau Pride, dated 19 August 2009 is that there will not be any problem with the cession, because they were requested to issue an instruction to the plaintiff to supply the product, which they did.
- [14] When asked whether the cession was approved by DPW, he said Tau Pride approved the cession and it was then sent to DPW for final approval. They were still awaiting the final approval from DPW and the plaintiff was aware of this, as he attached Tau Pride’s letter to his letter to the plaintiff on 24 August 2009.
- [15] He said the contract was between DPW and Tarfix, and the plaintiff was subcontracting for Tarfix. When asked about payment, he replied “If there is a cession agreement then the employer pays directly the subcontractor, if there is no cession agreement, the contractor pays the subcontractor”.

- [16] He confirmed that a schedule of quantities was prepared by Tarfix, together with Cool Ideas, and the engineers had to certify that the quantities are correct. He explained that initially a provisional amount of R3 000 000.00 was included as they were not sure of the quantity of the product. The amount of R2 667 600.00 was later calculated as the accurate quantity.
- [17] In an invoice issued by Tarfix to DPW, dated 19 October 2009, for the product in the amount of R2 667 600.00, there is a 10% retention fee deducted. When questioned why a retention fee was necessary, he replied that they and Tarfix had not used the product before and in the event the product failed, the retention fee was a guarantee. He also said that as the contract was between DPW and Tarfix, the retention is with the main contractor, and not the subcontractor. If the cession was valid between the plaintiff, DPW and Tarfix, then only would DPW pay the plaintiff the 10% retention fee.
- [18] The next witness for the plaintiff was Mr De Freitas, who is the sole director of the plaintiff. He explained that the product is a cement additive used for stabilizing roads. They had previously worked with Tau Pride on the N14 national road. Tau Pride was the project manager.
- [19] He said towards the end of March 2009, he was copied the email from Mr Madinyenya to Mr Ratshefola. He was then approached by Mr Peter Andre Marx ("Mr Marx") from Tarfix, who wanted him to explain the technology of the product, how it works and how to apply it. They met on site at D114 and a representative of Cool Ideas was also there. They agreed on quantities and the price.
- [20] He said Mr Marx expected the plaintiff to supply Tarfix with the product and to invoice DPW for payment. He wanted to secure a guarantee as he did not want to supply the product without being paid. He said in July 2009, Mr Marx phoned him and they met at a restaurant in Centurion, where Mr Marx produced a blank deed of cession, which he obtained from DPW. In the cession agreement, which he identified in Court, the cedent is Tarfix, the cessionary, the plaintiff and the client is DPW. He read paragraph 2.3 of the cession, which he understood to mean that if DPW does not pay the plaintiff, then the plaintiff is still entitled to recover the money from Tarfix. He also read paragraph 8 of the agreement, that the cession agreement is subject to the condition that the DPW approves the cession.
- [21] He said when he received the letter from Cool Ideas, in which the letter from Tau Pride was attached, he believed the cession was approved and he could supply the product. He would not have supplied the product if the cession was not approved. He said they were led to believe that the cession was signed and DWP was going to pay the plaintiff directly.
- [22] There were two invoices made out to DPW by the plaintiff. The first is dated 14 October 2009, in the amount of R2 964 000.00 and the second is dated 19 October 2009, in the amount of R2 667 600.00, which is less the 10% retention fee. He explained that Mr Marx told him to prepare the second invoice as it is a standard procedure for DPW to deduct a retention fee, which DPW holds for 12 months.

- [23] He said when he did not receive payment after submission of the invoice to DPW, he phoned Mr Madinyenya during November 2009, who informed him that the cession had not been approved and that payment will be made to Tarfix. Subsequent thereto, he wrote a letter to Mr Marx, wherein he told him inter alia that DPW was going to pay the plaintiff's invoice of R2 964 000.00 (VAT incl.) into the Tarfix account, and not the plaintiff's account as "originally planned". In this letter, he referred to the discussion he had with Mr Madinyenya that "the cession is no longer valid and Powercem will only be paid by Tarfix once Tarfix is paid by the North West Province".
- [24] He said they brought an application against Tarfix for payment in the South Gauteng High Court ("South Gauteng"), and Tarfix raised the defence that they had not been paid by DPW. DPW provided proof of payment to Tarfix and the matter was subsequently settled.
- [25] Under cross-examination, he admitted that he was aware that although Tau Pride approved the cession, it had to be approved by DPW. He said when he supplied the product he believed that the cession had been approved because Tau Pride and Cool Ideas 'instructed' his company to supply the product to Tarfix, and Tau Pride and Cool Ideas represented DPW. He said that in road construction, the capex managers represent DPW and he takes orders from the capex managers. He said it is a 'done deal', that the cession was approved as the capex managers approved the cession. Tarfix is the contractor and the plaintiff supplied the product to Tarfix on instructions of DPW. He conceded that if the cession had not been approved, then DPW was correct to pay the main contractor as they were the subcontractor.
- [26] Under cross-examination, he was referred to a paragraph in his affidavit in South Gauteng, wherein he states that Tarfix suggests that they are not obliged to pay them because of the cession signed between the plaintiff and Tarfix, and that Tarfix "overlooked the provisions of the cession itself, namely that it had to be approved by the DPW before it was effective". When asked to explain, he said he deposed to the affidavit as he was led to believe by Mr Madinyenya that the cession was not approved.
- [27] He now believes that the cession was approved and his belief is based on the letter from Cool Ideas instructing their company to supply the product as well as a payment certificate on DPW's letterhead, where the following remark is noted, "Of this amount R7 147 473.10 (VAT incl.) is payable to Tarfix and R2 667 600.00 (VAT incl.) is payable to Powercem according to the cession agreement". There are two signatures that appear below the remarks under the names, namely, 'Madinyenya' and 'Ntemane' (the Acting Director: Roads). He explained that he saw this document with his attorneys after launching the application in South Gauteng.
- [28] When asked why he did not lodge his claim with the liquidators appointed for Tarfix, he replied that "at the end of the day I was not paid by Tarfix so the North West (defendant) owes me money".

