



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case Number: A2023-051064

Heard on: 20/03/2024

Date of Judgment: 19/04/2024

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED.

DATE 19/04/2024

SIGNATURE



In the matter between:

SMART CIVILS CONSTRUCTION (PTY) LTD

First Appellant

RADON PROJECTS (PTY) LTD

Second Appellant

and

FRANCIS TRANSPORT AND PLANT HIRE CC

Respondent

JUDGMENT

UNTERHALTER J (WINDELL J AND SIWENDU J concurring)

Introduction

- [1] The first appellant, Smart Civils Construction (Pty) Ltd ('Smart'), and the second appellant, Radon Projects (Pty) Ltd ('Radon'), in May 2015 entered into a joint venture agreement to tender for the new Cosmo City Fire Station. They were successful. The Johannesburg Development Agency ('the employer') awarded the tender to the joint venture, and concluded a written agreement for the construction of the fire station. In December 2015, Radon appointed the respondent, Francis Transport and Plant Hire CC ('Francis TP'), as a subcontractor to carry out certain works on the fire station project. Radon and Francis TP concluded a written contract for the execution of these works ('the subcontract').
- [2] Francis TP commenced the works under the subcontract on 21 January 2016, and completed the works on 24 May 2016. Disagreements arose in consequence of what Francis TP considered to be the short payment of its Claim 8. These disagreements were not resolved. Francis TP instituted an action to claim payment, initially against Smart,

and then also as against Radon. Francis TP pleaded that it had duly executed and completed the subcontracted works and submitted its final claim, but that Radon and Smart had failed to pay the final claim. Radon denied it was liable to Francis TP. Smart pleaded that it had discharged its liability to Francis TP. And the matter proceeded to trial. The trial was heard by Dosio J. Dosio J rendered a judgment, finding for Francis TP, and ordered that Radon and Smart were jointly and severally liable to Francis TP for the payment of R 1 150 500.82, together with interest and costs. With leave, Radon and Smart appeal to this court.

- [3] Radon and Smart have confined the issues for our determination. The issues are these. First, did Francis TP agree to the cession and assignment of the subcontract to Smart? The court below found that Francis TP did not give its consent. Rather, the court below favoured the evidence of Mr Gomes, who testified on behalf of Francis TP. His evidence was that there was no agreement to cede the subcontract to Smart. The parties to the subcontract remained Francis TP and Radon, but Francis TP agreed that payment may be made by Smart, and that Radon and Smart would be jointly and severally liable to Francis TP under the subcontract. If the court below was in error, and Francis TP did consent to the cession and assignment, then Radon would not be liable to Francis TP in terms of the subcontract. And Francis TP's action against Radon would have to be dismissed. I shall refer to this as the cession issue.
- [4] Second, Radon and Smart confined their appeal to the findings of the court below on two of Francis TP's claims. The first was the claim for 'restricted works', and the second, for 'preliminaries and generals' ('P & G's'). The court below found for Francis TP in respect of both these claims. The claim for restricted works amounted to R379 923.63. The claim for P & G's totalled R543 267.00. Smart does not contest, on appeal, that Francis TP was entitled to the judgment it procured for the balance, being an amount of R364 109,37.
- [5] I shall consider first the cession issue, and then proceed to the issues raised by the claims for restricted works and P & G's. The resolution of the cession issue will determine whether Radon or Smart or both these parties are liable for the claims for restricted works and P & G's, should Francis TP sustain these claims on appeal.

The cession issue

- [6] It is common ground that the subcontract was concluded between Radon and Francis TP on 4 December 2015. Mr Klingbiel, who was the contracts manager of Radon, working on the fire station project, testified on behalf of Radon at the trial. Mr Baloyi did so on behalf of Smart. Their evidence was clear that under the arrangements concluded between
- [7] Radon and Smart, as joint venture partners, each company would be responsible for certain works, and be liable for its own suppliers and subcontractors. The appointment of Francis TP as a subcontractor to Radon was made in error because these works were the responsibility of Smart.
- [8] Mr Klingbiel and Mr Baloyi agreed to cure this error by the transfer of Radon's rights and obligations under the subcontract to Smart. They arranged to meet with Mr Gomes, who represented Francis TP. A meeting took place in January of 2016. Mr Klingbiel and Mr Germani attended on behalf of Radon and Mr Gomes did so on behalf of Francis TP. The meeting is not disputed between the parties. What was agreed at the meeting was very much placed in issue.
- [9] Mr Gomes testified that at the meeting he was told that there was a problem with Radon's BEE partner, and he was asked whether Francis TP would accept payment from a third party. Mr Gomes was willing to accept payment from Smart (as the third party), but Radon had to ensure that payment was on time and in full. According to Mr Gomes, no mention was made of the cession of the subcontract.
- [10] Mr Klingbiel's evidence was this. At the meeting, it was explained to Mr Gomes that the appointment of Francis TP should have been made by Smart, and not Radon. The solution was to transfer Radon's rights and obligations to Smart, and that, after some hesitation, Mr Gomes agreed.
- [11] What then occurred was that Mr Baloyi, as the Contract Manager of Smart, wrote to Mr Gomes on 29 February 2016 as follows: 'Further to our discussion, I hereby confirm that the subcontract order number 12821 issued by Radon Projects has been transferred to Smart Civils Construction and the conditions remain unchanged. All your invoices should be addressed to the following: Smart Civils Constructions (Pty) Ltd.' ('the

