REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

Case Number: 23819/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

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DATE

In the matter between:

VERNI-SPECIALITY CONSTRUCTION PRODUCTS

(PTY) LTD Plaintiff

and

AHLSTROM STRUCTURAL DESIGN First Defendant

ENGINEERS (PTY) LTD

MOTAUNG AND MOKORO BUSINESSZONE CC Third Party

JUDGMENT

FISHER J:

Introduction

[1] This case involves a simple claim for goods and services sold and delivered.

[2] It is not in dispute that the plaintiff provided the services and delivered the goods. The dispute relates to the identity of the party who contracted for the goods and services. The defendant claims that it was not the contracting party but rather that another corporation, being Motaung & Mokoro Businesszone CC ('MMB') was the party who contracted with the plaintiff for the goods and services supplied. The defendant alleges that, whilst it concluded the agreement, it did so as MMB's agent.

[3] Thus, the matter is to be determined on the facts.

[4] The defendant introduced MMB as a third party in order to seek indemnification it in the event of liability. The third party played no part in the proceedings. The defendant seeks that its case against the third-party be postponed because it appears that the notice of the trial date was not served on the third party.

I turn to the defendant's case with reference to the evidence.

The evidence

[5] The plaintiff is a specialist construction company with expertise in concrete repair, corrosion protection, waterproofing and the supply and installation of speciality construction chemicals.

[6] During May 2018, the defendant requested that the plaintiff provide it with a quotation for the supply and installation of acid brick lining to a sulphuric acid tank at Eskom's Lethaba Power Station.

[7] The plaintiff led the evidence of Messrs Vernon and Trenton Botha, respectively the CEO and the general manager of the plaintiff and also father and son. I will refer to them as Messrs Botha senior and junior.

[8] Mr Botha senior testified as to how the contract was concluded. A verbal inquiry for a quotation was made by Mr Dirk Dekker of the defendant. The official quotation which followed shows that it was addressed to Mr Dekker by Mr Botha junior. The quote was accepted and an official instruction was given by Mr George Lishea, a structural engineer employed by the defendant, for the work to be executed.

[9] Mr Lishea's letter of instruction dated 04 September 2018 was sent to Mr Botha junior. It was written under the defendants letterhead and read as follows:

"RE: LETHABO POWER STATION ACID BUND REPAIR

We hereby confirm that screed was applied and finished on the 1st of September 2018. This letter serves as a confirmation for Verni to begin with the installation of the acid bund tiles in the water treatment plant at Lethabo Power Station.

Please note that site induction has to be completed as soon as possible prior to working on site. Please contact Lefu Motaung to arrange site induction on 072 994 5252 or 061 409 5047."

[10] Messrs Botha senior and junior were both cross examined extensively as to their knowledge relating to the alleged agency relationship between MMB and Ahlstrom. They consistently maintained that they were never informed nor did anything lead them to believe that the defendant, in contracting with the plaintiff in its own name, was doing so on behalf of any other party. They maintained that, as the request for quotation and the instruction to commence the work all emanated from the defendant, there was nothing which suggested to them that they were not contracting with the defendant.

[11] It emerged in the course of cross examination of Mr Botha senior that the plaintiff had been erroneously cited as ''Verni Speciality Construction Projects'' when the correct name of the plaintiff is "Verni Speciality Construction Products". The correct name appears on all the documents and there was clearly a mistake made in the declaration. This was fully explained.

[12] When the plaintiff closed its case, Mr van Gass, for the defendant seized upon this error in the plaintiff's citation. He brought an application for absolution from the instance based on the error; the contention being that the plaintiff was a different party. Perhaps this was seen as a way out of a hopeless case.

[13] The absolution was refused. The reasons for such refusal are that the mistake was patent, I had been told by Ms Shahim for the plaintiff that the necessary formality of correcting the error by amendment would be attended to and the test for absolution was not, on any basis, met.

[14] Undeterred by the refusal of absolution, Mr Van Gass closed his client's case. Ms Shahim duly sought the correcting amendment.