- [29] The next witness for the plaintiff was Mr Marx. He testified that he was the contract manager for Tarfix since 2009. Tarfix was awarded a tender by DPW for the rehabilitation of a road. He said the product was not in the initial bill of quantities and was included later. He was approached by engineers from Cool Ideas and Mr Madinyenya of Tau Pride, and was informed that there is a new product on the market which is very good and that he should use it.
- [30] He said he obtained a copy of the cession from DPW and he and Mr De Freitas, signed the agreement. He completed clause 3 of the cession agreement, which provides that the amount of R2 964 000.00 shall be paid by DPW to the plaintiff. He gave Mr Madinyenya the cession agreement and he undertook to give it to Mr Thebe, the Chief Financial Officer, for signature. A month later, he met Mr Madinyenya at a site meeting, and he told him that the cession had been approved and that they could continue. The meeting was minuted. He said he first heard that the cession had not been approved when the plaintiff took Tarfix to Court in South Gauteng.
- [31] Mr Marx testified that the agreement was between the plaintiff and DPW, and that DPW should pay the plaintiff as the money was not due to Tarfix. He said DPW should claim the money from Tarfix and pay the plaintiff.
- [32] In cross-examination, he was directed to the payment made by DPW to Tarfix on 22 December 2009, and it was put to him that when Tarfix denied receiving money from DPW in South Gauteng, that payment had already been made. He replied that he was the contract manager and had no insight into the financial status of the company.
- [33] He was directed to his affidavit in South Gauteng, wherein he alleged that he inserted the condition that the agreement is subject to the approval of DPW because he “was led to believe by De Freitas that such an approval had been obtained from DPW, but not been given any proof thereof and in order to protect the Respondent (Tarfix), I inserted that condition failing which the cession would be void and unrefundable . . . it has now become known that DPW never gave such a consent on/or before 01 July 2009 or thereafter. We now know that therefore the deed of cession never came into force”.
- [34] It was put to him that his oral evidence contradicts his written statement because in this Court he is relying on minutes approving the cession, while in his affidavit in South Gauteng, he was alleging that the cession is void and unenforceable. He was not able to comment on whether one can rely on the cession agreement.

F. ABSOLUTION FROM THE INSTANCE

- [35] At this stage of the proceedings, the plaintiff applied for absolution. The Court, after hearing submissions, dismissed the application with costs in the action and undertook to furnish reasons in this judgment. The reasons follow.

