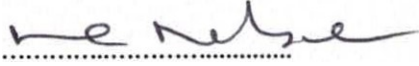




IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

Case Number: 64902/2016

REPORTABLE:	
(2)	OF INTEREST TO OTHER JUDGES:
	
MAUBANE AJ	DATE: NOVEMBER 2022

In the matter between:

CARGO MOVERS (SOUTHERN AFRICA) (PTY) LTD  
PLAINTIFF and  
TRANSNET SOC LIMITED DEFENDANT

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JUDGMENT

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MAUBANE AJ

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be IOhOO on 17<sup>TH</sup> NOVEMBER 2022.

INTRODUCTION

[1] The plaintiff, a private company duly incorporated and registered in terms of the Companies Act 71 of 2008, instituted an action against the defendant, a state-owned company duly incorporated and registered in terms of the Companies Act 71 of 2008.

## THE PLEADINGS

[2]On its particulars of claim, the plaintiff alleged and stated the following: -

- 2.1 On or about 22 September 2014 the defendant issued a request for proposal (RFP) for tipping of containers at Grootvlei Power Station using specialized 4x8 mining tipper vehicles.
- 2.2 On the 31<sup>st</sup> December 2014 the defendant made an offer to the plaintiff to provide the defendant with services for tipping coal containers at Grootvlei Power Station pending the conclusion of a 2-year contract between the plaintiff and the defendant.
- 2.3 As alleged by the plaintiff, on or about the 13<sup>th</sup> January 2015, and at or near Durban, the plaintiff duly represented by Mr N Naidoo accepted the defendant's offer and in the premises, a written agreement was concluded between the plaintiff and defendant, the relevant express, alternatively tacit, further alternatively implied terms were as follows:
  - 2.3.1 Plaintiff was identified as the preferred bidder for the provision of services for tipping coal containers at Grootvlei Power Station,
  - 23.2 Defendant wished to contract the plaintiff for the provision of the service which, if mutually agreed by the parties, would be documented and effected in accordance with a two-year contract "(Agreement)" between the parties,
  - 23.3 The LOA (letter of award) would remain in force until the agreement is signed by the plaintiff and the defendant or until 60 days have elapsed from date of issue of the LOA, whichever event should occur first,
  - 23.4 Pending finalization of the agreement, the plaintiff will commence to provide the services at a rate stipulated in Section 3(Pricing and Delivery Schedule) to the RFP,
  - 23.5 Should negotiations between the plaintiff and the defendant break down for any reason, the plaintiff may immediately invoice the defendant for all reasonable actual costs incurred prior to that date

and such amount shall become due and payable by the defendant

[3] It is further alleged and stated in the particulars of claim that the plaintiff and the defendant implemented the terms of the LOA, and,

3.1 The plaintiff provided the defendant with the services,

3.2 The plaintiff complied in all other respects with the terms and conditions of the LOA,

3.3 The plaintiff and the defendant continued to negotiate in an attempt to finalize the terms of the agreement until 1<sup>st</sup> March 2015,

[4] The plaintiff further alleged that:

4.1 negotiations between the plaintiff and the defendant broke down on or about the 28<sup>th</sup> February 2015 which was prior to the date upon the LOA 's lapsing 60-day period;

4.2 As alleged, the defendant was obliged to pay plaintiff the reasonable actual costs incurred by the plaintiff,

4.3 The actual reasonable actual costs incurred by the plaintiff prior to the 28<sup>th</sup> February 2015 amounts to R6,914,138.19, amount of R6,914,138.19 of which comprised of:

4.1.1 the reasonable actual costs incurred by the plaintiff in implementing the terms of the LOA prior to the 28<sup>th</sup> February 2015,

4.1.2 excludes contract fees and related costs paid to the plaintiff by the defendant in terms of the LOA,

4.1.3 costs incurred by the plaintiff that are related to the LOA and the implementation thereof by the plaintiff, and

4.1.4 represents a provisional amount that will be qualified with more accuracy upon receipt of an expert report. [5] It was further alleged in the particulars of claim that the plaintiff invoiced the defendant for payment of the plaintiffs reasonable actual costs incurred prior to the 1<sup>st</sup> March

2015 and the defendant was in breach of the terms of the LOA, failed and/or refused to pay the plaintiff such costs in the amount of R6,914,138.19 or any part thereof.

[6] Claim number 2 as alleged and stated in the particulars of claim arose as follows: -

6.1 From the 2<sup>nd</sup> March 2015, onwards until the 31<sup>st</sup> July 2015 the plaintiff and the defendant (duly represented) continued negotiations aimed at concluding an agreement similar to that contemplated in the LOA, and the plaintiff in the meantime continued to provide the services to the defendant.

6.2 On or about the 20<sup>th</sup> July 2015, the negotiations between the parties again broke down and with effect from the 31<sup>st</sup> July 2015 the plaintiff ceased to provide the services to the defendant, and the defendant requested the plaintiff to respond to an urgent request for quotation,

6.3 It was further alleged by the plaintiff that on or about the 1<sup>st</sup> August 2015 and at a place currently unknown to the plaintiff one or more of the defendant's employees (the identity of whom was then unknown to the plaintiff) intentionally and in a dishonest manner manipulated the tender process to ensure that the tender contemplated in the defendant's urgent request for quotation be awarded to an entity known as XMoor Transport (PTY) ILtd (also referred to as

Crossmoor)

6.4 The defendant's employee(s) intentionally and in a dishonest manner manipulated the tender process by (amongst others):  
6.4.1 calculating the points based on the plaintiff's BBBEE certification on the basis that the plaintiff level of certification was level 9 whereas the plaintiff's level of certification was to the knowledge of the defendant's employee(s) in fact level 3,

6.4.2 ignoring the fact that Crossmoor's tender was non-compliant in that it provided for a price escalation in the event of a variation in the diesel base rate whereas the defendant's Emergency Tender stated that the quotation should be

based on a month-to-month basis at a flat rate and not have fuel variations.

[7] The plaintiff further alleged that, at all relevant times:

- 7.1 A legal duty rested on the defendant to adjudicate the awarding of the Emergency Tender in a manner that is fair as is contemplated in Section 33(1) of the Constitution of the Republic of South Africa and not to act in a dishonest manner,
- 7.2 The Defendant's employee(s) who adjudicated the awarding of the emergency tender, acted in the course of the defendant's business and within the scope of his/her/their authority.

[8] But for the dishonest and intentional breach of the legal duty by defendant's employee(s) in the manner set out above, awarded the emergency tender to the plaintiff and the plaintiff would have continued with emergency tender until at least of the 2-year period contemplated in the LOA on 1<sup>st</sup> December 2016.