[15] Mr Van Gass then argued that he was entitled to a postponement of the trial for the purposes of responding to the amendment. When I pointed out that I would not allow the postponement and granted the amendment, Mr van Gass sought to reopen the defendant's case. I allowed this. Mr van Gass then sought to amend the plea in a manner which he argued was consequential on the amendment which, as I have said, only entailed a correction of name. The application for amendment was opportunistic. It sought to plead agency when in fact reference to the plea shows that it was not properly pleaded. The application by the defendant to amend was thus refused.

[16] Mr van Gass was thus ultimately and reluctantly put to proving his client's defence of apparent agency and Mr Ahlstrom was called.

[17] He confirmed that the defendant had contracted previously with the plaintiff on another transaction and that Mr Dekker of the defendant had dealt with Mr Botha junior in the concluding of the order. He conceded that the order was in the name of the defendant. He testified that the employer on the project in issue was Eskom and the principal contractor, MMB. The defendant was, he said, the consulting engineer appointed by MMB to design and manage the project. He testified further that the defendant was contracted by the proprietor of MMB, Mr Lefu Motaung to arrange sub-contractors to perform work on the project. The arrangement between the

defendant and MMB was thus, he said, that MMB would then pay the sub-contractors so ‘arranged’ directly.

[18] The plaintiff was, according to Mr Ahlstrom, one such sub-contractor. Mr Ahlstrom testified that it was known to the plaintiff that the defendant was acting in the capacity as agent and not as principal in concluding the contract.

[19] Mr Ahlstrom sought to suggest that, by virtue of the reference to Mr Motaung in Mr Lishea’s letter confirming that the work could commence, the plaintiff ought to have inferred that Mr Motaung was the principal contractor. This, in circumstances where the letter makes no mention of MMB but only of Mr Lefu Motaung in his personal capacity. Both Messrs Botha confirmed that they were under the impression that Mr Motaung was in charge of the security on site and that there was no reason for them to believe that he was, in fact, the principal contractor.

[20] After the plaintiff had left the site, the project suffered a setback when there was an acid spill which compromised the floor of the tank. Mr Ahlstrom explained that he then negotiated an arrangement with Mr Botha junior to the effect that the plaintiff would come back onto site and deal with the spill if it were paid an interim amount of R100 000 on the account. It appears from the correspondence, which I examine in more detail later, that the amount of R 100 000 was ultimately paid by Mr Ahlstrom. He testified that he ‘personally’ paid this money to get the project back on track. He then suggested that it had been a loan to MMB.

[21] When asked, in examination in chief, what his comment was on the evidence of Mr Botha senior that he had no knowledge of Mr Motaung being the representative of the principal contractor until this was raised in a letter ex post facto, Mr Ahlstrom testified somewhat hesitatingly, as follows:

“ Mr van Gass: Mr Botha senior said that the first time he heard of a third party or Lefu Motaung is when you wrote *the letter of 7 May 2019*. What would you say in response to that?

Mr Ahlstrom: Uhm, it is not true because uhm Mr Vernon Botha phoned me in January to ask for his money that was not paid. Uhm I said to him, I am not the guy that you need to phone. You need to phone Lefu Motaung of Mokoro Business Zone. And uhm I described that the only time that we will get the monies we all as in ASDE [the defendant], them and Motaung is when the contract is finished because, at that point in time, he was, they moved off site. So, it is after they moved off site that they started harassing us for, for monies they were due for a project that was not finished. That, that uhm that is my answer. "(Emphasis added).

[22] This letter of 07 May is important in that it is the first communication emanating from the defendant which suddenly raises the alleged agency. I examine this letter later in the context of the correspondence.

[23] A further reason posited by Mr Ahlstrom as to why the plaintiff should have known that it was contracting with MMB was because the only manner in which workman could access the site was by abiding by safety protocols which were imposed by Eskom through the principal contractor and the documentation relating to these protocols reflected that MMB was the principal contractor on the project. The point appears to be that the plaintiff should have known that the defendant was a sub-contractor and not the principal contractor. The implication seems to be that one sub-contractor would not usually contract in its own name with another sub-contractor.

[24] However, Mr Ahlstrom conceded that the relationship with Mr Motaung was not the usual building contract. For a start there was no written agreement between the defendant and MMB and there seems to have been a significant lack of clarity and formality in the relationship between Mr Ahlstrom and Mr Motaung. He testified as follows in relation to this relationship:

"Ms Shahim: So why was it not put in writing in this instance?