- [36] Counsel for the defendant, Ms Seboko, submitted that the real issue is whether the cession was approved by DPW. The plaintiff launched an application in South Gauteng against Tarfix, where Mr De Freitas, for the plaintiff, deposed to an affidavit alleging that the agreement was between the plaintiff and Tarfix, and in Court he testified that it was between the plaintiff and DPW. She submitted that this affects his credibility. Also in his affidavit, he alleged that the cession was not signed by DPW, and in this Court he alleged that DPW approved the cession. In South Gauteng, an official from DPW testified on behalf of the plaintiff that the cession was not authorised. Further, the letter from Tau Pride dated 19 August 2009 states that the cession was forwarded to DPW for final approval. The plaintiff in his affidavit also averred that “the cession does not become effective unless approved and signed by the DPW”. He also confirmed that in November 2009, Mr Madinyenya advised him that DPW had not approved the cession but would be paying Tarfix. Hence, the plaintiff, on his own version, was aware that the cession was not approved. The plaintiff and Tarfix settled in South Gauteng, in terms of which Tarfix agreed to pay the plaintiff.
- [37] Ms Seboko submitted that if Tau Pride was the agent, they would not say that they have submitted the cession to DPW for final approval. They could not bind DPW as they still required authorization.
- [38] Counsel for the plaintiff, Mr Strathern, submitted that the Court should consider what is pleaded with the evidence presented. He submitted that the cession demonstrates the right of recourse against Tarfix if DPW did not pay. He said DPW did not deny that Tau Pride is a manifestation of DPW and all dealings had to be done through Tau Pride, as testified by Mr Ratshefola and Mr Mpandaguta. Tau Pride instructed their engineers to issue an instruction to the plaintiff and the engineers instructed the plaintiff to supply the product to Tarfix. He submitted that the plaintiff, in South Gauteng, said it is obliged to submit to DPW but will retain a right of recourse against DPW. Mr Strathern submitted that the plaintiff had a right to proceed against any debtor and the plaintiff has a right to proceed jointly and severally against DPW. He relied on the case of *Parekh v Shah Jehan Cinemas (Pty) Ltd & Others* 1982 (2) 618 (D).
- [39] He said Mr Marx’s evidence was that the instruction came from DPW and the product was not initially included in the Bill of Quantities. Tau Pride had actual authority to act on behalf of DPW. Further, the payment verification form which was signed by Mr Madinyenya, on behalf of the subcontractor and recommended by Acting Director Roads, Mr Ntemane, establishes a contractual link between the plaintiff and DPW, and it states that R2 667 600.00 is payable to the plaintiff, according to the cession agreement. He said the alternate cause of action is *inter partes* and the plaintiff can look to DPW for payment. The letter dated 19 August 2009, by issuing an instruction, presupposes a valid agreement between the parties. At no stage was the plaintiff instructed to stop, only when the money was due was the plaintiff informed that the cession was not approved. At this stage, they had the undisputed evidence of Mr Marx that the cession was approved and that it was minuted. The plaintiff retains a contractual right to proceed against DPW as there is evidence of an agreement

between the plaintiff and DPW. Further, the plaintiff has a right to proceed against DPW for the 10% retention. The plaintiff sued Tarfix on an independent claim and not on the basis that there was a cession.

- [40] DPW did not plead that the claim was exhausted or compromised by South Gauteng proceedings. The facts disclose a contractual claim. There is nothing in the deed of cession to state that the approval must be in writing.

ANALYSIS

- [41] The test for determining whether absolution from the instance should be granted at the close of the plaintiff's case was set out by the Appellate Division in *Claude Neon Lights (SA) v Daniel* 1976 (4) SA 403 (A), namely:

"Whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."

- [42] Hence, if at the close of the plaintiff's case, there is no evidence to support the plaintiff's claim or insufficient evidence upon which a court acting reasonably might (not should nor ought to) find for the plaintiff, the court is entitled to absolve DPW from the instance.
- [43] At this stage of the proceedings, the requirement is that the plaintiff must have established a prima facie case, which is usually defined as evidence requiring an answer, i.e. evidence that will be conclusive if the opponent does not adduce evidence in rebuttal.
- [44] Although the credibility of the plaintiff's evidence is usually assumed for the purpose of an application for absolution, this evidence can therefore nevertheless be rejected if it is clearly false or contradictory. See *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958
- (4) SA 307 (T).
- [45] The Court will refuse the application for absolution unless it is satisfied that no reasonable court could draw the inference for which the plaintiff contends. See *Gandy v Makhaya* 1974 (4) SA 853 (N) at 855–856. In the absolution stage it does not need to be the most likely inference but it does have to be a reasonable one.
- [46] I dismissed the application for absolution from the instance as I was of the view that the plaintiff established a prima facie case, and the evidence presented by the plaintiff required an answer to the following questions:

46.1 Was there an agreement between the plaintiff and DPW for the supply of the product?

46.2 Did the capex manager, Tau Pride, have the authority to conclude an agreement on behalf of DPW?

46.3 Did DPW authorise the deed of cession?

- [47] In the circumstances, I could not, from the evidence presented, conclude that there is no evidence to support the plaintiff's claim to justify absolving the defendant from the instance. Accordingly, I dismissed the application.