[9] Accordingly, the plaintiff claims an amount of R8,276,838.29 representing the profit the plaintiff would have realized but for the dishonest and intentional awarding of the emergency tender to Crossmoor and not the plaintiff and such claimed amount is calculated on the basis that: -

- 9.1 The plaintiff would have transported at least 40 000 tons of coal per month as a rate of R56,50 per ton,
- 9.2 The plaintiff would have realized a monthly profit equal to 22,89 % of the total income derived from providing the transportation services to the Defendant,
- 9.3 The plaintiff would have continued with the emergency tender until the expiry of the 2-year period contemplated in the LOA on the 1<sup>st</sup> December 2016.
- 9.4 The plaintiff duly gave notice to the defendant as contemplated in Section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act, Act 40 of 2002 and the period of 30 days contemplated in Section 5(2) of the Act had expired.

[10] On the 6<sup>th</sup> April 2021 the plaintiff amended some paragraphs of its particulars of claim more importantly the amount in claim 1, was amended to R4 904 228,25

[11] The defendant, in its amended plea raised a special plea in that the claim has prescribed, and thereafter pleaded to the plaintiffs particulars of claim.

[12] In its special plea, the defendant specifically pleaded that the plaintiffs claim has prescribed, in that, a period of more than three years has lapsed, since the plaintiff was aware, alternatively, ought to have been aware of the facts giving rise to its claim against the defendant, and as such the plaintiff claimed, as against the defendant three years after the alleged debt arose and according to the defendant the claim has prescribed in terms of Prescription Act 68 of 1969.

[13] In addition to special plea, the defendant pleaded to the plaintiffs particulars of claim. The defendant denies that it is owing the plaintiffs as alleged, in that: -

13.1 The defendant paid the plaintiff for services that were rendered within the course and scope of the LOA, based on the plaintiffs price offer and in accordance with the terms of the LOA,

13.2 During subsistence of the LOA, the plaintiffs issued invoices for services rendered and was paid for such services in accordance with the price offer,

13.3 The plaintiff is not entitled to payment of additional amounts separately from the payments that have already been made for services rendered.

13.4 The plaintiff is not entitled to claim payment for costs that is allegedly incurred in rendering the services to Transnet, separately from the cost which it has already recovered from Transnet based on its bid price as such payment would be in contravention of Section 217(Procurement for goods or services by organs of

State) of the Constitution and the Procurement Manual,

13.5 All the costs that were due and payable to the plaintiff in accordance with the LOA and the Procurement Manual were paid to the plaintiff once it had rendered the services and issued its invoices for services rendered,

[14] The defendant further pleaded that: -

14.1 the parties did not sign the agreement contemplated in the LOA on or before the expiry of 60 days of the defendant issuing the LOA as contemplated in the LOA and accordingly the LOA expired in accordance with its own terms on the 1<sup>st</sup> March 2015, and further the negotiations between the parties broke down on the 1<sup>st</sup> March 2015.

14.2 The defendant further pleaded that on or about the 1<sup>st</sup> August 2015, the defendant lawfully awarded the Emergency Tender to Croosmoor Transport (PTY) Ltd and it denied allegation of dishonesty and manipulation leveled against it by the plaintiff. At the commencement of trial, the court was informed that the plaintiff was no longer continuing with claim 2 and as such claim 1 was to proceed and be dealt with.

The matter was set down for hearing from the 12<sup>th</sup> April 2021 to the 14<sup>th</sup> April 2022.

## EVIDENCE

The plaintiff led the evidence of the under-mentioned witnesses who testified as follows:

Mr Maclachlan

[16] He testified that he is the director of Tengwa Africa Limited. He told the court that his company entered into a joint venture with the plaintiff which had to render a service to the defendant. He further told the court that the plaintiff had to render interim service of collecting and tipping coal at Grootvlei Mine. Trucks had to be used for such services.

[17] The interim rendering of service by the plaintiff to the defendant would be effected pending the conclusion of a final contract between the plaintiff and the defendant. According to the witness's evidence, the interim service was based on a letter of award (LOA) both parties signed. He told the court that the purpose of the LOA was to document the intentions of the parties in respect of the required services, and it would remain in force until the final agreement of a two year plus two-year deal was signed or until sixty days have lapsed.

[18] The letter of award was signed by A Mabena on behalf of the defendant and Mr N Naidoo on the 31<sup>st</sup> December 2014 and 13<sup>th</sup> January 2015 respectively, and the sixty days period lapsed at the beginning of March 2015. He further told the court that after sixty days period had elapsed the contract continued in good faith. The rendering of service continued beyond

sixty days period with a hope that they would sign a final agreement. He further told the court that there was no reason to stop because, he thought everything was moving along quite nicely and the services they were rendering were in line with what was required.

[19] He further stated that the plaintiff complained about the minimum tonnage supplied and they were struggling with petrol costs and as such they asked for a revised rate. The fuel price had increased. There was exchange of correspondence between the parties and defendant threatened to suspend the services.

[20] The witness further testified that Tengwa Africa purchased the tippers in terms of servicing plaintiff and the latter had to service the defendant. According to the provisions of letter of award, in the event there was breakdown between the parties for any reason, the plaintiff may immediately invoice the defendant for reasonable actual costs incurred prior to the date of lapse of 60 day period and such amount shall become due and payable by defendant.

[20] The witness further testified that they bought trucks, hired drivers, and leased premises based on letter of award. He thought that should negotiations break down; they would be able to recover reasonable costs, and as such being a reasonable transaction it warranted the risk of buying what was quite expensive equipment to service the contract.

[21] He further told the court that the coal tipping fees was paid, and their claim was only based on the exist costs. The trucks had to be sold at a lower amount, penalties had to be paid to the financiers, the leased property and the drivers had to be paid because of premature termination of the contract.

[22] The witness further testified that some of the invoices were in the name of Tengwa Africa not in the name of the plaintiff because the Tengwa Africa was providing service for plaintiff as they were contracted by the plaintiff. The payment of rendering service to the defendant had to be paid to the plaintiff because it was the plaintiff which had a contract with the defendant. It was further told by the witness that Tengwa Africa had to receive payment from the plaintiff for services rendered to the defendant on the plaintiff 's behalf. The witness further conceded that the plaintiff should pay Tengwa Africa because the latter spent money on behalf of the plaintiff.