Mr Ahlstrom: Because the, the, because Lefu Mokoro [seemingly a reference to Mr Motuang] asked us for assistance. And it was a verbal agreement that I would assist him. And I gave him a quotation and he agree, he said yes he agrees to this quotation. And that is why I assisted him with this."

[25] Mr Ahlstrom's evidence was to the effect that the defendant had sourced a number of quotations including that of the plaintiff and that he had passed them on to Mr Motaung who decided that the plaintiff's quotation was the most cost effective and thereupon the defendant had contracted with the plaintiff in accordance with the quotation.

[26] Mr Ahlstrom, under cross examination, admitted that he had not specifically told the plaintiff that he was acting on behalf of MMB. He stated - 'it was inferred.'

[27] Mr Ahlstrom conceded that there was no evidence in the trial bundle that the quotation in issue had been sent by the defendant to MMB. He conceded also that he did not ask the plaintiff to send the quotation to MMB. He furthermore conceded that he 'made an error' when the defendant received the first invoices in the name of the defendant by not asking that it be corrected and sent to MMB.

[28] As is often the case, reference to the correspondence in the determination of the true intention of the parties and the true state of affairs is instructive.

[29] In response to a tax invoice sent by Ms Dianne Munnik, the accounts administrator of the plaintiff reflecting the amount of R 444 716 .89 to be due, Mr Ahlstrom wrote the following:

'Please note that the work has [not] been completed yet on site. Please invoice upon completed works.'

[30] Later, after yet a further demand had been made, Mr Ahlstrom wrote the following to Mrs Munnik:

'Please forward quantities used to prove your monthly claim. Also, send sign off of quantities by on site foreman to verify claim'.

[31] These are not responses which one would expect from a person who believes the contact is not with his company. The clear implication is not that the amount is not owed, but rather that ,in relation the first email, the invoice is

premature and in relation to the second, that information verifying the claim is sought. This is telling. A picture is created of a person who is casting about to find some way to avoid paying a debt which is due.

[32] The exchange continued with Mr Ahlstrom writing the following to Ms Munnik and Mr Botha junior:

'Dianne, Trenton,

Can I please remind you that your QCP was only approved on Friday 29 March 2019. Thus, Verni needs to invoice us and only on invoice received it is 30 days payment terms. Your method of sending us a statement dating back to the 1" of march is rather inappropriate. Also, your statement doesn't reflect our R100 000.00 payment to complete the work. Please send through your invoice as per quoted price.

I trust that this will be in order,' (Emphasis added.)

[33] Mr Botha junior replied as follows:

'Carl,

Trust you well? If you read the email sent from Di, it is automatically generated by our accounting system, so not inappropriate. I'd like to bring your attention to our quotation which you accepted. The payment terms accepted are "PROGRESSIVE MONTHLY CLAIMS PAID 30 DAYS FROM INVOICE" so on this premise we will accept the final payment 30 days from QCP sign off, i.e. paid at the end of April. However, the invoice which you only paid 100K towards is a progress claim for verticals and is way overdue. Kindly send through POP asap.'

(Emphasis added.)

[34] Further demands for payment followed and the relationship between the parties deteriorated further. The state of affairs appears clear. The payment was due but payment was not flowing from Eskom.

[35] It was at this point that Mr Ahlstrom wrote the letter of 07 May 2019. The letter amounts to a *volte- face* from a position that payment was not yet due to a position that it was not due at all.

[36] The letter of 07 May has been carefully crafted. It sets out at some length the project structure and the various roles and responsibilities of the parties on site. It states the following in relation to its role in the debacle:

'3. CURRENT FINANCIAL STATUS AND FAILURE OF PAYMENT

ASDE is the designer and quality manager of the project and specified that the Client (ESKOM) should use the Acid Proofing Tile that Verni manufactures. This tile is a good quality tile and requires a specialist to install. MOTAUNG AND MOKORO BUSINESSZONE requested that ASDE (PTY) LTD to require a quotation from VERNI as to what it will cost to install the tiles for this project. VERNI issued a quote addressed to ASDE (PTY) LTD. MOTAUNG AND MOKORO BUSINESSZONE accepted the quote verbally and instructed ASDE (PTY) LTD to arrange for VERNI to install the tiles. ASDE (PTY) LTD in good faith and in the success of the project instructed VERNI to continue.