G. THE DEFENDANT'S CASE

- [48] The defendant called Mr Chaka Abram Ntemane ("Mr Ntemane"). He is currently on pension. He worked for DPW from 1975 to November 2012. Since 1996, he was the deputy director in the roads section. In 2007, he was the acting director for roads. His duties included referring the contractors' claims to the chief director for approval, and after approval, his office handed the claim to the finance section for payment. He said in 2009, DPW awarded the tender to Tarfix. Cool Ideas were the consultants engaged by DPW to design the road and to supervise the work done by Tarfix and Tau Pride was employed by DPW as programme directors, and whose responsibility it was to supervise the contractors engaged by DPW. He said Mr Madinyenya worked for Tau Pride and they worked hand-in-hand when it came to payment to the companies.
- [49] He explained that a cession is concluded when the contractor engages a subcontractor and wants DPW to pay the subcontractor directly. He said he knows the product, powercem, and in 2009 DPW issued an instruction that contractors should buy this product from the plaintiff. He received an invoice from Tarfix that came through Mr Madinyenya, where Tarfix wanted the money to be paid to the plaintiff in terms of a cession agreement. He said they demanded the cession agreement and it was not forthcoming. He informed Mr Madinyenya that they are not going to pay the plaintiff as there was no cession agreement.
- [50] He said the consultants and engineers did not have the authority to enter into cession agreements on behalf of DPW as the arrangements are only done by the Head of Department ("HOD"), who was Mr Nick van Staden ("Mr Van Staden"), in 2009.
- [51] He was referred to the payment verification form, which he described as a route form in the department. The route form has a standard checklist. The programme manager, Mr Madinyenya first signs the form and then it is sent to him for his signature. The route form is attached to the payment certificate. He checks the attached documents and signs in the appropriate place.
- [52] Under 'remarks' where it reads that "R2 667 600.00 is payable to Powercem SA" according to the cession agreement, he said Mr Madinyenya wrote these comments. He explained that generally after a cession agreement is approved by DPW, it is kept by them in a project file and used in times of payment. He said after receiving the route form, he looked for the cession agreement, but did not find it in the project file or with the supply chain management. He then informed Mr Madinyenya that there is no cession agreement. Tau Pride did not furnish them with an approved document. When they did not find the cession, they referred it to Mr Van Staden ("the HOD"), who issued an instruction that the outstanding sum should be paid to Tarfix, and R2

667 600.00 was paid to Tarfix on 22 December 2009.

- [53] He also said that DPW would not have a retention on an invoice of a subcontractor because the contract is awarded to the contractor and the subcontractor is engaged by the contractor and not DPW. It was put to him that the plaintiff alleges that they supplied the product to DPW. He replied that the product was supplied to Tarfix, and DPW did not have any agreement with the plaintiff.
- [54] Under cross-examination, he was asked what he understood by the word 'recommended' where he appended his signature on the payment verification form. He replied that it means that he agrees with the documents that were attached. The documents were the invoices and certificates and not the cession agreement. He said at that stage when he signed the form, the cession was not required, it was only required at the next level, which was when it was forwarded to the payment unit. He explained that after checking the attached invoices and the certificates, it goes to the payment unit where the specific project file is drawn and only then do they check the supporting documents to allow payment to be effected. The cession agreement was a supporting document. It is at this stage that they could not proceed with the payment and he could not make a recommendation to the chief director for approval as no cession was found.
- [55] He identified a letter from Tarfix to DPW wherein Tarfix confirmed receipt of an email dated 30 November 2009 where Mr Van Staden wrote to Tarfix's attorney confirming that payment would be made directly to Tarfix as per Invoice No. 1505. He confirmed that Tarfix sent an invoice, Invoice No. 1505, for R2 667 600.00 to DPW for payment, which amount was duly paid.

H. CLOSING ARGUMENTS

[56] Mr Strathen, in his closing arguments, submitted the following:

56.1 a written agreement was concluded between the plaintiff and DPW for the supply of the product;

56.2 the written agreement is in terms of an exchange of correspondence, namely, an instruction from Tau Pride to Cool Ideas to appoint the plaintiff to supply the product as reflected in a cession agreement between the plaintiff and Tarfix, signed on 25 July 2009 and a letter from Cool Ideas instructing the plaintiff to supply the product. The plaintiff supplied the product and DPW paid Tarfix for the product;

56.3 Tau Pride had actual or ostensible authority to bind DPW contractually for the following reasons:

56.3.1 Tau Pride was authorised to represent DPW as the capex programme managers;

56.3.2 all queries in respect of the tender document had to be addressed to Tau Pride;

56.3.3 Tau Pride was authorised by DPW to instruct Cool Ideas to instruct the plaintiff to provide the services ‘as per the cession agreement’;

56.3.4 it was a clear and unequivocal instruction and the cession agreement identified the services to be rendered irrespective of whether the cession agreement had been formally approved at that time by DPW or not;

56.3.5 the reference to the fact that the cession had been sent to DPW for final approval does not suggest that such approval was in doubt or would not be granted, it suggests that such approval was merely a matter of formality as the instruction to provide services was unconditional;

56.3.6 there has been no evidence on behalf of DPW, through Mr Ntemane, that Tau Pride was not entitled to issue the initial instruction to Cool Ideas;

56.3.7 a consideration of the evidence as a whole demonstrates on a balance of probabilities, the existence of an agreement between DPW and the plaintiff;

