

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

|                                                       |                                                                                             |
|-------------------------------------------------------|---------------------------------------------------------------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE                    |                                                                                             |
| (1) REPORTABLE: <del>YES</del> / NO.                  |                                                                                             |
| (2) OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO. |                                                                                             |
| (3) REVISED.                                          |                                                                                             |
| DATE 2/3/2015                                         | SIGNATURE  |

CASE NO: A644/2014

DATE: 4/3/15.

IN THE MATTER BETWEEN:

**GLOBAL HOUSE OF ACCOUNTING  
 (PTY) LTD t/a HOUSE OF  
 ACCOUNTANTS**

**APPELLANT**

AND

**FRANCOIS LAAS STEYL**

**RESPONDENT**

**JUDGMENT**

**KOLLAPEN J:**

**INTRODUCTION**

1. This is judgment in an appeal against the whole of the order and judgment of the learned Magistrate Ms A C Nyambo sitting in the Regional Court of Pretoria when an order was made that the appellant pay to the respondent the sum of R273 493-17 together with interest and costs.

**BACKGROUND**

2. It is common cause that the respondent was engaged by the appellant to perform certain professional services for and on its behalf – the services were in the nature of accounting and other professional services for local authorities. It appears that when that arrangement came to an end and in order to bring finality to the relationship between the parties with regard to payment and other issues, the appellant in an e-mail dated the 16<sup>th</sup> of June 2009, acknowledged its indebtedness to the respondent in the amount of R700 000-00. Of that amount the e-mail recorded that R150 000-00 had already been paid and there was an undertaking to pay the balance of R550 000-00 in instalments during the period June 2009 to September 2009.
3. On or about the 22 June 2009, the respondent caused a close corporation to be incorporated under the name of CDF Sky Consultants CC ('CDF') in which he was the only member and thereafter requested the appellant to pay the amounts due to him, to the close corporation. The respondent also issued an invoice in the name of CDF to the appellant reflecting the outstanding amount as set out in the email of the 16 June 2009.
4. The appellant made some payments to the close corporation but there remained a balance of R273 493-17 which then triggered the issue of summons by the respondent in the Court *a quo*. One of the issues raised in the proceedings in the Court *a quo* was whether the undertaking to pay was an undertaking in favour of the respondent or the close corporation to be formed, and the related issue of whether in submitting an invoice in the name of CDF and requesting payment to be made to it, the respondent had relinquished his entitlement to seek payment in his own name, having effectively ceded his right to payment to CDF.
5. After considering the evidence of Mr Pretorius on behalf of the appellant and that of the respondent, who testified in his own case, the learned Magistrate entered judgment in favour of the respondent.

## **GROUND OFS OF APPEAL**

6. The grounds of appeal the appellant originally relied on are that:
  - i. The learned Magistrate erred in finding that the undertaking to pay as set out in the e-mail of the 16<sup>th</sup> of June 2009 constituted an agreement between the appellant and respondent investing the respondent with the necessary *locus standi* to sue;
  - ii. That the learned Magistrate erred in concluding that it was common cause that the respondent had performed the work for the appellant;
  - iii. That the learned Magistrate erred in framing the question for determination as being whether there was a cession from the respondent to CDF, as no such case was made out on the papers; and
  - iv. That the learned Magistrate erred in allowing the admission of evidence that the close corporation was registered after the date of the undertaking of the 16<sup>th</sup> of June 2009.
  
7. During the hearing of the appeal the appellant abandoned the grounds of appeal set out in ii), iii) and iv) above but sought to raise two new grounds of appeal. These were, namely, that the agreement reflected in the e-mail of the 16<sup>th</sup> of June 2009 constituted a pre-incorporation contract on behalf of CDF which was ratified upon the registration of CDF, the issuing of an invoice in the name of CDF and the receipt of some payments by CDF, and in addition the appellant sought to argue that the conduct of the parties after the 16<sup>th</sup> of June 2009 constituted an amendment of the agreement of the 16<sup>th</sup> of June 2009.

## **ANALYSIS**

### **➤ THE UNDERTAKING DID NOT CONSTITUTE AN AGREEMENT TO PAY THE RESPONDENT:**

8. The case for the respondent is premised on the written undertaking to pay. It is not in dispute that when the undertaking was given, the close corporation was not yet registered and on account of that, could not have conducted any business. If one has regard to the e-mail of the 16<sup>th</sup> of June 2009 despatched by the appellant to the respondent, then it is clear that it purports to provide a clear and unambiguous basis for the settlement of any claims between the parties and that the obligation to pay is an unconditional one and made by the appellant to the respondent in person. There can simply be no suggestion that it was given to the respondent in any capacity other than in his personal capacity. The work that was undertaken and that constituted the debt was undertaken by the respondent and it was the respondent that was entitled to payment – the e-mail of the 16<sup>th</sup> of June 2009 confirms this in clear terms.
9. While it is trite that ordinarily a plaintiff has to prove all the terms of an agreement it relies on, the position is different when the plaintiff sues on a written document and the defendant pleads that the written document differs from the actual agreement arrived at.
10. The strong probative value of the document has been seen as a factor affecting the incidence of the onus, and the true position as to the question of onus is that the respondent (plaintiff) bears the overall burden of showing that it is possessed of rights which entitled it to claim the attachment order. That overall onus remained on it throughout. However since it is armed with a written agreement which appears, on the face of it, to confer such rights on it, the appellant (the defendant) bears the burden of rebutting the *prima facie* case.
11. On the evidence there was no rebuttal of the respondent's *prima facie* case and reliance on the e-mail of the 16<sup>th</sup> of June 2009 and in this regard the evidence of Mr Pretorius accepting that CDF could not have conducted business at least at any time before the 22<sup>nd</sup> of June 2009 when it was incorporated, must be

decisive of the argument that the undertaking was not given to, and for, the benefit of the respondent.

