

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

CASE Number: A92121/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Reserved 27 May 2025

Delivered 11 August 2025

In the matter between:

PHOPHI TRAVEL TOUR AND PROJECT

APPELLANT

And

SOUTH AFRICAN BIODIVERSITY INSTITUTE

RESPONDENT

Disclaimer: This Order is made an Order of Court by the Judges whose names are reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. This Order is further uploaded to the electronic file of this matter on CaseLines by the Judge or his/her Secretary/Registrar. The date of this Order is deemed to be July 2025.

JUDGMENT

Nicholson AJ

Introduction

[1] This is an appeal against both the judgment and the costs order handed down by the Honourable Magistrate T Truter in the above matter on 10 July,

2024, in the District Magistrate's Court of Pretoria, in terms of which the Court granted absolution from the instance at the end of the hearing and ordered the Appellant to bear the costs of suit.

The parties

- [2] The Appellant is Phophi Travel Tour and Project, ("Phophi", "Appellant", or "Plaintiff").
- [3] The Respondent is the South African National Biodiversity Institute ("SANBI", "Respondent", or "Defendant"), a state-owned entity.

Background

- [4] The Appellant has appealed the judgment of Honourable Magistrate T Truter ("Magistrate Truter") from the Court *a quo* on both the merits and on the costs award.
- [5] The Respondent opposes the appeal.
- [6] Judgment in the Court *a quo* was granted on 10 July 2024 by the Honourable Magistrate Truter, and the Notice of Appeal was delivered on 15 August 2024.
- [7] It was common cause between the parties in the matter that:
 - [7.1] SANBI issued a Request for Quotation, RFQ0002608 ("RFQ") on 19 January 2022, requesting potential service providers to provide quotations for the supply of three line-items, one of which was, "10 I25 Pop Up (12 per box)".¹
 - [7.2] Phophi submitted an offer, in the form of a quotation, in accordance with the RFQ.²
 - [7.3] In the evaluation of quotations submitted by potential service providers, Phophi's pricing was the best overall and its quotation was accepted by SANBI, and Phophi was appointed to provide the goods.

¹ CaseLines, 007-201 to 007-202.

² CaseLines, 007-92.

- [7.4] On 16 February 2022, SANBI issued a Purchase Order, P[...] (“PO”) to Phophi and allocated the funds to pay the Appellant on delivery of the goods.
- [7.5] The Appellant was required to source the goods to be supplied at its own cost and to deliver same to the Respondent.
- [7.6] The Appellant delivered fully on line-items one and three but, it delivered only 10 individual units of I25 Pop Ups (line-item two) on 17 March 2022, instead of 10 boxes, each containing 12 I25 Pop Ups, for which it had allegedly quoted.
- [7.7] After delivery of the goods by the Appellant on 17 March 2022, the Respondent brought the defective delivery to the Appellant’s attention by means of an e-mail addressed to the Appellant by Ms. Felicity Poole.³
- [8] On 5 December 2022, the Respondent demanded full performance in accordance with the RFQ, and undertook to pay in full, on perfection of performance.⁴
- [9] In its demand for performance, the Respondent emphasised its position that the quantities requested in the quotation were carefully and unambiguously described by name and quantity, that the Appellant had not delivered in accordance with the terms and conditions of the contract, and that the payment of R 152 700.00 was not yet due and would only become due and payable upon full compliance with the terms and conditions of the contract.⁵
- [10] This offer to pay on delivery of all the goods was repeated in follow-up correspondence with the Appellant’s attorneys on 12 December 2022.⁶
- [11] On 7 December 2022, the Appellant proceeded to institute proceedings against the Respondent for payment of the sum of R 152 700.00, being the amount payable in respect of performance under the accepted quotation.⁷

³ CaseLines, 007-159.

⁴ CaseLines, 007-168, par 8.

⁵ CaseLines, 007-168 par 7.

⁶ CaseLines, 007-172-173.

[12] In its plea, the Respondent again averred that the Appellant had failed to perform in terms of the agreement and, consequently, payment was not yet due and would only become due and payable upon receipt of full delivery of the goods per the agreement between the parties.⁸

The hearing before the Court *a quo*:

[13] The Appellant asserted in the Court *a quo*:

[13.1] That there had been an error on the part of the Appellant in interpreting the quantity of line -item two in the quotation and it was submitted that this was a *bona fide* mistake.⁹

[13.2] That the error was not fatal to the agreement to such an extent as to warrant cancellation of the agreement, which is what the Appellant asserted the Respondent sought.¹⁰

[13.3] That it was of the view that it should be allowed to remedy its *bona fide* mistake. To compel performance otherwise, would amount to requiring the Appellant to perform the impossible.¹¹

[14] The Respondent contended that:

[14.1] The quotation received was, amongst others, for delivery of 120 I25 Pop-Ups to the value of R9200.