56.4 the objective facts establish actual, alternatively ostensible authority on the part of Tau Pride to represent DPW in all matters pertaining to contractors and subcontractors involved in the project, and to conclude contracts with them for the provision of services and to bind DPW as regards payment;

56.5 any judgment that this Court may grant should be joint and several with the order contained in the settlement agreement between the plaintiff against Tarfix;

56.6 the evidence demonstrates on the probabilities that the cession was approved or if not formally approved, at all relevant times DPW had contractually bound itself to pay the plaintiff for the product, and not Tarfix;

56.7 Mr Marx’s evidence was that at a meeting on site, it was stated that the cession had been approved and the meeting was minuted. There is no reason why the Court should not accept Mr Marx’s evidence in this regard;

56.8 Mr De Freitas referred in evidence to a letter written by DPW, which refers to the payment of R2 667 600.00 which must be paid directly to the plaintiff, in which it is stated that “We will have to deal with this matter next week”. This letter was not dealt with at all in the evidence on behalf of DPW and in the absence of such evidence, the Court should accept that this letter is supportive of the fact that at the time it was written (27 November 2009) DPW regarded this amount as being due by it to the plaintiff;

56.9 Mr Ntemane testified that he signed the ‘route’ form. This form clearly stated that R2 667 600.00 “is payable to Powercem according to the Cession Agreement”. The route form clearly acknowledges the existence of a cession agreement;

56.10 it is improbable that Mr Ntemane as acting head of the roads department, would have recommended payment of an amount due “according to the Cession Agreement” unless he was satisfied that:

56.10.1 such a cession agreement did exist and that payment was due in terms thereof; alternatively

56.10.2 DPW was contractually obliged to pay this amount to the plaintiff;

56.11 the probabilities are that at the time the route form was prepared and the product supplied, DPW considered that it was contractually

obligated to the plaintiff and not Tarfix, as there was no documentation in existence that would have entitled Tarfix to obtain

payment;

56.12 even assuming that DPW subsequently changed its mind for whatever reason and belatedly decided to pay Tarfix instead of the plaintiff, this does not assist it and does not detract from the existence of a binding agreement between DPW and the plaintiff;

56.13 a contract can only be varied by agreement between the parties to the contract and any subsequent decision taken by DPW without agreement by the plaintiff cannot detract from the plaintiff's entitlement to enforce its contract;

56.14 DPW is the author of its own misfortune and it cannot rely on its payment to Tarfix to avoid its obligation to the plaintiff;

56.15 the plaintiff is not disputing the oral agreement in South Gauteng, but it was not an agreement of purchase and sale, only an agreement to supply for use in the project.

[57] Ms Seboko, in her closing argument, submitted inter alia the following:

57.1 the plaintiff downplays the South Gauteng application where he says the contract was between the plaintiff and Tarfix;

57.2 prescription is not abandoned as it is not clear from the plaintiff's case if its cause of action is a contract of sale or cession. If the plaintiff's claim is based on a contract, the claim has not prescribed but if it is based on a cession then the claim has prescribed because the cession was signed on 01 July 2009 and a cession is complete when the cessionary and cedent act in terms of the cession which is 01 July 2009;

57.3 the doctrine of effectiveness applies. The plaintiff has a judgment and can pursue its claim against the liquidators. See Numsa 1994 813 (T);

57.4 the plaintiff failed to discharge its onus to prove the existence of a contract on the balance of probabilities;

57.5 the cession was not signed. There was no written authorization;

57.6 the letter from Tau Pride is that the cession is forwarded to DPW for final approval. There is no doubt that although Tau Pride and Cool Ideas approved, final approval was necessary;

57.7 Mr Ntemane testified that the plaintiff was the subcontractor to Tarfix;

57.8 the insertion in the route form was by Tau Pride and not DPW. Mr Ntemane says the cession was not approved by DPW;

57.9 the fact that the cession was necessary for DPW to pay the plaintiff demonstrates that the contract was not between DPW and the plaintiff but between the plaintiff and DPW;

57.10 DPW does not hold a retention in respect of subcontractors.

I. ANALYSIS

A) WAS AN AGREEMENT CONCLUDED BETWEEN THE PLAINTIFF AND DPW?

