

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Case No: 1500/07
Heard: 09/02/2009
Delivered: 06/03/2009

In the matter:

FILYAT 4 CC t/a AMBIENT CONTROL CC **Plaintiff**

and

**KIMGAS REFRIGERATION AND APPLIANCE
CENTRE CC** **Defendant**

JUDGMENT

KGOMO JP

- [1] The plaintiff is Filyat 4 CC trading as Ambient Control (Ambient Control) a close corporation doing business from premises in De Beers Street, Kimberley. The corporation specializes in the installation and repair of air conditioning, cold storage rooms, ventilation apparatus and related matters.
- [2] The defendant is Kingas Refrigeration and Appliance Centre CC (Kingas CC) a close corporation operating from Old Main Road, Kimberley. Kingas' activities are in the distribution of gas products and other work allied to what Ambient Control does.

- [3] The Ambient Control sues Kingas CC for payment in an amount of R129, 231-22 for breach of contract allegedly committed by one of its directors, Mr Johnny Jonkers, when he is said to have repudiated the contract orally on the 29th October 2007.
- [4] What falls to be determined in this trial is the narrow issue of whether a valid contract between the parties came into existence. This is so in light of the concession made by counsel for Kingas CC, Adv J.A Fourie, that the evidence of the witnesses for Ambient Control, Mr Elias Reineke and his wife Mrs Francis Reineke, be accepted as credible and that of his client, Mr Johnny Jonkers and the latter's secretary Ms Susanna Bredenhann, be found to be less satisfactory and therefore, by implication, stood to be rejected.
- [5] The Department of Transport Roads and Public Works of the Northern Cape (the employer) invited tenders on behalf of the Department of Sports, Arts and Culture from service providers for the installation of air conditioning, ventilation and electrical services for the Northern Cape Civic Theatre in Kimberley. On the 17th August 2007 prospective bidders attended a compulsory site inspection tour. The Reinekes and Mr Jonker, who knew each other from a previous joint venture, met and discussed further collaboration on the envisaged project. A follow-up meeting took place a day or so at Ambient Control's premises where a few loose ends were tied. The parties agreed that should the tender be awarded to Kingas CC, Ambient Control would be appointed as a subcontractor.

- [6] The parties entered this mutual symbioses because Ambient Control, with an exclusively white membership, was not Black Economic Empowerment (BEE) compliant, whereas Kingas CC was. On the other hand, the evidence revealed, Ambient Control had the resources, the capacity and know-how to complete the project tendered for whereas the converse was the case with Kingas CC.
- [7] Pursuant to this arrangement Mr Reineke, with Ms Bredenhann of Kingas CC by his side and Mrs Reineke in attendance, compiled the parties' tender in the name of Kingas CC with the aid of the procurement documentation guidelines obtained from the employer Department. Through his sole endeavours Mr Reineke produced an eight page schedule, "Exhibit B", which specifies item by item a detailed setting-out of the material to be used, the unit number, the quantity, the cost, the mark up prices etc required to fulfil the tender contract. He worked out that the profit to the parties for the completed work would be R 139 231-22 which in truncated form is arrived at as follows:

Contract price	R 867, 779-49
Less costs for completed work	R 728, 548-27
	R 139, 231-22

- [8] In accordance with the particulars of claim Ambient Control would solely perform the work tendered for using its own material and labour and that Kingas CC would be paid an amount of R 10 000-00, essentially for mere fronting. Kingas CC pleaded baldly denying that it was to be rewarded an amount of R10 000-00 for the use of its name. It remained

silent on what, on its version, the terms of the agreement were or how the profits were to be apportioned.

[9] When Mrs Reineke, an excellent witness with a head for meticulous and accurate detail, testified for Ambient Control it surfaced for the first time through Mr Fourie's cross-examination that Kingas CC will aver that the parties had agreed on 17 August 2007 that the profits would be shared 50/50 percentum between them. It was also put to the Reineke couple that part of the agreement was that Kingas CC would sponsor two workers to team up with plaintiff's workforce to perform the work tendered for. Mr Jonkers subsequently confirmed these statements when he testified.