[14.2] The delivery of only 10 I25 Pop-Ups rendered delivery defective in terms of the applicable General Conditions of Contract (GCC), a copy of which was included in the trial bundle.¹²

[14.3] The GCC is a public document applicable to parties having dealings with the government or state-owned-entities such as those between the Appellant and the Respondent.

⁷ CaseLines, 007-6.

⁸ CaseLines, 007-31 – 32 pars 7 & 8.

⁹ CaseLines, 003-6, par 4.7.

¹⁰ CaseLines, 003-6 par 4.8.

¹¹ CaseLines, 003 par 4.9.

¹² CaseLines 007-132 to 143.

[14.4] It held a *bona fide* belief that a unit price in line-item two of the quotation referred to a box and not a single Pop-Up and thus, 10 boxes ought to have been delivered at the price of R9 200.00.

[14.5] It maintained the position that it could only consider paying the Plaintiff on delivery of the balance of the Pop-Ups, i.e. a further 110 I25 Pop-Ups, without variation of the quoted amount of R9200.00.

And, finally,

[14.6] The incomplete delivery vitiates the agreement to such an extent that the Respondent is absolved from paying for any items already delivered unless and until performance is perfected.

The judgement of the Court *a quo* and reasons therefor

[15] The Court *a quo* noted that “[i]t is trite that the plaintiff must prove their case on a balance of probabilities”¹³ and that the claim emanated from the contentious delivery of the “I25 Pop Up (12 per box)” and the refusal of the defendant to make payment in respect of any of the items quoted, including those duly delivered, unless there is full delivery of all items in accordance with the agreement;¹⁴

[16] It noted further, that there was “confusion” that arose concerning whether the quotation submitted by the Appellant, based on the RFQ issued by the Respondent, was for the delivery of 10 individual units or 10 boxes, that could not be remedied if the parties remained steadfast with regards to their viewpoints in this regard, which they did.¹⁵

[17] The Plaintiff contended that there was an obligation on the Defendant to perform a vetting process where items quoted were not consistent with market values and, as such, the Defendant should have been aware that the Plaintiff’s quotation was only for 10 I25 Pop Ups and not 10 boxes.

¹³ CaseLines, 005-04 at 28.

¹⁴ CaseLines, 005-2 at 8.

¹⁵ CaseLines, 005-3 at 19.

[18] Defendant's testimony was, however, that it was the practice to only vet a quotation in circumstances where a bidder quotes a price higher than the market value of an item, however, if the price quoted by a particular bidder is less than the market value, this is of no concern as there could be a myriad of reasons for the under-quotation.¹⁶

[19] The parties both testified as to their true belief on the meaning of the quotation and the Court *a quo* found both parties credible. For this reason, the court concluded that, if it were to accept the Respondent's version, that the quotation provided was for R 920.00 per box, with each box containing 12 units, this would negate the explanation provided by the Appellant.¹⁷

[20] The Court *a quo* was of the view that the parties did not perceive the quotation submitted in the same light and, as a result, there was no meeting of the minds. Consequently, it could not be concluded that any form of agreement came into being, between the parties.

[21] Given that, in the Court *a quo*'s view, the versions as to the meaning of the quotation were mutually destructive, it granted absolution from the instance and awarded costs against the Appellant.

[22] The main issue before this Honourable Court is thus, whether the Court *a quo* erred in arriving at its decision on the evidence that served before it.

Legal principles

[23] It is trite that consensus is the foundation of contract.¹⁸

[24] In relation to contracts of sale, this Court has held that there must be a mutually communicated meeting of the minds of the contracting parties with

¹⁶ CaseLines, 005-03 at 21 to 24.

¹⁷ CaseLines, 005-6 at 12 to 13.