- [58] It is trite that the most common technique for ascertaining whether there has been agreement is to look for an offer and an acceptance. A binding contract is a rule constituted by the acceptance of an offer. See *Reid Bros (SA) Ltd v Fischer Bearings Co. Ltd* 1943 AD 232 at 241.
- [59] A binding contract is said to be concluded when an offeror makes an offer, that is, when he puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed. The express or implied intention to be bound by the offeree's acceptance, *animus contrahendi*, is what distinguishes a true offer from any other proposal.
- [60] Lack of *animus contrahendi* describes those cases in which from the surrounding circumstances or the manner in which the offer was made, or both, it is clear to the Court and was or ought to be clear to the offeree that the intention that by its mere acceptance, a contract is formed is lacking.
- [61] If the language of the contract is not sufficiently clear, then the Court must look at the surrounding circumstances and any other admissible evidence in order to ascertain the true common intention of the parties. See *Spies v Standard Industries Ltd* 1922 NPD 343.
- [62] In examining the surrounding circumstances, it is important not to lose sight of the object of examination, which are to ascertain whether the offeror had the necessary *animus contrahendi* and whether the offeree knew or ought to have known the state of the offeror's mind. See *Gallaher v Normans Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 506E.
- [63] The plaintiff relies on the correspondence from both Cool Ideas and Tau Pride as the offer made to the plaintiff to supply the product, as the plaintiff was 'instructed' to supply the product by Tau Pride, who was the capex managers and authorised to represent DPW.
- [64] At this stage, it is necessary to look at the content of the letter dated 19 August 2009 from Tau Pride to Cool Ideas, which is cited in paragraph [12] *supra*. From the plain language used in the letter, Tau Pride approved the cession and forwarded it to DPW for final approval and Cool Ideas was requested to issue an instruction to the plaintiff to provide the service as per the cession agreement. This letter was attached to the letter sent by Cool Ideas to the plaintiff on 24 August 2009, where the plaintiff was instructed to supply the product to

Tarfix. Mr De Freitas admitted that he was aware of the fact that final approval by DPW's was required.

[65] Hence, the agreement to supply the product to Tarfix was:

65.1 subject to final approval of DPW;

65.2 in terms of a cession agreement.

[66] The deed of cession cannot be divorced from the agreement that the plaintiff is relying on as the instruction from Tau Pride to Cool Pride was to instruct the plaintiff to "provide the service as per the cession agreement".

[67] It is also not in dispute that the cession agreement was subject to the fulfilment of a conditio precedent, namely, the approval of DPW, and further that the consent of DPW must be in writing in the form of Schedule A to the cession which is the consent to be signed by DPW.

[68] A conditio precedent is also known as a suspensive condition. A conditio precedent suspends the operation of all or some of the obligation flowing from a future uncertain event.

[69] Van der Heever JA in *Frumer v Martland* 1954 (3) SA 840 (A) at 850, held that where the language is plain, the golden canon of interpretation has been crisply stated by Greenberg JA in *Woman v Hughes & Others* 1948

(3) SA 497 at 505(A):

"It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties intention was, but what the language used in the context means, i.e what their intention was as expressed in the contract."

From the nature of the function of a suspensive condition it seems to me that the rule should in that case, if anything, be more strictly adhered to than in regard to other terms of a contract."

[70] Hence, when applying the rule strictly, it is clear that DPW's approval was necessary. This was confirmed by Mr Mpandaguta, who testified that the cession was sent to DPW for final approval. Hence, no agreement could be concluded between the plaintiff and DPW, as DPW's final approval was required.

[71] Turning to the question of whether Tau Pride had the authority to conclude the agreement on behalf of DPW, I am of the view that neither Cool Ideas nor Tau Pride had the requisite animus contrahendi to make an offer on behalf of DPW, that by mere acceptance without more, a contract should be formed. (Own emphasis) The 'more' that was still required was the final approval of the cession agreement by DPW.

- [72] Further, according to the evidence of Mr Ntemane, Mr Van Staden, the accounting officer in DPW, was not aware of a cession and instructed him to obtain an invoice from DPW's contractor, Tarfix, and to pay Tarfix. There is no evidence that DPW delegated the authority to Tau Pride or Cool Ideas to conclude agreements on behalf of DPW. Also, refer to paragraph [86] *infra*.
- [73] The fact that Tau Pride were the capex programme managers and that all queries in respect of the tender had to be addressed to Tau Pride, and because Cool Ideas, acting on Tau Pride instructed the plaintiff to provide the services, in the circumstances does not prove that Tau Pride had actual or ostensible authority to bind DPW. Hence, the plaintiff knew or ought to have known that DPW's written consent was required, and neither Cool Ideas nor Tau Pride had actual or ostensible authority to enter into the agreement on behalf of DPW.
- [74] When one considers all the surrounding circumstances, especially the fact that final approval of the cession agreement from DPW was a requirement, a cession agreement signed by DPW was not produced, the HOD paid Tarfix, and Tau Pride was not authorised to conclude an agreement on behalf of DPW, then I am of the view that there was no agreement concluded between the plaintiff and DPW.
- [75] Furthermore, on the plaintiff's own version in South Gauteng, he alleged that the agreement was concluded between plaintiff and Tarfix. Mr De Freitas, in his affidavit in South Gauteng, relied on an oral agreement concluded between the plaintiff and Tarfix for the supply of the product, and that the plaintiff will provide Tarfix with an invoice made out to DPW and if DPW did not pay, Tarfix would pay the plaintiff within a reasonable time of the invoice. He admitted that as the subcontractor, he dealt with Tarfix.
- [76] Further, in his replying affidavit, he reiterated that the agreement for the supply of the product was between the plaintiff and Tarfix, and not between the plaintiff and DPW, that Tarfix remains liable to make payment to the plaintiff. He relied on specific terms in the cession agreement to strengthen his case that the agreement was concluded between the plaintiff and Tarfix, and said that DPW would only be responsible to pay the plaintiff in the event the cession was approved by DPW. Mr De Freitas, in his replying affidavit said the following:
- "The mere fact that the respondent purported to cede to the applicant the respondent's rights against DPW in respect of the supply of the Powercem necessarily demonstrates that the applicant's contract was not with DPW but with the respondent (Tarfix). It matters not whether the cession was approved or not, as its terms, which were agreed to by both the applicant and the respondent (Tarfix), clearly demonstrates the existence of a contract between the applicant and the respondent (Tarfix) for the supply of powercem."*
- [77] Mr Marx also admitted that Tarfix entered into an oral agreement with the plaintiff to supply the product.