12. In addition there is no evidence relative to the conclusion of the agreement which is reflected in the e-mail of the 16<sup>th</sup> of June 2009 that the respondent was acting in any capacity other than in his personal capacity. The suggestion that the agreement constituted a pre-incorporation contract stands unsupported by the evidence.

➤ **THE ISSUE OF THE ALLEGED CESSION**

13. While it is so that the question of the cession of the claim was not raised on the pleadings, it was raised during the evidence and in particular during the cross-examination of the respondent when it was suggested to him that he had ceded his claim to CDF. A similar stance was taken by Mr Pretorius during his testimony.
14. Although ‘the object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent a full enquiry...within those limits the Court has a wide discretion’ because ‘where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstance has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.’ (see ***ROBINSON v RANDFONTEIN ESTATES G.M., CO. LTD.*** 1925 AD 173 at page 198)
15. As the appellant had raised the possibility of cession at the trial, it was incumbent upon the Magistrate to consider that aspect in her judgment.
16. When one has regard to the case in support of the alleged cession which the appellant was under an evidential burden to prove, then it could hardly be said

that this was proved on a preponderance of probabilities. The evidence of the respondent was simply that the formation of CDF represented a vehicle through which he would conduct his business and that the issuing of invoices in its name for monies that were due and payable to him was purely an administrative arrangement. In this regard I am not even sure whether the respondent fully appreciated the difference between a close corporation in which he was the only member, as a separate and distinct legal entity, which in my view further militates against the suggestion that he ceded rights from himself to the close corporation.

17. In my view the fact that invoices were issued in the name of CDF did not alter the nature of the original obligation that was created. A party is entitled to use an agent or another entity to receive payment.
18. In ***AGRICULTURAL RESEARCH COUNCIL v BREDELL AND OTHERS*** 2005 (1) All SA 515, the Court expressed itself as follows (at 523f):

*'This means that the condictio indebiti is enforceable against the recipients of the undue payment, but nobody else. The recipients is not necessarily the person into whose hands the money was actually put when it was paid. He is the one who must be considered, in all the circumstances of the case, truly to have received the payment. Whenever a payment is made to an agent with authority to accept it, for instance, the recipients is the principal, not the agent. A conduit through whom payment passes is likewise not its recipients.'*

19. The invoice by CDF can carry no greater consequence than an intimation by the party entitled to payment, namely the respondent, making an election that the payment due to him be paid to CDF. This cannot under any circumstances and certainly in the absence of a cession, endow CDF with any rights to claim such payment in its own name. The evidence before the Court *a quo* did not

establish the existence of a cession from the respondent to CDF nor was it established that CDF had somehow become entitled to payment by virtue of the undertaking of the 16<sup>th</sup> of June 2009.

20. The invoice issued at the instance of CDF, and the request by the respondent that payment be made to CDF, cannot alter the character of the debt that had come into existence. Absent a cession, it can never be so that an invoice can on its own constitute the basis for indebtedness. *In casu* the basis for the indebtedness of the appellant was the work done by the respondent and the written undertaking by the appellant to pay an agreed amount for that work.
21. Finally the argument that there was an oral agreement that had the effect of amending the agreement of the 16<sup>th</sup> of June 2009 needs consideration. Apart from the fact that the existence of such an oral agreement was never pleaded, it was only raised quite tangentially in evidence when it was put to Mr Pretorius in re-examination that the request by the respondent that payments be made to CDF constituted an oral agreement amending the written agreement.
22. Apart from the very vague and generic nature of the alleged oral agreement, it is so that it was never the case the respondent was required to meet and it was raised for the first time in re-examination. Once again I am compelled to conclude that on the available evidence it could hardly be said that the appellant had discharged the evidentiary burden of proving the existence of such an oral agreement. If one has regard to the evidence of the respondent, then clearly there was simply no meeting of the minds with regard to the case for the existence of such an oral agreement.
23. In my view and for the reasons given, the appeal is destined to fail.

## **ORDER**

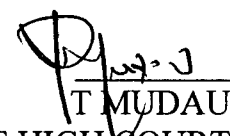
I therefore propose the following order:

That the appeal be dismissed with costs.



N KOLLAPEN  
JUDGE OF THE HIGH COURT

I AGREE,



T MUDAU  
ACTING JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

A644/2014

HEARD ON: 19 FEBRUARY 2015

FOR THE APPELLANT: ADV. J ROUX (assisted by ADV. W R DU PREEZ)

INSTRUCTED BY: MACROBERT INC (ref: CG/ew/1023804)

FOR THE RESPONDENT: ADV. D B DU PREEZ SC

INSTRUCTED BY: DU PLESSIS & EKSTEEN ING. (ref: Heunis/anton)