[23] Mr. Maclachlan further told the court that his company did not submit a bid proposal to defendant and further admitted to the court that the plaintiff and Tengwa Africa are two separate entities. He further admitted that there



was no relationship between the defendant and Tengwa Africa and as such Tengwa Africa had no claim against the defendant. He further accepted that the arrangement that Tengwa had with the plaintiff did not involve the defendant. [24] The witness further testified that according to the bid document, the plaintiff was not allowed to subcontract, and it would be rendering service itself. The witness emphasized to the court that Tengwa Africa rendered services to the plaintiff and the plaintiff rendered the services to the defendant. He further told the court that Tengwa Africa could not seek to recover costs incurred by rendering services to the defendant for the plaintiff. He further testified that Tengwa 's BBBEE certificate was not submitted to the defendant when the plaintiff submitted its bid proposal because Tengwa Africa was not part of the bid proposal. He said that Tengwa would perform the services which were required by the defendant, and firstly, they entered into a joint venture with the plaintiff and the plaintiff had outsourced the services to Tengwa Africa.

[25] He further testified that he was not part of the people who authorized and signed the letter of award and as such could not confirm that the agreement between the plaintiff and the defendant was extended beyond 60 day period. He further testified to the court that after expiry of 60 days and the final agreement not having been signed by the plaintiff and the defendant, the contract continued in good faith.

[26] He further told the court that a cession was concluded between Cargo and I-IBS which later changed its name to Tengwa Africa. The witness admitted that the cession was not signed by the cessionary. He told the court that in the event the court found that the cession in question is a valid document, then it should be considered to be between the plaintiff and Tengwa Africa and not between Tengwa and the defendant. The witness conceded that the actual reasonable services fee for the service rendered has been paid and only amount due was for exist costs. He further conceded to the court that the amount ceded was not the actual amount owed by the defendant.

Mrs. Cecilia Marriot

[27] The witness testified that she was working for "ETG", the holding company of Tengwa Africa. She told the court that she went to Balfour to negotiate for the retrenchment of the drivers. She further told the court that she was not on Tengwa Africa's payroll. She told the court that she was to negotiate for retrenchment of 26 drivers who were hired to drive 13 trucks. She said that the plaintiff received a message, on the week of the 27<sup>th</sup> July 2015,

that the plaintiff had to let go off the contract because of the defendant's issues with finance and non-performance. She further testified that the drivers were then given retrenchment notifications. The drivers were offered severance pay of one week's salary per year by the witness on behalf of Tengwa Africa. Tengwa Africa had to bring a human element when giving the drivers severance package of one week in a year even though they were employed for less than a year.

[28] The reason why they offered to pay severance package to the drivers was because they were part of the Bargaining Council. She told the court that the drivers were offered pay of one week (August salary) and leave pay. Each of the drivers was paid an amount of RIO 628.41 as severance benefit. She further told the court that the plaintiff was just their supplier and did not have any relationship apart from that.

[29] She further told the court that there were employments contract entered into between Tengwa Africa and the retrenched employees, but the contracts were not shown to the court, as such she could not confirm terms of the contract. As a result of the non-availability of employment contract to the court she could not confirm whether the employees were employed on a fixed term or on permanent basis and if they were entitled to severance pay. She further testified that Tengwa Africa fell under National Bargaining Council for the Road Freight Logistics Industries Collective Agreement of which in terms of the collective agreement, an employee is entitled to the severance pay of one week for every completed year. She told the court that since the employees worked for only six months, they were not entitled to severance pay.

Mrs. Annika Louise Bothma

[30] Mrs. Bothma testified that she is internal legal counsel for EDG group, and she attends to all the South African companies secretarial work based in South Africa. The witness was called to explain the group structure. She told the court that I-IBS group changed to Tengwa Holdings and Tengwa Holdings is held by ETG Agro Products, and Agro Products is in turn held by ETG Investments. The ETC, which is based in Mauritius, is the holding company of entire group of companies. She further testified that Tengwa Africa is held by Tengwa Holdings as a subsidiary. She told the court that HBS Group changed its name to Tengwa Holdings last year, that is 2021. The witness further told the court that as much as these companies are related as subsidiary and a holding company, they are separate legal entities.

Mr. Daniel John Stephen

[31] The witness testified that he was the managing director of Tengwa Africa (Pty) Ltd. He told the court that the Grootvlei Project was run by and operated by Tengwa Africa of which 's main line of business was running a trucking business across the borders of South Africa and was also involved in Grootvlei Project. He further testified that his company supplied equipment and ran the transporting of coals coal for the plaintiff on the Grootvlei coal project. Their company's main business is running close to hundred trucks mainly to Zimbabwe and Zambia transporting fertilizer and grain. In the cause of running their business, his company got the Grootvlei project to supply coal to the Belfour Power Station. He said that only South African citizens were employed to drive the trucks for the Grootvlei project. Tengwa Africa deployed 13 trucks and 26 drivers for the Grootvlei Project. According to the witness, the truck operated on a 24hour service. He further told the court that she bought the trucks and deployed them on the proviso that "they" would be allocated a certain minimum tonnage that "they" needed to move to make the operation

work. The court was further told by the witness that they exited the contract because the defendant could not supply the minimum tonnage and as they could not be able to meet their basic minimum costs. He further told court that they existed the contract without having secured a long-term deal. He further told the court that beside supplying trucks and drivers, they rented a depot and housed the drivers, he further testified he and Mr. Maclachlan negotiated to the exit the project seeing that it was not working. They negotiated with Daimler to get them out of the lease agreement. The company's operation manager Collin Herman negotiated for the exit from depot. The witness further testified that his company had a contract with the defendant. The company was not given a twoyear contract as anticipated. He further told the court that his company made a joint bid with the plaintiff and the plaintiff was the one who negotiated with the plaintiff and company provided the equipment and service to the plaintiff. He told the court that in the event they incurred costs they should claim from the plaintiff and the plaintiff had to claim from the defendant. He said that his company took Zimbabwean drivers from Polokwane to Balfour to "get the project going, as they would later get the South African drivers on the Grootvlei project". He further told the court that given the fact that they started with eight Zimbabwean drivers of the 26 drivers that ultimately worked on the project not all of them would have worked for the five months' period. He further testified that he could not tell the court what the termination penalty was in the event of any exit.

Mr. Heinrich Wilhelm Reganass

[321 The witness testified that he has a master's degree in business in Leadership. He came to the court to testify as an expert witness. The witness was examined on the composition of the amount claimed by the plaintiff. He told the court that he prepared the report he was being examined on. He further testified that according to his findings, the total amount due to the plaintiff by the defendant was R2 678 948,06. The amount claimed, comprised of the penalty due to Kempston Finance, loss on the sale of the trucks (depreciation and loss on selling the trucks), retrenchment costs, lease rental, auditors fees (costs charged by the auditors to get to the tax directives from SARS to determine what tax must be paid on the retrenchments and packages). He further testified that he analyzed Miss Naidoo (the defendant's expert witness)

and found out that their respective reports had a difference of R900 000 which was occasioned by Mr. Naidoo's deduction of the residual value, which was supposed not to have been done, and other difference was that Miss Naidoo calculated the depreciation value at 25% meanwhile he calculated it as 33%. He further told the court that there were other differences, but they were insignificant to dwell much on. He further told the court that he sourced the information for the preparation of the report from certain individuals by the names of Monier and Amal, being the account and financial manager of Tengwa Africa respectively. The court was further told that he scrutinized the financial records of Tengwa Africa and identify the costs that resulted as due to the termination of the transport services and further verify the costs against available sourced occurrence. According to him the trucks were bought for R15 813 685,42 and sold for R13,65 million and accordingly, there was a shortfall of an amount of R2 163 685.42.