[78] On probabilities, the plaintiff and Tarfix would not have signed a cession agreement if the contract was concluded between the plaintiff and Tarfix.

[79] Hence, on the plaintiff's own version in South Gauteng, the agreement was concluded between the plaintiff and Tarfix, and from the facts and circumstances of this case as stated *supra*, I accept.

[80] The plaintiff has not discharged the onus to prove that Cool Ideas and/or Tau Pride had actual or ostensible authority to conclude an agreement on behalf of DPW, with the plaintiff, for supply of the product and that an agreement was concluded between the plaintiff and DPW. This view is fortified when I consider the next question hereinbelow.

B) WAS THE CESSION APPROVED BY DPW?

[81] When considering this issue, the starting point is the deed of cession signed by the plaintiff and the defendant on 01 July

2009. The preamble to the deed of cession reads as follows:

"WHEREAS the cedent (Tarfix) has contracted with the employer . . . to execute contract NWTR 91/08 – Repair road D114 from Boshoeck to --- Portdaw and

WHEREAS Powercem Trading and Manufacturing (Pty) Ltd will supply roadcem as additive to stabilization to Tarfix (Pty) Ltd and

WHEREAS the cessionary (Powercem) requires from the cedent the cession of the said portion of the contract sum."

(Own emphasis)

Hence, it is apparent that Tarfix and the plaintiff agreed that the plaintiff will supply the product to Tarfix.

[82] The following paragraphs, in the cession agreement, are relevant to this discussion:

82.1 Under the heading 'Warranty', paragraph 5.1(iii) reads:

"The cedent obtained the necessary consent, in writing by way of completion and signature of the form attached to this cession agreement as Schedule A from the employer in terms of the contract to cede his right to receive payment of the said portion of the contract sum from the employer to the cessionary."

82.2 Paragraph 5.2 reads:

"The cessionary warrants that it shall not sign this cession agreement before the employer's written consent to this cession has been received by the cessionary as obtained by the cedent."

82.3 Schedule A to the cession agreement is a consent by DPW where provision is made for DPW and two witnesses to sign.

82.4 Paragraph 7 reads:

“The cessionary hereby accepts the said cession upon and subject to the terms and conditions of this cession agreement.”

82.5 Under the heading ‘Conditions Precedent’, paragraph 7 reads:

“This cession agreement is subject to the fulfilment of the following conditions prior to the effective date:

8.1 Approval by the Client.”

82.6 paragraph 9 is headed ‘Undertaking by the Cedent’, and reads:

“The cedent undertakes to immediately notify the employer of the execution of this cession agreement.”

[83] The cession agreement that was tendered in as evidence was not signed by DPW and no evidence was tendered that Tarfix obtained the consent in writing from DPW as required in paragraph 5.1(iii) or is that the condition precedent as required in paragraph 8, namely, the approval DPW was obtained.

[84] What the plaintiff relies on, is the following:

84.1 DPW’s payment verification form, where the remark appears that R2 667 600.00 is payable to the plaintiff according to the cession agreement;

84.2 the two correspondence, one from Tau Pride to Cool Ideas dated 19 August 2009, wherein they were requested to issue an instruction to the plaintiff to provide the service as per the cession agreement and the letter from Cool Ideas dated 24 August 2009, wherein they instructed the plaintiff, as the nominated subcontractor, to supply the product to Tarfix; and

84.3 Mr Marx’s evidence that Mr Madinyenya, at a site meeting, told him that the cession had been approved.

[85] Mr Ntemane explained that the remarks in the payment verification form were inserted by Mr Madinyenya. He said he was not furnished with a cession agreement when he signed the route form, and that the cession agreement was only a requirement at the next level when the route form went to the payment section, where no cession was found. Only if there was a cession agreement, would payment in the amount of R2 667 600.00 been made to the plaintiff. I accept the explanation proffered by Mr Ntemane as to why he signed the payment verification form. He proved to be a good witness who did not contradict his evidence, and I am of the view that the plaintiff is attempting to place undue weight on this document.