¹⁸ *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd and Others* [1980]1All SA 30 (A); *Swart v Vosloo* 1965 (1) SA 100 (A); *Commissioner of Inland Revenue v Saner* 1927 TPD 162.

the intention of contracting a sale for such an agreement to come into existence.¹⁹

[25] In *Steyn v LSA Motors Ltd*²⁰ the Court stated that where the parties' subjective perceptions and intentions differ with regards to a contract, "each can only testify to its own state of mind and cannot directly challenge the evidence of the other."²¹ Thus, if the Court is of the view that the testimony of both parties is credible, it is competent for the Court to conclude that the minds of the parties never met and there was thus a lack of consensus. In such a situation, the outward appearance of agreement and the expressed intention do not automatically result in contractual liability.

[26] The Court in the above matter,²² referring to the *dictum* of Blackburn J in *Smith v Hughes*,²³ indicated that the Court would also be required to assess whether a reasonable man in the position of the offeree would have accepted the offer in the belief it represented the true intention of the offeror.

Analysis

[27] The test for absolution to be granted by a court at the close of the Plaintiff's case, is authoritatively set out in *Claude Leon Lights (SA) Ltd v Daniel*²⁴ and, *Akoon v Kader*,²⁵ the full bench of the High Court upheld, on appeal, the decision of the Magistrate's Court, to grant absolution from the instance at the close of a civil trial when, having heard all the evidence, the Magistrate was unable, on the evidence, to determine which party's version of the contract was the correct one. Thus, absolution remains the appropriate outcome in circumstances where the evidence does not support a particular set of probabilities.

¹⁹ *Commissioner for Inland Revenue v Saner* 1927 TPD 162.

²⁰ 1994 (1) SA 49 (A).

²¹ 1994 (1) SA 49 (A) at par 19.

²² At par 25.

²³ (1871) LR 6 QB 597 at 607

²⁴ 1976 (4) SA 403 (A) at 409 G - H.

²⁵ 1963 (2) SDA 664 (N).

- [28] This view was also supported in *National Employers' General Insurance Co Ltd v Jagers*,²⁶ per Eksteen AJP, where a full bench of the High Court upheld the decision of the Judge sitting in the High Court, that the Court *a quo*, finding no reason for preferring the evidence adduced by either side as more reliable, found that the Plaintiff had failed to discharge the onus that rested on him.
- [29] The current matter before this court can be distinguished from the above matters in which absolution from the instance was granted, in that the quotation submitted by the Appellant to the Respondent exactly mirrored the wording of the RFQ.
- [30] Despite having ample opportunity to query the meaning of line-item two with the Respondent before submission of the quotation, the Appellant failed to do so.
- [31] It appears from the evidence that the Appellant needed to source all three of the line-items for delivery in terms of the quotation, however, it only obtained a quotation for line-item two from the manufacturer after it had been awarded the contract, at which stage it became aware that it could not perform as it had undertaken.
- [32] Thus, as was the case in *Smith v Hughes*,²⁷ the fact that the Appellant made a mistake was entirely its own fault. It was not misled by the Respondent and there was no mutual mistake. Thus, the agreement is valid.
- [33] Furthermore, the Respondent, as the offeree, receiving a quotation that mirrored the RFQ could not reasonably have detected or understood that the Appellant was labouring under any confusion with regards to the quantity of items required to be delivered.

²⁶ 1984 (4) SA 437 (E).

²⁷ (1871) LR 6 QB 597.

- [34] The Honourable Magistrate Truter found, despite Ms Ramabulana's concession that she, acting for the Appellant, made a mistake, that there was no basis on which to find that either party's version as to the meaning of the quotation delivered by Phophi was more probable.²⁸ In effect, the Court *a quo* found that the probabilities as to the agreement that was concluded, were evenly balanced.
- [35] It was eminently competent for the Court, in the light of that finding, to issue a judgment granting absolution from the instance, however, as appears below, this Court differs from the view of the Court *a quo* as regards the finding on the balance of probabilities in this matter.
- [36] The Appellant stated it had made an error with regards to the quantity of 125 Pop-Ups to be delivered, which resulted in an under-quotation to the Respondent on that line-item.
- [37] This under-quotation was not detected by the Respondent who based its award of the bid on the competitive pricing of the Appellant's quotation with regards to this line-item, given that its quotation on the other two line-items was higher than one or more of the other bidders' quotation on the same items.²⁹
- [38] The Appellant seeks the Court's intervention to allow her to remedy her error and to require the Respondent to accept that the delivery of line-items one and three, together with ten 125 Pop-Ups constitutes full performance in terms of the quotation and entitles it to payment in full in terms of the agreement.
- [39] The Respondent has been unwavering in its view that it cannot make payment on the agreement unless full delivery is made in compliance with the accepted quotation. As a State-owned entity, it has strict procurement processes and procedures in place that must be complied with before a

²⁸ CaseLines 005-6 at 13.