February letter'). Of the February letter, Mr Gomes testified that he did not see it when sent, or at most he saw it but did nothing about it. In making its claims under the subcontract, and seeking to secure payment, Francis TP addressed both Smart and Radon in different permutations.

- [12] After the dispute arose concerning Francis TP's claims, Francis TP appointed attorneys ('Fasken') to claim payment for the completion of the subcontract works. On 3 November 2017, Fasken addressed a letter of demand to Radon. This letter simply references the subcontract as the basis for the claim. Radon responded on 9 November 2017. Its letter explained that Radon had in error appointed Francis TP, but that this appointment was cancelled, and Francis TP was appointed by Smart. Francis TP had invoiced Smart and been paid by Smart. Radon accordingly invited Fasken to redirect their letter. This they did.
- [13] On 23 November 2017 Fasken addressed a letter of demand to Smart. This letter refers to the subcontract concluded with Radon. It goes on to state: 'We are instructed that on or about 29 February 2016, the Subcontract was ceded and assigned to Smart Civils Construction (Pty) Ltd. In this regard, a copy of the letter addressed to our client from Smart Civils is attached hereto marked B. In accordance with the cession and assignment of the Subcontract our client issued its invoices to Smart Civils.' Demand was then made for the payment by Smart of the amount said to be due and payable.
- [14] When this demand was not met, Francis TP brought an action in May 2018. In its particulars of claim, Francis TP cited Smart as the first defendant, and Radon as the second defendant. Its claim was made against Smart. Radon was cited thus: 'No relief is sought against the second defendant, and it is joined herein merely insofar as it may have any interest in the relief sought against the first defendant'. Francis TP then pleaded the subcontract, and stated further that this agreement was ceded and assigned to Smart by agreement between Radon and Smart. It references the February letter from Mr Baloyi, described above, and avers that this letter 'informed the plaintiff in writing of the cession and assignment'. Francis TP later amended its particulars of claim to reflect the joint and several liability of Radon and Smart.
- [15] The court below found Mr Gomes to be a credible witness and was less impressed with the credibility of Messrs Klingbiel and Baloyi. And some deference is due to that

assessment. The court below accepted the evidence of Mr Gomes as to what was agreed at the meeting in January 2016 between Messrs Gomes, Klingbiel and Germani ('the critical meeting'). It found that there was no cession and assignment of the subcontract. Rather, Smart was a conduit for the payment of Francis TP by Radon, and that Radon and Smart were jointly and severally liable under the subcontract.

- [16] There are difficulties in accepting this finding. True enough, Mr Gomes sent claims to Messrs Klingbiel, Germani and Baloyi. And Mr Klingbiel remained involved in the certification process. None of this is surprising given that Mr Gomes and Mr Klingbiel had a long-standing commercial relationship. Invoices were however addressed to Smart, and Smart issued the payment certificates. But as to what was agreed at the critical meeting, the version offered by Mr Gomes faces some significant hurdles. First, the text of the February letter from Mr Baloyi is consistent with a common sense understanding of a cession and assignment; it is inconsistent with the version of Mr Gomes. The letter was written not long after the critical meeting, and Mr Baloyi, who was not at the meeting, and was assuming liability on behalf of Smart, would have little reason to distort what he understood that liability to be. No mention whatever is made of joint and several liability which would have been advantageous to Smart.
- [17] Second, Mr Gomes does not deny receiving Mr Baloyi's letter, and allowed for the possibility that he may have seen it and done nothing more. In a matter of such importance, if the letter did not reflect Mr Gomes' understanding of what was agreed, one would expect him to have set the record straight. That he did not do so is damaging to his version.
- [18] Third, Fasken's first demand was made of Radon. When Radon explained the demand should be directed to Smart, Fasken's instructions were to do so and to claim from Smart on the basis of the cession and assignment of the subcontract to Smart. Those instructions could only have come from Mr Gomes. In all likelihood, he was reminded of the letter from Mr Baloyi, and instructed his attorneys accordingly. Those instructions are entirely inconsistent with the version offered by Mr Gomes in his evidence. They evince no equivocation as the cession and assignment. And were confirmed by the summons then issued which claimed against Smart, and not Radon.