[86] Furthermore, the HOD, Mr Van Staden, did not authorise the payment as there was no cession agreement and he instructed Mr Ntemane to pay the contractor, Tarfix. This is also evident from the following:

86.1 an email dated 30 November 2009 sent by Mr Van Staden to Tarfix’s attorney requesting that they submit a new invoice of R2 667 600.00:

86.2 the invoice from Tarfix to DPW in the amount of R2 667 600.00; and

86.3 the email from Tarfix to Mr Ntemane informing him that Mr Van Staden wrote to their attorney confirming that payment would be paid directly to Tarfix.

[87] As stated supra, the plaintiff cannot rely on the correspondence from Cool Ideas and Tau Pride to contend that a cession agreement was concluded, based on the fact that the plaintiff was instructed to supply its product. In the letter from Tau Pride, they stated in no uncertain terms that they were waiting final approval from DPW. Mr De Freitas conceded that he was aware that final approval was required and Mr Mpandaguta testified that they were still awaiting the final approval from DPW. This was also the plaintiff's

case in South Gauteng, where Mr De Freitas, in his affidavit, alleged that the cession agreement had to be approved by DPW before it was effective.

[88] Mr Mpandaguta and Mr De Freitas' 'belief' that a cession was approved does not detract from the fact that there is no evidence to support their contention that the cession was approved by DPW. According to Mr Ntemane, a signed cession agreement was not found and that is why payment was made by DPW to Tarfix, its contractor.

[89] Mr Marx's evidence that Mr Madinyenya confirmed at a site meeting that a cession agreement was approved, is improbable for the following

reasons:

89.1 he did not raise this in his affidavit in South Gauteng and raised it for the first time in this Court, which fact he conceded. This matter was postponed to inspect the minutes of the site meeting and no minutes were found;

89.2 Mr Marx, in his opposing affidavit in South Gauteng, alleged that "it has now become known that DPW never gave such a consent on/or before 01 July 2009 or thereafter. We now know that the deed of cession never came into force. The deed of cession is in any event void and unenforceable";

89.3 he also said he was not aware of the condition in the cession agreement that Tarfix would be responsible if DPW does not pay, even though he appended his signature to the deed of cession on behalf of Tarfix;

89.4 he denied, under oath, that Tarfix received payment from DPW when in fact DPW paid Tarfix;

89.5 he was unable to satisfactorily explain the discrepancies in his two conflicting versions in this Court and in his affidavit in South Gauteng;

89.6 he admitted that Tarfix entered into an oral agreement with the plaintiff to supply the product to Tarfix. However, in his answering affidavit, he denied that any oral agreement was concluded between the plaintiff and Tartix. When asked to explain the discrepancy, he replied “I can only say it must have slipped my mind or something, that I did not deem it necessary or important but there was, I will say now that there was definitely an agreement”.

[90] Mr Marx generally did not make a good impression on the Court, and in his evidence attempted to protect Tarfix and lay blame on DPW.

[91] On probabilities, if DPW had signed the consent to the cession or approved the cession, DPW would have paid the plaintiff and Tarfix would not have invoiced DPW for the product.

[92] Accordingly, I am of the view that the plaintiff cannot rely on the cession agreement to demand payment from DPW.

[93] Furthermore, on the issue of the retention, it is clear from the facts stated supra that the plaintiff has no claim against DPW for the retention. Both Mr Madinyenya and Mr Ntemane testified that the contract was between the plaintiff and Tarfix, and that the plaintiff was a subcontractor for Tarfix, and that the plaintiff accordingly cannot claim the retention from the defendant.

[94] In view of my findings supra, it was not necessary to consider the special pleas raised by the defendant.

J. ORDER

[95] In the circumstance, I make the following order:

a) The plaintiff’s claim is dismissed with costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 26 JUNE 2014

DATE OF JUDGMENT : 11 SEPTEMBER 2014

COUNSEL FOR PLAINTIFF : ADV P. STRATHERN

COUNSEL FOR DEFENDANTS : ADV SEBOKO

ATTORNEYS FOR PLAINTIFF : SMIT STANTON INC.

(Instructed by RAMSAY WEBBER INC.)

ATTORNEYS FOR DEFENDANTS : THE STATE ATTORNEY

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