[33] The witness was also taken through the payment made to the retrenched 26 truck drivers. He said that he was informed about the exact figures of their monthly salaries and the figures provided by Tengwa Africa tallied with the tax directives that was applied for, for each employee. The witness further testified that he assessed, and checked the report given to him by Tengwa Africa and in the event he relied on the wrong facts then the court should not rely on his opinion based on incorrect facts. He further told the court that the plaintiff and the defendant established an agreement which confirmed that services to be rendered by the plaintiff to the defendant was for the period of 24 months of which it was incorrect. He further stated in his report that the plaintiff terminated the transport services, of which there was a 24-month contract with a possible extension between the parties. It is worth noting that there was no 24 months' contract entered into by the parties. He conceded that the thirteen trucks were bought by Tengwa Africa, and not by the plaintiff and as such the costs claimed were incurred by Tengwa Africa. He further told the court that the plaintiff and Tengwa Africa are separate entities with separate legal personalities. He told the court that "these were the costs of Tengwa and Tengwa has a claim against Cargo (referring to the plaintiff) in terms of the law and quantification of the costs in terms of the agreements, maybe found like by the court would be an amount that Cargo (the plaintiff) can recover from Transnet (the defendant) based on the costs that the plaintiff expended in that period." He accepted that in terms of double entry system, in accounting only

Tengwa Africa and the plaintiff are the entities to be considered to the exclusion of the defendant. He further admitted to the court that he did not produce and reference any clause showing that the lease agreement was for a period of 24 months. He conceded that he could not show the court that the lease agreement had a penalty clause. The witness further told the court that the penalty calculating on the exist costs of the trucks were incorrect because he made calculation as if they were purchased on the same date whilst it was not the case. The witness further agreed that his calculation of the depreciation on all the 13 trucks was incorrect because they were not brought to business at the same time and his calculations were as if they were bought and brought to business at the same time. Insofar as the payment made to each retrenched employee, the witness told the court that he did not know what constitutes severance pay, and what constitutes leave pay. He further stated that he did not know what the monthly salary rate of each driver was, the rate, which was used to calculate the severance pay, paid to each employee. He did not consider whether those employees were entitled to severance pay. He said that he prepared the report without all the information which was exposed to him during testimony at court.

#### Johannes Herman Collen

[34] Mr. Collen testified that he was an Operations Manager of Tengwa Africa, and the latter was the preferred supplier of the plaintiff. The sole purpose of Tengwa Africa was to transport coal from Belfast to Grootvlei Power Station. The demand for coal deliveries was hectic. He told the court that Tengwa Africa was not involved in obtaining the tender from the defendant. He further told the court that delivery of a minimum of 40 000 tonnes per month was contemplated. They had the vehicles which could transport more than 40 000 tonnes. He told the court that the service awarded was interim as there was no final tender agreed upon. There was a clause in the letter of award which stated that in the event plaintiff and the defendant's negotiations break down, then the plaintiff would invoice for reasonable actual costs. Thirteen vehicles with specialized frame on the back were used to tip and deliver coal to Grootvlei Mine as per the parties 's agreement. Those vehicles were specially built and were not accessible on the market.

[35] After the deal went sour due to non-agreement on the 24 months or 48 months agreed upon, he had to sell those vehicles and told the court that the vehicles were not regular on the market. The vehicles could not be utilized in any other operations and as such had to be sold. They had to take the price that was given and had to sell them at a loss.

[36] He further told the court that they had to pay penalties as a result of early exit from the lease agreement. The drivers were retrenched, and they had to pay the drivers for such retrenchment. He further testified to the court that the rendering of the service commenced on the 25<sup>th</sup> February 2015, and the service had to be rendered for a period of 24 months at R15 000.00 per month. He further told the court that the party were not entitled to terminate the contract before the initial lease period i.e., before lapse of 24 months. In the event both parties agreeing on early termination whoever initiates the termination will be charged the cancellation fee of 50% of the balance of the lease. He said that the lease agreement was terminated 17 months before the actual date and as such they had to pay for the remainder of their lease period. He said that they employed South African drivers, and the Zimbabwean drivers were only employed to convey the vehicles from Polokwane to the contract side.

[37] He told the court that he did not have knowledge about the agreement that was entered into between the plaintiff and the defendant. He further told the court that Tengwa Africa was not part of the agreement, as per letter of award, between the plaintiff and the defendant. He does not know what was submitted by the plaintiff to the defendant to be awarded the contract. He acknowledged that the arrangement that the plaintiff might have with Tengwa Africa did not apply to the defendant and Tengwa's agreement is only confined to the plaintiff. He further told the court that since the agreement was between the plaintiff and the defendant, he cannot dispute that there was no agreement between the plaintiff and the defendant that the plaintiff would be given a two-year contract plus two years with guaranteed tonnages.

[38] The witness further told the court that he relied on the inserted in script and believed that there were two years plus 2 years guaranteed contract. He further told the court that the plaintiff at no stage told Tengwa Africa to incur the costs which the latter would claim. The witness further made an admission to the court that any costs incurred by Tengwa Africa could not be recovered from the defendant, and that there was no promise that indeed a 24-month

contract would be concluded. He further told the court that it was unreasonable for Tengwa Africa to buy all those trucks and employ 26 drivers, rent a property for two years whilst on the interim contract. He however disagreed that it was unreasonable to acquire all these assets in circumstances where there was no guarantee that they would have 24-month contract, reason being that there was an interim contract that they had to honor. He told the court that, in terms of the letter of award, the contract was valid for 60 days. He understood that it was unreasonable for any contractor who has at most 60 day contract to procure services and goods for 24 months period, and as the operation manager he was just following seniors 's instructions. He further said that it was not unreasonable to employ truck drivers as permanent staff meanwhile having an interim contract.

[39] He further told the court that Tengwa Africa invested its resources based on what the plaintiff told it, to the extent that Tengwa Africa suffered losses based on the plaintiff 's information. He admitted that Tengwa Africa had to look at the plaintiff for payment, for service rendered, and not from the defendant.