- [19] Taken together, this evidence casts grave doubt on the version of Mr Gomes. His version is also contradictory. If Smart is simply a conduit for the payment of Radon's liability, how did Smart somehow also assume joint and several liability for Roydon's obligations? And how did this come about when clause 1.8 of the JBCC agreement, which was of application to the subcontract, provides that a variation of the agreement shall not be effective, unless reduced to writing and signed by the parties. The supposed assumption of joint and several liability of Smart under the subcontract, without compliance with clause 1.8 is left unexplained.
- [20] What then of the evidence of Mr Klingbiel and Mr Baloyi. It too is not without blemish. But there seems little doubt that they agreed that the subcontract should be transferred from Radon to Smart to correct their initial error. That was the approach made to Mr Gomes at the critical meeting. And that is what is reflected in the February letter.
- [21] What exactly is the correct legal characterisation of this transfer? The letter of demand of Fasken references the transfer as a cession and assignment. That is the language of clause 13 of the JBCC agreement. The assumption by Smart of Radon's duties under the subcontract would amount to a delegation. And delegation, being a species of novation, required the agreement not only of Radon and Smart, but also Francis TP as the creditor. In addition, clause 13 of the JBCC agreement required the written consent of Francis TP for a party to 'assign or cede his rights or obligations'.
- [22] The question then is whether Francis TP agreed to the assignment and gave its written consent to the cession and assignment, as required by clause 13 of the JBCC agreement. There was certainly no written consent at the time of the critical meeting. At the critical meeting, Mr Klingbiel's testimony was that Mr Gomes agreed to the cession and assignment. Mr Gomes' evidence denied this was so. What is decisive is the Fasken letter of demand sent to Smart, and what followed. It was sent on the instructions of Francis TP, after Radon had explained why it had no liability under the subcontract. It is a clear acknowledgement, in writing, of the cession and assignment of the rights and obligations under the subcontract from Radon to Smart. It was the foundation of Francis TP's claim against Smart. Francis TP issued a summons in which it claimed payment from Smart. Radon was joined as a party 'insofar as it may have any interest in the relief sought against the first defendant' (that is Smart). In the particulars of claim, Francis TP pleads the cession and assignment of the subcontract, and its acceptance thereof.

This is clear evidence that Francis TP not only recognised that Radon and Smart had ceded and assigned the subcontract, but gave its consent to this, thereby agreeing to the delegation. How else could it have claimed performance by way of payment from Smart. Francis TP also gave its consent in writing, given the contents of the Fasken letter of demand, and thereby satisfied the requirements of clause 13 of the JBCC agreement.

[23] The court below declined to entertain the significance of this conduct on the part of Francis TP on the basis that the consent of Francis TP was given after the agreement of Radon and Smart to the cession and assignment of the subcontract. This was unwarranted. While clause 13 of the JBCC agreement could be read to require that written consent is given prior to the cession and assignment, that is not an interpretation of commercial practicality. The general proposition was stated in *Neugarten*¹: it is not the rule that in all cases where the consent of some person is a prerequisite to the validity of a transaction, it must be by way of prior consent. The written consent may indeed be constitutive of the assignment, and hence, it was upon the consent being given that the assignment came into being. But I see no reason why clause 13 should not be read to permit of written consent after the cession and assignment was agreed. The point of clause 13 is to ensure that the parties retain reasonable control over the transfer of rights and obligations. That object is satisfied by allowing a party to decide whether to bless the cession after it has been concluded. In the case of the assignment, as indicated, consent by the creditor is constitutive of the assignment. That consent is not required to be in writing. But clause 13 does so require. And hence there is no reason why the assignment should not have come into being when written consent was given by Francis TP.