²⁹ CaseLines 008-64 at lines 20 to 24.

payment can be made. Variation of a quotation after the award of a bid is not possible and thus, it remains steadfast in requiring full performance in terms of the agreement before payment is made.

[40] While the Court *a quo* was fully within its rights to consider the issue of absolution from the instance *mero motu*, it was, with respect, incorrect in finding that there was dissensus between the parties that founded such a finding of absolution from the instance in this case.

[41] The onus was on the Plaintiff/ Appellant to establish its case before the court *a quo* on a balance of probabilities. Based on the evidence led, the Plaintiff/ Appellant failed to discharge the onus. Given there was no confusion with regards to what exactly had to be delivered in terms of line items one and three, and the quantities required in respect of those items, it seems unlikely that the Appellant did not comprehend from the outset, that the Respondent required a quotation for delivery of 10 boxes of 125 Pop Ups and not simply 10 such Pop-Ups.

[42] Furthermore, it is noted that the determining factor in the award of the quotation was, in fact, the low price quoted on this line-item.

[43] It appears that the Appellant was intent on making delivery on the quotation until it realised that the amount it had quoted in terms of line-item two was hopelessly inadequate to cover the cost it would incur in securing the items which were manufactured by a third party.

[44] It was only after the Appellant had obtained a quotation from its supplier on this line-item, that it became aware of the cost per item and the fact that the items did not come in boxes but as individual items.

[45] It appears from the above, that the Appellant possibly failed to properly cost the quotation before submitting it and thus, found itself in the invidious position of either having to honor the agreement at own cost, or accepting that the agreement would have to be set aside and the goods already

delivered returned to it, with a possible action for damages accruing to the Respondent.

[46] Although the appellant alleged that it would be impossible for it to perform on the contract,³⁰ this is not the case, performance remains objectively possible, although it would be expensive for the Appellant to perform as agreed.

[47] It seems that, in order to avoid either of the two outcomes mentioned in par [45] above, the Appellant sought the Court *a quo*'s intervention to compel the Respondent to make payment in full, despite the fact that the delivery remained incomplete.

[48] The Appellant's assertion that the Respondent should have vetted the quotation and identified the under-quotation on line-item two was dealt with in the evidence.³¹ The Respondent testified that it vets quotations where prices exceed the market price substantially but, not where the price quoted is below the market price as this could be the case for any number of reasons.

[49] In this instance, the under-quotation could have been an inducement to award the quotation or a genuine error on the part of Appellant with regards to the actual cost of the item, however, the Respondent cannot be faulted for trying to achieve the best price for the required items.

[50] It can further, not be said, as Appellant asserts in its Heads of Argument, that there is no prejudice or hardship for the Respondent in allowing the Appellant to provide the additional 110 I25 Pop-Ups at a revised price.³² Indeed, it would be prejudiced by having to pay a higher price for the goods than was initially agreed and, this would potentially expose it to a risk of legal challenges from unsuccessful bidders on the RFQ.

³⁰ See par [13.3] above.

³¹ CaseLines, 005-03 at 21 to 24

³² Caselines, 002-6 par 4.10.

[52] The onus was always on the Appellant to carefully evaluate the cost of doing the business before submitting the quotation, which clearly it did not do.

[53] The Respondent has not acted unreasonably or unfairly in refusing to make payment prior to complete performance, as is required in terms of the applicable GCC.

[54] Thus, clearly, it is my view that the version of the Respondent, as presented before the court *a quo*, is more probable than the version put forward by the Appellant. Consequently, the order of the court *a quo* granting absolution from the instance on the basis of the evidence presented, amounted to a misdirection on the part of the court.

[55] During the appeal hearing, the Respondent indicated a willingness to return to the Appellant all goods already delivered in terms of the RQF. This should be done.

[56] In light of the above, I propose the following order:

[56.1] The appeal is dismissed with costs on scale B.

[56.2] The Respondent must return to the Appellant all goods already delivered to it in terms of the agreement within 30 days of date of this judgement.

HEARD ON 27 MAY 2025

DELIVERED ON 11 August 2025

CMA NICHOLSON AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

COLLIS J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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