[40] Reference was made to the employment contracts of the truck drivers and the retrenchment packages paid to them. The witness told the court that the truck drivers worked for about five months, and they were paid for one week for a completed year, despite the fact that they did not complete a year of employment. The witness further confirmed that Tengwa Africa was not 100% black owned and as such it did not qualify to be on the Grootvlei Project as it was not compliant with level 3 BEE status. He also accepted that in terms of the defendant's bidding policy 100% subcontracting was prohibited. He further told the court that the plaintiff was the preferred bidder to provide vehicles on that specific contract and there was no relationship between the defendant and Tengwa Africa. He told the court that the initial agreement was to deliver a minimum of 40 000 tonnes of coals per month. He further testified to the court that the contract did not stop after the 60 days period, but it continued up until the end of July 2015 and Tengwa Africa were paid about RI 1m for the service rendered.

Mr. Nurian Solomon Naidoo



[41] The witness testified that he is the managing director of the plaintiff. He told the court that his company was identified by the defendant as a preferred bidder. It was contemplated that as the preferred bidder his company would be awarded a 2+2-year contract and 40 000 tonnes of coal would be delivered to Grootvlei Mine. The court was told that the transport money was paid, and it was not an issue for this court to deliberate on. He told the court that from February 2015 to July 2015 an amount of R1 1m was paid to the plaintiff by the defendant for the interim contract. He further told the court that the plaintiff had never billed for less than 40 000 tonnes per month. To his knowledge they always transported less than 40 000 tonnes but both parties agreed that the plaintiff should invoice for the minimum of 40 000 tonnes even if less than 40 000 tonnes was transported. He further testified to the court that they had to acquire trucks to run the interim service. He told the court that initially the plaintiff had to provide 6 trucks and it transpired that the plaintiff had to transport between 100 and 120 000 tonnes and as such the trucks had to be increased to 13.

[42] The interim service did not cease after the lapsing of 60 days period nor when the 2+2 years contract was not signed. The interim contract went on until the end of July 2015. He confirmed to the court that the letter of award stated that should negotiations between the parties break down for whatever reason, the plaintiff should invoice the defendant for reasonable actual costs. He further testified that on the 10th of February 2015 and the 16<sup>th</sup> of February they bought 12 trucks, that is 6 on each day. The trucks were purchased by Tengwa Africa. The trucks bought were not normal type of trucks. They were purpose built. The plaintiff employed local truck drivers, those residing at Balfour. The plaintiff had to transport 4000 tonnes of coal daily, with the capacity of 13 trucks and 26 drivers on 24-hour operation. He told the court that they raise a complaint with the defendant that they were not transporting 40 000 tonnes of coal as per agreement and as such they were battling to break even.

[43] In the middle of June 2015, he met the defendant lamenting about the increase of fuel price. In that meeting, they also talked about tonnages and prices. He made a proposal of a revised structure of the Grootvlei project. He told the court that because of the challenges he was encountering with the project he wanted to have a further meeting with the defendant, and should they not get the response, they would have no option but to suspend the service by 30<sup>th</sup> June 2015. The defendant responded to him by stating that a different

approach was required to make the project a success and he told them an alternative should be discussed and considered. He told the court that he wrote the letter to the defendant stating that they acted in good faith, meeting all the requirements and obligations, but they could not take losses anymore. He said to the defendant that the operation was based on 13 vehicles at 60 000 to 80 000 tonnes per month, however the volumes were not the case and as such it was not sustainable to carry on without them going bankrupt. He told the court that he was still hopeful of getting to a final agreement. He said they resumed the services at Grootvlei and it could only be kept going for 7 days until all the matter has been addressed and resolved. He was then advised by Mr. Nyiko Nkuna, Transnet engineer, to give clarity of what he meant by suspension of services, whether he meant to cancel the contract or suspending the services and if he was not cancelling the contract he should resume with the operation as of 15<sup>th</sup> July 2015. He eventually ran out of steam and left the scene. Based on the letter of award he invoiced for reasonable costs and was not paid. He said that he was claiming from the defendant because when he started the project, he gave it to Tengwa Africa as he was travelling up and down between Australia and South Africa. He told the court that the proceeds of this claim would go to Tengwa Africa as it had made a loss.

[44] When he submitted bid to the defendant, he had about 24 years as a businessman. He acknowledged to the court that a person who advertised the bid would not have to buy the equipment and the resources to render the service. He said when submitting the bid, he provided the price for acquiring trucks, employees, and everything that he needed to render the service. He told the court that a person who bid for the defendant's service should not be a person who would need to be provided with trucks and equipment. He further confirmed to the court that the bid was assessed on functionality, which is the ability to provide the required service. He further told the court that he accepted the terms of RFP, and it formed part of a binding contract between the plaintiff and the defendant. He said he submitted a bid and was identified as a preferred bidder and was issued with a letter of award. He further confirmed that the plaintiff did not buy any truck, but Tengwa Africa did.

[45] He told the court that he was the one who inserted a minimum 40 000 tonnes per month on the LOA. He disputed that he put the handwritten inscription after Mr. Mabena signed the letter of award. He further told the court that the defendant paid him a minimum of 40 000 tonnes per month

irrespective of whether he delivered less than 40 000 tonnes per month. It was put and shown to him that, Mr. Mabena signed the document on the 31<sup>st</sup> December 2014, and he only signed it on the 13<sup>th</sup> January 2015. He reluctantly admitted to the court that it was in fact true and when Mr. Mabena signed the document as it did not have handwritten inscription. The handwritten inscription was not initialed or signed by both parties as shown to the court and the witness accepted that. He said that the pricing schedule which was provided by the defendant did not mention that a minimum of 40 000 tonnes would be provided by the plaintiff. He further admitted that in terms of the RFP, no alterations, additions, or deletions must be made and as a result his insertion of minimum 40 000 was impermissible. He said that the defendant never gave them 40 000 tonnes per month, but instead gave them 20 000 tonnes per month. The witness further testified that the terms of the LOA was incorporated in the RFP of which there was no undertaking by the defendant to provide 40 000 to 60 000 tonnes of coals. He said he wrote to the defendant and informed it that he got its tonnage numbers wrong and wanted more tonnes. He told the court that what was in terms of the RFP, was bound by the price that he proposed to the defendant regardless of whether it was correct or not.

[46] He further testified that he had a telephonic conversation with the defendant on the 3<sup>rd</sup> July 2015, wherein the defendant said it was not prepared to commit itself to paying revised rates that he proposed, and further said that should he provide services at the quoted price in the RFP, the defendant would be prepared to sign the final agreement by next week. He further told the court that the defendant told him that the final agreement could not be concluded because the defendant had to stick to what he needed for the quoted price. He further testified to the court that he understood that after the lapse of 60-day period there was binding obligation on the plaintiff to provide services to the defendant. According to him, 60-day period lapsed on the 3<sup>rd</sup> March 2015 and any agreement, engagement that might be between the parties could not have been in terms of the LOA.