[10] The disunity between the parties was precipitated by Mr Jonkers informing the Reinekes on or about the 8th October 2007 that Mekan Engineering Services, who acted as private consultants for the Department of Works, reported that certain heavy equipment transported by road from the Eastern Cape required to be offloaded on site on Wednesday the 10th October 2007 and that he (Mr Jonkers) must arrange a crane for that purpose. As expected Mr Jonkers ceded the obligation to Ambient Control. Mrs Reineke raised several problems she had with the arrangement:

10.1 She had no knowledge at that stage that the tender had been awarded to Kingas CC. Mr Jonkers assured her that he had been verbally notified of the award. Mrs Reineke insisted, not for the first time, that she be furnished with a copy of the certificate from the Department to that effect without which a tenderer is debarred from consummating the tender agreement;

10.2 Mr Reineke had a prior commitment out of town and had to be present during the offloading process. The contractor (nominally Kingas CC, but in reality Ambient Control) would assume the risk and liability for any damage caused during the offloading process. The equipment is very expensive and had to be handled in a particular manner which Mr Reineke was familiar with and could not entrust the task to someone else;

10.3 Besides, the Reinekes were unable to secure a suitable crane at such short notice.

[11] Mrs Reineke testified that pursuant to the foregoing Mr Jonkers told her that Ambient Control is unable or unwilling to discharge its obligations in terms of their agreement. She says Mr Jonkers also told her, telephonically, that she treats him like a barbaric person (derogatory racial term) and said he was terminating the contract and "slammed the phone down" in her ear. Mrs Reineke denies the abuse or any improper conduct.

[12] To the contrary Kingas CC denies that its Mr Jonkers repudiated the contract either on Monday the 29th October 2007 as alleged by Ambient Control or at all and pleads as follows in this respect:

"Verweerder pleit dat die ooreenkoms reeds op 8 Oktober 2007 en te Kimberley tussen die partye by ooreenkoms gekanselleer is. Namens eiser het opgetree mev F Reineke en names verweerder het opgetree mnr Jonkers."

[13] Upon a request for Further Particulars for trial Kingas CC was asked whether the cancellation was in writing or oral and

where it was alleged to have occurred on the 8th October 2007. Kimgas CC responded with a bland:

"Die kansellasië het mondelings plaasgeving. Sien ook skrywe van eiser hierby aangeheg gedateer 8 Oktober 2007 wat vir sigself spreek."

The oral terms are not pleaded by Kimgas CC.

- [14] There is no hint of an intention by Ambient Control to cancel or repudiate the contract and even less evidence of a consensual cancellation thereof by the parties in the letter of the 8th October 2007 alluded to by Kimgas CC. The letter in its entirety written by Mrs Reineke, reads:

"RE: KIMBERLEY THEATRE AIR CONDITIONING – DELIVERING OF AIR CONDITIONING UNIT TO SITE:

With reference to letter from Mekan Engineering Services dated 05 October 2007, we wish to point out that this is insufficient notice. We also want to point out that we only allowed for a one-time crane rental. As we still have no letter of appointment, we cannot work on the site, as the existing unit has to be removed before the new unit can be put in place.

Please also note that our person responsible (Mr Zack Reineke) for the rigging of the unit will be out of town on Wednesday 10 October 2007.

The cost of second rental of the crane if the unit has to be offloaded on Wednesday is ± R 12 000.00 excluding VAT, payable in cash and this is not allowed for in the tender price. If you wish to proceed with this delivery this amount would be an extra on the tender and we need to have it amended before any work can be done. Please advise as soon as possible."

- [15] When Mr Jonkers testified on this point (the alleged mutual agreement to cancel) he explained:

"En toe gaan ek aan. Toe vind ek nou mense uit wat my kan help op daai datum. Toe kom ek terug na haar toe. Toe sê ek mevrou,

ek gaan julle nie meer kan gebruik nie want julle kan my mos nie help nie. Ek het iemand anders gekry wat my kan help. Toe sê mev Reineke ja is reg.

Goed? --- En dit is hoekom ek het nooit weer kontak met haar gemaak nie."