It is at this point everyone understood the contract and VERNI sent their workers whom underwent full site induction under the authority of the principle contractor (MMB). All VERNI staff got access cards with MMB as principle contractor."

[37] The letter goes on to cast blame on the plaintiff for the non-payment. Mr Ahlstrom stated that after it had contracted with the plaintiff, it was incumbent on the plaintiff to have sought out MMB and 'fixed a contract with it. This portion of the letter reads as follows:

'4. CONSEQUENCES OF LACK OF CORPORATE PROCEDURES

It is of ASDE (PTY) LTD opinion that VERNI knew from the beginning of the project that MOTAUNG AND MOKORO BUSINESSZONE was the principle contractor and didn't fix a contract with them directly. The lack of corporate governance on Verni's side is not the problem of ASDE (PTY) LTD and payment needs to be extracted from MOTAUNG AND MOKORO BUSINESSZONE.'

[38] Thus, it appears clear that Mr Ahlstrom did not dispute liability until it became clear that money would not flow to the defendant from the project via MMB.

[39] The following further aspects of the evidence are, to my mind, important in relation to the probabilities:

- There was no indication that the quotation was sought on behalf of MMB;

- The quotation was sent in the name of the defendant and this was accepted without demur.
- The defendant instructed the plaintiff to commence work.
- It was only on in May 2019 and when the matter of non-payment had reached the stage of dispute, that Mr Ahlstrom denied that the defendant was the contracting party and stated that the defendant was acting as agent for the main contractor on the project, MMB.

- There was no documentary evidence that showed that the quotation had been emailed to MMB by the defendant.
- In the letter of 07 May, Mr Ahlstrom went as far as to suggest that the plaintiff should seek payment directly from Eskom and not MMB.
- There was no independent evidence of an agency agreement between MMB and the defendant.
- The high watermark of the evidence as to the knowledge of the plaintiff that it was contracting through the agency of the defendant with a third party is that this should have been inferred from the fact that Mr Motuang was the person charged with statutory safety requirements on site that this meant that he was the main contractor on the project.
- Messrs Botha Junior and senior were good witnesses and their evidence that they had no knowledge that they were dealing with anyone other than the plaintiff is compelling, particularly due to the fact that it is common cause that the plaintiff never had dealings directly with MMB and the documents all reflect, on the face of then, that the defendant was acting as principal.
- Mr Ahlstrom was hard pressed to suggest that there was any firm evidence to suggest that the plaintiff was aware of the alleged agency and, to his credit, he conceded this point.

The disputes

[40] Ms Shahim argues that agency has not been properly pleaded. She says that even if it had been pleaded, the case has not been established on the evidence. I move to deal with each of these arguments.

Agency not pleaded

[41] Ms Shahim argues that a distillation of the plea reveals the case of the defendant to be that, in performing the work, the plaintiff was not acting as the defendant's agent but rather that the defendant had entered into an agreement with MMB and that the plaintiff performed under this agreement.
[42] She argues that the defendants plea is so poorly constructed that its case is difficult to fathom.

[43] Whilst I accept that the plea is not a model of clarity, I must also consider that no exception was taken to the pleadings and that there was no objection to the leading of the evidence relating to the alleged agency. In the circumstances, it is my inclination to deal with the matter on the merits.

[44] Mr van Gass clarified, in argument, that the case of the defendant is that the defendant concluded the agreement with the plaintiff not as principal but as agent.

[45] Thus the question to be determined is whether the defendant has established the agency on the facts.

Has the defendant established the defence of agency?

[46] From all the evidence, it appears clear that the defendant did not act as agent. It entered into the agreement in its own name.

[47] There is no basis to find, on the evidence, that the contract was not that as set out in the written quotation by the plaintiff. The evidence shows no engagement by the defendant with the transaction on the basis that it was not, itself, the contracting party until the demand for payment was made. There was, furthermore, no evidence of the alleged agency agreement between the defendant and MMB. Mr Motuang was

never called. Mr van Gass told me from the Bar that the defendant 'couldn't find him.' I was not told of any steps taken to locate Mr Motuang.