[24] Finally, the court below placed some emphasis upon *Bentel*² and the provisions of clause 1.8 of the JBCC agreement that required a variation or termination of the agreement to be reduced to writing and signed by the parties. *Bentel* is not of

¹ *Neugarten & others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A) at 802 F

² *Bentel Associates International (Pty) Ltd & another v Bradford Corner (Pty) Ltd & another* [2013] JOL 30165 (GSJ)

application, given the provisions of the JBCC agreement at issue in this case. Clause 13 specifically regulates the cession and assignment of rights and obligations. It requires the consent in writing of the other party. And, importantly, it stipulates that this consent may not be withheld without good reason. This regime balances the requirement for written consent against the dictates of reasonableness. This differs markedly from clause 1.8 which contains no standard of reasonableness. Clauses 1.8 and 13 cannot be read cumulatively. For then the standard of reasonableness in clause 13 would be nullified by the absolute requirements of clause 1.8. Clause 13 must therefore be interpreted as the specific regime of application to cession and assignment. The court below fell into error in reading the JBCC agreement otherwise.

- [25] It follows that Radon did establish that there was a valid cession and assignment of the subcontract in favour of Smart. Radon had no liability to make payment to Francis TP for the works undertaken under the subcontract. Radon's appeal is thus upheld, the judgment and order of the court below against Radon must be set aside, and Francis TP's claim against Radon must be dismissed with costs.

The restricted works

- [26] The court below found in favour of Francis TP and awarded an amount of R 468 301,00 excluding VAT, to Francis TP in respect of a claim for restricted works. These works were claimed on the basis that it was necessary to extend the terrace to instal pipes. The court below based its award on the quantification of the expert called by Francis TP at the trial, Mr Andrin. It held that there was no reason to think that Mr Gomes or Mr Andrin would lie about the necessity of this work.
- [27] It is not disputed that neither the subcontract, nor the bill of quantities provided for a claim for restricted works. Mr Gomes admitted that the final claim, submitted on 18 July 2016, made no reference to restricted works. The claim was made in the letter of demand sent in November 2017.
- [28] The question that arises is this. What agreement was struck between Smart and Francis TP in respect of restricted works? Francis TP contend that, in an e mail dated 21 August 2017, Mr Klingbiel requested Mr Gomes to provide a quantity and rate build-up for the restricted work. Mr Gomes sent (indeed resent) the build -up to Messrs Klingbiel and Baloyi. Mr Baloyi sent a revised claim build-up. Francis TP rely upon a passage in the

cross-examination of Mr Baloyi in which the following was put to Mr Baloyi: 'Your e mail accepts Mr Gomes's proposal. What do you say to that?'; and Mr Baloyi replied, 'I agree M 'Lord'.

- [29] The proposal however formed part of a larger engagement between the parties. Mr Gomes accepted that the final claim, submitted on 18 July 2016, made no reference to restricted works. How then did the claim for restricted works come to be made. Mr Gomes explained that the restricted claim came about because Smart and Radon had wanted to claim from Francis TP an amount of R178 000 for an excavation to extend the platform. Responsively, it appears, the quotation for restricted works was made on the basis that it would be submitted to the employer for payment. Mr Baloyi expressed doubts that the employer would pay the claim, and it did not. Mr Andrin, the expert who testified for Francis TP, confirmed that the quotation was used for submission to the employer.
- [30] On this evidence, there is little to show that the scope of Mr Baloyi's acceptance of the claim for restricted works went beyond agreement to submit the claim to the employer to see if it would pay the claim. The evidence does not establish that Mr Baloyi's acceptance went any further than this. And if it did not, then there is no basis for Francis TP to claim for restricted works from Smart.
- [31] Francis TP submitted that the 'pay-when-paid' provision of the subcontract applies only to progress payments, and hence is not of application to the claim for restricted works. This submission fails to engage an insuperable hurdle. Francis TP did not contend that the agreement to pay for restricted works constituted a variation to the subcontract that complied with clause 1.8 of the JBCC agreement. Absent such compliance, the agreement contended for by Francis TP, resting upon Mr Baloyi's acceptance of the claim, is, in terms of clause 1.8, of no effect. But, even if the agreement could have effect outside of the subcontract (a conclusion that is difficult to sustain) Francis TP cannot invoke the provisions of the subcontract to regulate the separate agreement upon which it seeks to rely.
- [32] For these reasons, the appeal in respect of the restricted works must be upheld.