- [16] Mr Jonkers was caught out in a lie several times. The most significant on this aspect is that documentary evidence was produced by Mrs Reineke to demonstrate that the last communication by Ambient Control with him could not have been on the 8th October 2007 and that the contract was not terminated on that date. Exhibit "F" is a phone record showing that there was a telephonic conversation between Mr Jonkers and Mrs Reineke. Shortly thereafter Mrs Reineke, the record shows, spoke to her attorney, Mr Rassie Erasmus. Exhibit "F" was handed up by consent. Exhibit "D" is a delivery note dated the 30th October 2007 and is proof that a letter Exhibit "A5-6" also dated the 30th October 2007 was hand-delivered to Kingas CC.

- [17] Exhibit "A5-6" read in part:

"Ambient Control has contacted Kingas on 3 occasions by telephone to enquire about the progress of this matter. It now seems that Kingas wants to repudiate this agreement.

We wish to afford you the opportunity to make an appointment with us to discuss this matter before close of business on Wednesday the 31 October 2007. This meeting must also take place before close of business on Friday the 02 November 2007. You may choose any venue convenient to yourself.

Please take note that if you should fail to arrange for a meeting we shall accept that you repudiate the above mentioned agreement

which then leaves Ambient Control no other avenue but to take legal action which would incur substantial financial costs that no company would like to bring onto itself. If there is any legal costs it will be for your account."

I accordingly accept that the contract was only repudiated as per Ambient Control's version at the earliest on the 29th October 2007.

- [18] When Mr Jonkers was exposed as shown above an attempt to save face in this fashion was made:

"KRUISONDERVRAG DEUR MNR FOURIE:

Mevrou, ek wil net vir u stel as daardie brief geteken is deur Joyce by Kimgas, dan is my kliënt se weergawe hy het daai brief nooit gekry nie. Hy het dit self nie gesien nie? === Wel meneer, ek vra net as iemand its indien by my kntoor en my ontvangsdame ontvang dit, dan is dit te sê dat die brief is daar af, ek kan nie verantwoordelikheid (aanvaar) dat sy ontvangsdame nie vir hom die brief oorhandig het nie."

- [19] Faced with the foregoing intractable difficulties Mr Fourie argued that Ambient Control has failed to prove that a valid agreement to subcontract came into being between the parties in light thereof that the contract amount, viz the amount payable by Ambient Control to Kimgas CC, has not been agreed. He submitted that the amount is neither determined nor determinable. He went on to say that Ambient Control's case was throughout that the agreed amount to be paid to Kimgas CC was R 10 000-00 but in his evidence Mr Reineke stated categorically that the consensus was that an amount of between R5000-00 and R 10 000-00 would be paid. Counsel urged me to find that an essential ingredient of the contract was lacking and that no binding

agreement ever existed between the parties which could be repudiated, breached or cancelled.

- [20] Of particular note is that Kingas CC has admitted in their plea that a contract to subcontract came into being between the parties. This admission is still extant because it has not been withdrawn nor has Kingas CC amended its plea. It is also not correct that Ambient Control's case has throughout only been that the agreed amount payable to Kingas CC was R 10 000-00.

20.1 The second paragraph of Exhibit "A5-6" dated the 30th October 2007, thus written before summons was issued, states:

"Ambient Control wishes to remind Kingas that you (Johnny Jonkers) personally approached Ambient Control after the compulsory site meeting held on the 13 August 2007 to enter into a joint venture with Kingas to do the above tender.

Ambient Control wishes to bring to your attention that we had a verbal agreement that Zack Reineke would do the full costing and prepare the tender documents for Kingas to submit. Ambient Control also included a list of Ambient Control's plant & equipment, similar jobs completed as well as all Zack Reineke's qualifications and his 32 years of experience. If this bid were successful, Kingas in turn would sub-contract the entire tender to Ambient Control. Furthermore, Kingas also agreed to cede the full payment for this tender to Ambient Control after receiving the letter of appointment from the Department at Standard Bank. On successful completion of the tender works it was agreed that Ambient Control would pay Kingas a facilitating commission of R 5 000-00 to R 10 000-00 this amount not exceeding R 10 000-00." (My emphasis)

20.2 In Exhibit "A7-10" dated the 9th November 2007 by Ambient Control's attorneys to the Department of Sport, Arts & Culture, and copied to various interested parties concerning the very tender they repeat the contents of para 20.1 but the following is added:

"Mr Reineke then said that (Ambient Control would pay Kingas CC) between R 5000-00 and R10 000-00 but not exceeding R 10 000-00, depending on (whether) the contract (is) going smoothly and any unforeseen extra costs are incurred. This amount is more than 10% of the net profit on this project and Mr Jonkers agreed to that."

