

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA

Case no: 21344/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. [REDACTED]
31 JULY 2023

DATE

SIGNATURE

In the matter between:

BILA CIVIL CONTRACTORS (PTY) LTD

PLAINTIFF

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA

DEFENDANT

J U D G M E N T

MAKHOBHA, J

- [1] The plaintiff is Bila Civil Contractors (PTY LTD, a company incorporated and registered in accordance with the company laws of South Africa.
- [2] The Defendant is the Passenger Rail Agency of South Africa is a juristic entity established in terms of the Legal Succession of the South African Transport Services Act 9 of 1989, it is an organ of State.
- [3] In 2011 the defendant invited tenders under Tender No. HO/INF/304/03/2011 for the upgrade of the Mamelodi Garden Station above platform level (*"the tender"*), to which the plaintiff submitted a proposal.
- [4] Part of the tender documents forming part of the tender was the contract data for the Principal Building Contracts Committee (*the JBCC*) Contract, Series 2000, Edition 5.0 (*"the contract data"*).
- [5] On 9 September 2011 the Supply Chain Management of the defendant approved the appointment of the plaintiff and the contract was signed by the plaintiff on 23 September 2011.
- [6] This is a matter in terms of Rule 33(1), (2) (3) and (5) of the uniform Rules of Court, namely a special case premised upon a written statement of fact, to be decided by this court. Parties agree that the following are the questions of law and issues in dispute.

6.1 Whether an agreement was concluded between the Plaintiff and the Defendant as pleaded by the plaintiff;

6.2 If indeed an agreement was concluded whether the Plaintiff's claim against the Defendant has become prescribed;

6.3 If the answer to the aforementioned questions are in favour of the plaintiff, whether performance in term of the agreement by the Defendant became impossible and the contract therefore null and void;

6.4 The parties have agreed that the question of damages not be determined as part of this stated case but will be determined separately dependant on the outcome of this stated case.

6.5 Costs.

[7] The plaintiff contends that there is an agreement between it and the defendant, the defendant repudiated the upgrade agreement. The defendant denies this.

[8] The defendant raise the defence of prescription and that there was no consensus between the parties and thus, no agreement.

[9] The defendant contends further that insofar as it is found that consensus was present, that it was impossible for it to perform as in order to perform it was required to obtain ownership of certain

properties and was unable to do so and the plaintiff has suffered no damages.

- [10] The matter was initially set down for the 1st of November 2022, but due to non-compliance on the part Plaintiff the matter did not appear on the trial roll of the day. The parties however utilized the opportunity to prepare the agreed statement of facts, for special adjudication by this court.

Whether an agreement was concluded between the parties as pleaded by plaintiff.

- [11] In *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South Africa Post Office Ltd*¹ the facts of this case are slightly similar to the facts of this matter before me.

- [12] In that matter, the appellant was advised that it had been awarded the tender. Shortly thereafter the respondent was provided with a draft contract however the contract was not finalized.

- [13] In paragraph 12 the court said the following: "[12] The dispute thus arising is not novel. It frequently happens, particularly in complicated transactions, that the parties reach agreement by tender (or offer) and acceptance while there are clearly some outstanding issues that require further negotiation and agreement. Our case law recognises that in these situations there are two possibilities. The first is that the agreement reached by the acceptance of the offer lacked *animus contrahendi* because it was conditional upon consensus being reached, after further negotiation, on the outstanding issues. In that event, the law will

¹ [2013] 1 All SA 266 (SCA).

recognise no contractual relationship, the offer and acceptance notwithstanding, unless and until the outstanding issues have been settled by agreement. The second possibility is that the parties intended that the acceptance of the offer would give rise to a binding contract and that the outstanding issues would merely be left for later negotiation. If in this event the parties should fail to reach agreement on the outstanding issues, the original contract would prevail (see eg CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd 1987 (1) SA 81 (A) at 92A-E; Namibian Minerals Corporation Ltd v Benguela Concessions Ltd 1997 (2) SA 548 (A) at 567a-c [also reported at [1997] 1 All SA 191 (A) – Ed]).”

This decision is quoted with approval in *Sivubo Trading and Projects CC v Development Bank of Southern Africa*²

[14] In *CGEE Alsthom Equipment et Enterprises Electriques, South Africa Division v GKH Sankey (Pty) Ltd*³ at paragraph A the court said “.....where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matter material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force.”

[15] It depends on the facts of a particular case whether the initial agreement acquires contractual force or not. The intention of the parties is to be determined from their conduct.⁴

² 233/2018 [2019] ZASCA 28 (28 March 2019) para 13.

³ 1987 (1) SA 81 (A).

⁴ *CGEE Alsthom Equipment* para 92E.

[16] In my view the failure by the plaintiff to attach the addendum which was required resulted in a failure to reach consensus by the parties.

[17] Furthermore, In Prasa Steering Committee meeting NO 16, The following was said: “ **Finalization of the Bila Contract is critical.*

**Construction work on the non-station structure can commence as soon as PRASA conclude their agreement with Bila Civil Contractors”.⁵*

In my view this is indicative of the fact that the parties lacked *animus contrahendi*.

[18] In addition the letter dated 26 July 2017⁶ from the plaintiff reads as follows: “*Can we now sign the contract of which the tender document is in your possession*”

[19] It is clear from the conduct of the parties that they did reach an agreement by tender however, there are clearly some outstanding issues that require further negotiations and agreement.

[20] In my view there is no contract between the plaintiff and defendant until the outstanding issues have been settled by agreement.

[21] In regard to the costs for 1 November 2022, counsel for the defendant did come to court however the matter was not properly placed before court, and it ended up in the chambers of the Deputy Judge President.

⁵ CaseLines 074-6 to 074-7 para 27.

⁶ CaseLines 0020 – 32.

[22] In my view the defendant is entitled to the cost for 1 November 2022 since it is not the defendant's fault that the matter could not proceed on said day.

[23] I make the following order;

25.1 The plaintiff's claim is dismissed with cost including cost of 1 November 2022.


MAKHOB A J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED JUDGMENT: 6 JUNE 2023

JUDGMENT HANDED DOWN ON: 31 JULY 2023

Appearances:

For the Plaintiff: Ms J Harwood (instructed by) Hewlett Bunn Incorporated
For the Respondent: Adv C Erasmus SC (instructed by) Ngeno & Mteto Incorporated.