[47] He told the court that the plaintiff submitted the triple BEE certificate to the defendant and according to the bid they submitted, Tengwa Africa's triple BEE certificate was not submitted, and further alluded to the court that the plaintiff was not allowed to use a subcontractor. He did not disclose to the plaintiff that Tengwa Africa would be rendering or executing the contract. He

further admitted that he did not tell the defendant that he would be subcontracting the services, and further told the court that the plaintiff would solely be servicing the contract. Having conceded that, he accepted that it was prohibited to subcontract the services as it was contrary to the RFP. He further accepted that Tengwa Africa had a lower BEE rating as compared to his company, and according to the RFP it was prohibited to subcontract more than 25% of the contract. He was aware that there was no agreement between the parties which extended the 60-day period, and he further told the court that, in terms of prescripts and rules, the defendant should have an authorized person to conclude its agreement, in that case Mr. Aaron Mabena was the person authorized to do so. The authorized person should then reduce the agreement in writing and then the agreement should be signed by both parties. He further told the court that there was no agreement signed after the expiry of 60-day period.

[48] He further told the court that he knew that according to the defendant's applicable policies, when entering into any agreement, there should be prior advice of the relevant services department. When the contract is modified there must be the first written advice of the legal service department and all amendments to the contract must be approved by the manager who originally signed the initial contract and in that instance was Mr. Aaron Mabena.

[49] At a later stage of the trial the witness was shown a copy of the LOA, which was signed by Mr. Mabena, without both their signatures on the handwritten inscription. Contrary to his earlier testimony, he said that he put inscription on the LOA and sent it back to Mr. Mabena. He told the court that since there was no agreement between the defendant and Tengwa Africa, any costs incurred by Tengwa Africa could not be recoverable from the defendant. He said that during February 2015 they transported 17 000 tonnes and charged a minimum of 40 000 tonnes which the defendant paid, and the payment was not reclaimed by the defendant. He said that if they could have transported more than 40 000 tonnes they would have adjusted their invoices to be more than the minimum of 40 000. He was with Tengwa Africa's consultant, Mr. Denin Moodley when he made handwritten inscription and Mr. Mabena was in Koedoespoort, the defendants base). He told the court that after he had inserted that amendment on the LOA, he then emailed it to Mr. Mabena.

Mr. Lukas Venter

[50] The witness testified that he was a parts manager at Mercurius Motors in 2015. He was part of the people involved in selling of the trucks to Tengwa Africa. The 13 trucks were resold to Mercurius Motors, and each was paid for R1 .5m. He said that since trucks were purpose-built, their market was very slim. He further told the court that those trucks were bought, from them, in the beginning of 2015. The trucks were resold to them because of the expiry of the contract and their usage was not required anymore and they could not find buyers for them. The plaintiff then closed its case and the defendant applied for absolution from the instance and same was not granted with a proviso that reasons will be given at a later stage.

After the closing of the plaintiff 's case the defendant applied for absolution from the instance of which the court dismissed and stating that reasons for dismissal will be given at a later stage.

## ABSOLUTION OF THE INSTANCE

[51] The test for absolution, to be applied by a trial court at the end of the plaintiff 's case, was formulated in *Claude Neon Lights (SA) Ltd v Daniel* <sup>1</sup> at 409G-H wherein the learned judge said:

"when absolution from the instance is sought at the close of the plaintiff 's case, the test to be applied is not whether the evidence led by plaintiff establishes what would be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.  
"

[52] It was also stated in *Gordon Lloyd Page & Associates v Rivera and Another*<sup>2</sup> at par 2 wherein the court said:

"This implies that the plaintiff has to make out a prima facie case- in the sense that there is evidence relating to all the elements of the claim- to survive without such evidence no court could find for the plaintiff . . . As

for as inference from the evidence are concerned, the inference relied upon by the plaintiff must be reasonable one, not the only reasonable one... The test has from time to time been formulated in different terms, especially has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff, "

1976 (4) SA 403 (A).

<sup>2</sup> 2001 (1) SA 88 (SCA).

[53] In *Osman Tyres and Spares CC and Another v ADT Security (Pty) Ltd*<sup>1</sup> the court said that:

"The fact that a defendant had at that stage not yet given evidence, is often a cogent factor to be taken into account, particularly where the facts are within the peculiar knowledge of the defendant and the plaintiff has made out a case to answer. In those circumstances a plaintiff should not lightly be deprived of his remedy without the court first hearing what the defendant has to say. "

The plaintiff presented evidence before court, on the face of it the defendant had a case to answer. For instance, the plaintiff told the court that the defendant knew about the existence of Tengwa Africa which had a joint venture with the plaintiff. This piece of evidence was later refuted by Mr. Mabena who said he only became aware of Tengwa Africa during evidence in court.

## DEFENDANTS WITNESSES

Mr. Aaron Mabena

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<sup>1</sup> (1174/2018) [2020] ZASCA 331, [2020] 3 All SA 73 (SCA) (3 APRIL 2020).

[54] The witness testified that he is currently employed by Transnet Engineering as manager, Governance and Compliance. His duties are to review, to ensure that the goods and service are procured within the prescribed Transnet frameworks, prescribed delegation of authority and they could comply to all legislative requirements as prescribed by Section 217 of the Constitution of the Republic of South Africa and various acts such as PFMA, and triple EEA. The defendant issued a tender on the open market for provision of goods and services, inter alia for tipper trucks for tipping coals between a mine and a power station. He further told the court that the defendant issued RFP with the objective to source for the service from service provider that was capable of servicing the defendant with tipper trucks. He said that the defendant's expectation was to receive high level of delivery of service of the agreed quality and should be rendered within the profitability margins that the defendant expected to deliver the service for. According to the witness, the required minimum threshold for the service provider to be regarded as competent before they do the price evaluation was 60%

[55] The service provider should render quality and reliable service, based on the viable agreement entered into by the parties. He further told the court that in terms of RFP the service provider has had to have technical capacity and the ability to render service. The prospective bidders were requested to submit three years of audited financial statements, which would have been used by the evaluation committee of the defendant to assess the financial stability of the service provider.

[56] He said that the plaintiff stated in the tender document that it was not going to subcontract any portion of the service should it be awarded the contract. He said that in the event the service provider was to subcontract any portion of the contract it should declare to that effect, and such subcontractor must submit its triple BEE certificate to the defendant. He further said that the service provider should not subcontract more than 25% of the contract. Thirdly, the service provider should not subcontract to another entity with a triple BEE that is not in the same as theirs or better than theirs. He further testified that the plaintiff deviated from the terms and conditions of RFP as well as its own (plaintiff) submission in making declaration that it would not subcontract the service.