[48] The defendant appears to rely on the mere fact that it was not the principal contractor on the project to suggest that the plaintiff should have known that it was contracting through an agent. Clearly this does not suffice, particularly in light of the concession that the relationship with Mr Motaung was not clear.

[49] Whatever the relationship between Messrs Motaung and Alstrom, it is clear that Mr Ahlstrom did not convey to anyone that he was acting as agent.

[50] Even if one accepts that Mr Ahlstrom was acting as agent on the basis of an agreement between himself and Mr Motuang, which, to my mind is unlikely, his failure to disclose this agency is fatal to the defendants case on the basis of the doctrine of the undisclosed principal. In terms of this doctrine an agent who does not disclose that he is acting as an agent is personally liable.[1]

Conclusion

[51] In the circumstances, I find that the defendant has failed to establish on the facts (i) that there was an agreement between MMB and the defendant that the defendant would act as agent for MMB in concluding the agreement with the plaintiff and (ii) that, in concluding the agreement, it acted as agent.

[52] On the probabilities, it emerges that the defendant entered into the agreement as principal and that when it was not paid by its client, MMB it sought to suggest that the payment should be obtained from MMB directly.

[53] There was also some alleged consternation as to the quantum. The respondent alleged that there was a miscalculation of the amount due in the amount of between R25 000 and R30 000. Despite my attempts to attain some agreement between counsel as to the quantum or some clarity from Mr van Gass as to the basis for the proposed reduction of the claim, none was forthcoming. The defendant has thus shown no basis on which the claim made in the summons should be reduced.

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[1] See :*Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Kooperasie Bpk* 1972 (1) S 761 (A) 767.

[54] The payment was due in terms of the statement, but the plaintiff did not specifically plead nor prove the mora date. It is thus proper that it be dealt with on the basis of the demand. This was made at the beginning of May 2019. It seems to me that a proper date for the interest to run from is thus 01 June 2019.

[55] The rate of interest was said in terms of the plaintiff's standard terms and conditions to be charged at ABSA's prime overdraft rate.

[56] The defendant disputed that it received the terms and conditions which included this rate as well as a provision for attorney/client costs for recovery of the amounts owing. There was no proof that the terms and conditions were sent. The quotation states that the terms and conditions are available on request. The plaintiff has, to my mind, not established that these standard terms applied. The plaintiff also did not establish the rate of interest claimed. In the circumstances, I will not award costs on the attorney and client scale as per the agreement. I will furthermore grant interest at the prescribed rate.

Costs

[57] Ms Shahim argued that the costs should be paid on a punitive scale in that the defence raised was so patently without any merit that the only conclusion to be drawn was that it was vexatious.

[58] Whilst there are elements of vexatious conduct which extend even to the manner in which Mr van Gass has conducted the proceedings, to my mind, this is not sufficient to attract a punitive order. Arguably, this matter should have been dealt with by way of exception – but I make no finding in this regard.

Third party claim

[59] Although the case for the postponement of the third party claim was not made on any cogent basis, I am not disposed to unsuit the defendant as against the third party at this stage – whatever that may be worth in due course.

Order

[60] In all the circumstances I make the following order:

1. The defendant is to pay the plaintiff R430 659.29.
2. The defendant is to pay the plaintiff interest on this amount at the prescribed rate of interest such interest to run from 01 June 2019 to date of payment.
3. The defendant is to pay the costs of the action as well as all reserved costs relating to the case.
4. The defendant's case against the Third Party is postponed sine die.

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FISHER J

HIGH COURT JUDGE

GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 08 -10 February 2022, matter then postponed sine die for the typing of the record and subsequent delivery of heads of argument.

Heads of argument:

Plaintiff duly delivered heads to office of Fisher J on **March 2022** as directed.

Defendant failed to deliver heads to the office of Fisher J; the attention of Fisher J was directed to the defendant's heads (which had been filed but not delivered to Fisher J) only on **27 June 2022**.

Judgment delivered: 04 July 2022.

APPEARANCES:

For the Plaintiff: Adv C Shahim.

Instructed by: Thomson Wilks Inc.

For the 1st Defendant: Adv L van Gass

Instructed by: Van der Merwe & Van der Merwe Attorneys.