[21] Mr Fourie has referred to the decision in **Raymond v Abdulnabi & Others** 1985(3) SA 348 (W) at 349 G-H for the contention that where the amount to be paid is not fixed or determinable a contract is invalid. The Raymond case does not lend support to plaintiff's case because in that case the parties to a contract of sale of shares agreed that the determination of the purchase price be left to be fixed by a third party, an independent auditor. The court held that the agreement was unenforceable as the price payable was neither fixed nor sufficiently determinable; that to have the price fixed would require the parties' further agreement as to who the auditor should be and they may even disagree on the choice of an auditor or the price subsequently determined. As a price is a material term of a contract of sale, no contract was concluded. The other cases relied on by Mr Fourie all relate to contracts of sale and need not burden this judgment.

[22] In this trial the parties fixed the parameters of the payment to Kingas CC as being not less than R 5 000-00 but not exceeding R 10 000-00 *"depending on (whether) the contract*

(is) going smoothly and any extra costs are not incurred."

This stipulation is sufficiently fixed or determinable for contracts of this nature. More fundamentally, however, the agreement between the parties is not a sale agreement and therefore the general principles applicable to the conclusion of a contract applies.

[23] The representatives of Ambient Control and Kingas CC were fully aware that Mr Reineke did the detailed costing of the tender which Mr Jonkers' secretary, Ms Bredenhann, familiarized herself with at the Ambient Control offices. In fact when the parties fell into dispute and Mr Jonkers unilaterally terminated the agreement Kingas CC merely plagiarised and reproduced Mr Reineke's costing documents, already referred to, and presented same to the department.

[24] I am, in conclusion, satisfied that a valid contract existed between the parties and that same was repudiated by the defendant during or about the 29th August 2009. The calculations by Mr Reineke were never placed in dispute and were, on the contrary, essentially adopted by the defendant, with some camouflage.

[25]	Plaintiff stood to benefit the sum of	R 139 231 – 22
	Less R10 000-00 due to defendant	R 10 000 - 00
	<u>Damages proved</u>	<u>R 129 231 -22</u>

[26] I point out for the record that the agreement between the parties may have been disguised as a subcontract, but it was not. It will be noted that there was a wholesale abdication of its obligation by Kingas CC by farming out the tender project to Ambient Control. A subcontractor is one who agrees with

the contractor to perform any part of the work that the contractor previously agreed to perform for another; it is one who takes a portion of a contract from the principal contractor (or even from another subcontractor). See **Street Pole Ads Durban (Pty) Ltd v Ethekweni Municipality** 2008(5) SA 290 (SCA) at 298 F-G (para 28). I have, however, not been called upon to adjudicate on the propriety or impropriety or ethics of the real nature of the agreement concluded by the parties. The result may, in the view that I take, in any event have remained the same.

[27] As far as this claim, Claim 1, is concerned the costs will follow the result.

[28] Claim 2: The defendant has consented to judgment as prayed.

Claim 3: The claim has been abandoned and it was agreed that there shall be no order as to costs.

I make the following order:

1. **Claim 1:** The defendant (Kimgas CC) is ordered to pay the plaintiff (Ambient Control) an amount of R 129 231-22 plus interest on that amount at the rate of 15,5% from 07 December 2007 (the date of service of summons) to date of payment.
2. **Claim 2:** The defendant is ordered to pay the plaintiff an amount of R 23 166-20 plus interest on that amount at the rate of 15,5% from 07 December 2007 to date of payment.

3. **Claim 3:** This claim has been abandoned and there shall be no order as to costs.

F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

<u>On behalf of the Plaintiff:</u> Instructed by:	Adv. W. Coetzee Engelsman Magabane Inc.
<u>On behalf of the Defendant:</u> Instructed by:	Adv. J.A Fourie Christo Faber Attorneys