[57] Regarding Mr. Naidoo's handwritten inscription, he said that he became aware of it during these proceedings. He said that when an offer is made to the would-be service provider, he would sign first then the would-be service provider would then sign in the event it is happy with content and in that regard the contract would have been entered into. After signing the LOA, he personally emailed it to Mr. Naidoo on the 31<sup>st</sup> December 2014 and did not receive any response from Mr. Naidoo.



[58] He further testified that the LOA had two conditions. The first condition was that its duration was either valid for 60 days or alternatively the 60-day period would lapse once a formal agreement was entered into and as such that agreement would supersede the LOA. Should 60-day period lapse without the parties concluding the agreement, the letter of award would lapse. He said that the RFP stated that the service provider would be paid contract fees which comprised of fuel, rental of offices, staff and overtime as such fees would be interim pending the signing of the final contract or lapse of 60-day period whichever comes first. He said that in the event negotiations breaks down before expiry of 60 days and the final contract not signed, then the would-be service provider would be paid according to what it has rendered to the defendant, and the payment would be regarded as the contract fees. He said that the defendant could and should not have to pay Tengwa Africa for the usage of trucks, lease of the property, salary of the drivers and the shortfall on the sale of the trucks. The defendant had only to pay for services rendered as per LOA hence the defendant had paid the plaintiff for the tonnages delivered. The parties' expectations were that during of 60 day period, the final agreement would be concluded, and in the event the agreement was not concluded, the letter of award would lapse.

[59] The witness further told the court that the RFP documents expressed the Transnet 's requirements regarding the nature of the vehicles that would have to be acquired, and it is also expressed what would be looked at in terms of assessing durability and suitability to render the service. He further testified that the plaintiff was awarded the tender as it reached all the requirement as per his submission of the RFP. The plaintiff was awarded the contract because the bid it submitted showed and confirmed its readiness to start with the contract; and it further stated that it had capacity to deliver and had previous experience.

[60] He said that insofar as Mr. Naidoo's handwritten inscription was concerned, the defendant would have not agreed to that because if indeed there was an agreement to effect amendment by way of the inscription, then

he should have countersigned the amendment so made. In case that the parties wish to amend the agreement, the agreement must be referred to the Adjudication Committee to change the amount of the tones to be delivered by the service provider. He further told the court that for any contract to be signed and sent out, the defendant's legal department must have to peruse that contract

and a manager who has authored the contract may not conclude the contract and sign it off without delegated authority of Adjudication Committee. In case of amendments being effected, legal department has to be consulted and agreed to and after its approval then the manager concerned may sign the document.

[60] He further told the court that all the contracts should be in writing. He disagreed that the contract was tacitly extended beyond 60-day period, and further said that the Adjudication Committee should have agreed to the extension and manager who had delegated authority would have to formally sign off the extension which would have to be in writing. He said to the court that it did not happen. The contract continued beyond the lapse of 60 days period and payment was made to the plaintiff, but he told the court that pricing of the amount tendered for, could not be amended after the tender has closed. The LOA must be read in conjunction with the RFP. He further told the court that the payment made to the plaintiff for the 40 00 tonnes meanwhile it delivered less was irregular and should be paid back to the defendant.

Miss Vashney Naidoo

[61] The witness testified that she is subcontracted to BDO, an international advisory and audit firm. She has been an independent contractor to BDO since around October/November 2019. She performed the review analysis of evidence and drafting of the defendant's report regarding the contract the plaintiff and the defendant were involved in regarding transportation of coal. She told the court that she specializes in investigative and forensic accounting.

[62] She dealt with the quantification of the loss the plaintiff alleged to have suffered, as a result of the termination of the tipping contract. She was instructed by the defendant to analyze and critique the report prepared by the plaintiff's expert, Mr. Regenass. She told the court that she was critical of Mr Regenass terming of his report "forensic report" as there were specific methodology, protocols, and approaches that one would apply in forensic work which should be documented in detail and Mr. Regenass report was short of that. According to the witness, in the forensic report, one would have cited sources outlining complete scope of review and cite all references. She further told the court that one's full mandate should also be stated in their report. During the preparation of her report, she found that there were missing documents in plaintiff's expert's report which would affect the quantification of

the claimed amount. She also realized that the lease agreement was incomplete. The incomplete lease agreement impacted the calculation of the termination on the amount and there was missing information with respect to calculation of the drivers 's remuneration and as a result there was an impact on the calculation of retrenchment packages. The penalty interest calculation would have required certain instalment sale agreements which were also missing. She further told that Mr. Regenass's report did not state the disposal date of assets in certain instances, as well as the start and end dates or the purchase states of the vehicles.

[63] She further testified that Mr. Regenass's report did not state the connection between the plaintiff and Tengwa Africa. Mr. Regenass did not, in his report, provide any explanations as to how Tengwa Africa incurred losses, if any how the losses were qualified and quantified. Against the defendant. Mr. Regenass's report is silent on how the expenses incurred by Tengwa Africa is being claimed against the defendant in terms of the accounting policy of debit and credit system. She said that when calculating depreciation, the assets should be owned and be in the name of the plaintiff. She further said that Mr. Regenass's report was deficient in explaining how the costs incurred by Tengwa Africa was considered reasonable actual costs incurred by the plaintiff. She said that Mr. Reganasse did not state the depreciation value of the vehicles, further he did not state how the carrying value was arrived at and did not stat the source of the selling value.

She further told the court that the retrenchment packages were not calculated. The directives spoke about 28 employees and Mr. Regenass spoke about 28 employees. Further it has to be noted that the employees did not work for a year and as such they should not have been paid one a week retrenchment package in a year. She further told the court that besides the fact that Tengwa Africa is a separate entity which could not claim payment from the defendant, the plaintiff could not prove its claim against the defendant for lease, loss on selling of trucks, retrenchment packages and auditor's fees.

## ANALYSIS

[64] On the 2<sup>nd</sup> October 2014, the plaintiff and the defendant signed request for proposal (RFP) for tipping of coal containers at Grootvlei Power Station using specialized 4x8 mining tipper vehicles. Both parties were represented by Mr. Naidoo and Mr. Mabena respectively. The RFP, which was confirmed and consigned by Mr. Naidoo and Mr. Mabena, amongst others, stated that the

plaintiff should not sub-contract its services, as it was prohibited for a successful bidder to subcontract more than 25% of the value of the contract to another entity which does not have an equal or higher BBBEE status level than successful it. It was further contained in the RFP form that in the event the successful bidder wishes to subcontract its services, the subcontractor should be disclosed in the RFP. The subcontractor should also submit its BBBEE certificate. During trial both the Mr. Naidoo, (the plaintiff 's witness) and Mr. Mabena, (the defendant 's witness) told the court that the RFP should be read in conjunction with letter of award (LOA) which was signed by both parties respectively. The plaintiff, according to the LOA, was confirmed and identified as preferred bidder, and it was further stated that the LOA will remain in effect until the agreement is signed by both parties, or until 60 days have elapsed from the date of issue of the LOA, whichever event should occur first.