Additional P & G's

- [33] The court below awarded an amount of R476 550.00 for additional P&G's, being a claim for additional costs. The court below appeared to recognise the application of clause 29 to a claim of this kind, but did not decide upon whether Francis TP's claim was barred by a failure to comply with it. Before us, the parties were at odds as to whether clauses 29.2.10 read with 29.4 and 29.5 of the JBCC agreement govern claims for additional payment.
- [34] It is not necessary to resolve this disagreement. It is common ground that Mr Baloyi accepted in his testimony that Francis TP should be paid for additional P&G costs. Francis TP's reading of his evidence is that there was no agreement as to a final amount. Smart submits that Mr Baloyi's evidence was that an amount of R120 000 was agreed. In the relevant passage of Mr Baloyi's evidence, Mr Baloyi states that 'the R120 000 was agreed separately out of this meeting'.
- [35] Counsel for Francis TP asks us to discount this evidence because it began with a leading question. It is fair to say that this was so, but thus prompted, this was Mr Baloyi's recollection. Mr Gomes' evidence made no mention of such an agreement. But that does not suffice to rebut what Mr Baloyi recalled, not least because Mr Baloyi was, by so doing, making a concession to the case that Francis TP advanced. The court below simply states that the parties did not agree the final amount. Why that was so required some treatment of the evidence as to why Mr Baloyi should be disbelieved. There is insufficient reason to do so. On the contrary, Mr Gomes, under cross examination, accepted the agreement. Accordingly, I find that Smart is liable to make payment to Francis TP in the amount of R120 000 in respect of the claim for additional P & G's. The appeal is sustained to the extent that the P&G claim is limited to R120 000.

Conclusion

- [36] The appeal of Radon is upheld. The order of the court below against Radon must be set aside and replaced with an order dismissing Francis TP's claim against Radon. The appeal of Smart must also be upheld. The order of the court below which included the claims made by Francis TP in respect of the restricted works and the additional P &

G's, as determined by the quantity surveyor, Mr Andrin, called as an expert by Francis TP, must be set aside. I have found that Francis TP did not prove its claim for restricted work, and succeeds only in part in respect of its claim for additional P&G's. As Smart limited its appeal to these two claims, the balance of the sum found by the court below to be owing by Smart to Francis TP stands. These amounts attract interest as stipulated in clause 1 of the JBCC agreement from the date of the letter of demand. Radon has been successful in its appeal, and Smart substantially so. They are entitled to their costs on appeal. However, Smart has submitted a draft order in which it recognises that the order to be made against it, in substitution of the order of the court below, is one in which Smart pays Francis TP's costs of suit, including the qualifying fees and expenses of Mr Andrin. That appears a fair attribution, since Francis TP was required to bring an action against Smart to claim the amount to which it is entitled. Francis TP was justified in doing so in the High Court.

[37] In the result, the following order is made:

- (i) The appeal of the second appellant is upheld, with costs.
- (ii) The order of the court below is set aside and replaced with the following order: 'the plaintiff's claim against the second defendant is dismissed with costs.'
- (iii) The appeal of the first appellant is upheld, with costs, including the costs of two counsel.
- (iv) The order of the court below is set aside and replaced with the following order:
 - (a) The first defendant shall pay to the plaintiff an amount of R364 109,37, together with interest at the rate stipulated in clause 1 under the definition of interest of the JBCC 2000 Principal Building Agreement (edition July 2007) from 23 November 2017 to the date of payment.
 - (b) The first defendant shall pay the plaintiff's costs of suit, including the qualifying fees and expenses of the quantity surveyor, Mr Andrin.



DN UNTERHALTER

Judge of the High Court

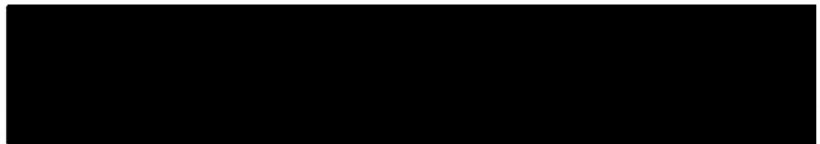
Gauteng Local Division: Johannesburg



L. WINDELL

Judge of the High Court

Gauteng Local Division: Johannesburg



TS

T SIWENDU

Judge of the High Court

Gauteng Local Division: Johannesburg

APPEARANCES:

COUNSEL FOR 1ST APPELLANT: ADVOCATE C J HARTZENBERG SC

INSTRUCTED BY: VAN DER MEER AND PARTNERS INC

COUNSEL FOR 2ND APPELLANT: ADVOCATE DON MAHON SC

INSTRUCTED BY: TERRY MAHON ATTORNEYS

COUNSEL FOR RESPONDENT: ADVOCATES G J NEL SC & C T PICAS

INSTRUCTED BY: FASKEN ATTORNEYS