[65] Both parties told the court that negotiations broke down within 60 days of the issue of LOA.

## CESSION

[66] The plaintiff also tried to rely on the cession, and on closer look of the cession the court noticed that the amount mentioned on the cession is not the amount claimed from the defendant, and further the cession is not fully signed and therefore it does not take the court any further. Further than that, the plaintiff's counsel did not mention the cession issue in his oral nor written heads of argument.

## SUB-CONTRACTING

[67] It is further worth noting that the plaintiff subcontracted 100% of its service to Tengwa Africa, did not disclose Tengwa Africa as a partner nor state Tengwa Africa 's BBBEE's status in the RFP form. Mr. Naidoo told the court that the plaintiff made Tengwa Africa to do the work as he was travelling a lot overseas. All the plaintiff's witnesses conceded that the damages claimed by the plaintiff were Tengwa Africa 's damages and once paid were going to be transferred to Tengwa Africa.

[68] It is common cause that plaintiff and Tengwa Africa are two separate legal entities. In *Salomon v Salomon & Co Ltd*<sup>4</sup> the court found that once a company is legally incorporated it must be treated like any other independent

person with its right and obligation appropriated to it, and it has its own rights and liabilities. In *Airport Cold Storage (Pty) Ltd v Ebrahim and Others*<sup>5</sup> at paragraph 7, the court confirmed that:

"one of the most fundamental consequences of incorporation is that a company is a juristic entity separate from its members, the court does

<sup>4</sup> [1897 ACI 22.

<sup>5</sup> 2008 (2) SA 303 C.

not have general discretion simply to disregard the existence of a separate corporate identity whenever it considers it just or convenient". My emphasis is that it is also separated from any other entity. It should sue or be sued as a separate entity.

[69] The court in *Avena NP Incorporated in France v Eskom Holdings SOC Limited*<sup>6</sup> par 38, stated that a company that has submitted a tender can enjoy rights and obligations arising from the award of the tender and that another company, even if it is related to the bidder, or forms part of the same group, cannot claim rights and obligations arising from the tender process. Tengwa's costs are not the plaintiffs costs. Simply put and as testified by the plaintiff 's witnesses, Tengwa Africa should claim from the plaintiff. Mr Naidoo admitted that Tengwa Africa did everything in respect of servicing the contract between the plaintiff and the defendant despite admitting that it was not allowed to do so at envisaged in the RFP.

## COSTS INCURRED BY THE PLAINTIFF

[70] Evidence presented before court by both parties, through documents and orally was that the plaintiff was paid about RI 1m for service rendered. There is no dispute that the LOA should be read together with the RFP. All the plaintiff 's witnesses including Mr. Naidoo admitted to the court that the costs incurred by Tengwa Africa should be claimed from the plaintiff not the defendant. Further Miss Naidoo, the defendant 's expert, told the court that the claim was not only a legal issue but also taking accounting system in consideration, the double entry was not applied against the defendant, as the transactions were between the plaintiff and Tengwa Africa to the exclusion of the defendant. The plaintiff

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<sup>6</sup>2017 (6) SA 621

's witnesses testified that even if it was to be accepted that plaintiff subcontracted the service to Tengwa Africa, by so doing the arrangement could not create privity of contract between Tengwa Africa and the

reference to that effect is made to Concrete Construction (Pty) Ltd v Keidan & Co (Pty) Ltd, Minister of Public Works and Land Affairs v Group Five Building

Ltd<sup>2</sup> (A) at 471.

## PRESCRIPTION

[71] The defendant raised a plea of prescription in that the plaintiff amended its particulars of claim on the 5<sup>th</sup> May 2021, claiming costs purportedly incurred between March 2015 and September 2015. Before then, the plaintiff claimed the costs incurred prior to the expiry of the LOA. The LOA lapsed on the 1<sup>st</sup> March 2015, and such expiry date was confirmed by the plaintiff witnesses. Maclachlan further told the court that the contract continued after the 60-day period had lapsed, because the contract, was based on good faith.

[72] Prescription is dealt with by Prescription Act 68 of 1969. In terms of Section 1 1 (d) a prescription of a debt shall be three years. Section 1 1 (d) should be read with Section 12(1) and (3).

Section 12(1) states that subject to the provisions of subsections (2)(3) and (4), prescription shall commence to run as soon as the debt is due.

Section 12(3) states that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises provided that a creditor shall be deemed to have acquired it by exercising reasonable care.

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<sup>2</sup> [1955] 4 All SA 296 (A) and [1991] 3 A LL SA 467 (A).

A debt is regarded as something owed or anything which a person is under an obligation to pay or render to another see *Off-beat Holiday Club and Another v Sanibona Holiday Spa Shareblock Limited*<sup>34</sup>) and includes a delictual claim.

[73] In *Truter and Another v Deyse*<sup>P</sup> the court said that:

"Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running-it does not require knowledge of the relevant legal conclusions (i.e., that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions. "

[74] It was further stated in *Minister of Finance v Gore N. O*<sup>5</sup> that:

"This court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal right. "

[75] <sup>6</sup>It was further emphasized by the court in *Mtukunya v Minister of Police* <sup>11</sup> that it was not necessary for the plaintiff to know that the conduct of the defendant was wrongful and actionable because those were legal conclusions. Setting the bar high for prescription, the court said, would be tantamount to abolishing it because the only trained lawyers would be familiar with legal conclusions.

[76] It was also held in *BMW Financial Services (SA) (Pty) Ltd v Harding and Another*<sup>7</sup>SA 716 at par 9 that:

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<sup>3</sup> 2017(5) SA 9(CC) at par 32.

<sup>4</sup> (4) SA 168 (SCA at 16.

<sup>5</sup> 2007(1) SA 11 (SCA) at par 17.

<sup>6</sup> 2018(5) SA 22(CC) of par's 62-63.

<sup>7</sup> (2007) 4A 11

"Section 11 of the Prescription Act, 68 of 1968, provides that a debt", like that of the first defendant, "becomes prescribed after a period of three years from the date which the debt becomes due and payable or becomes claimable"

[77] In the present case the LOA lapsed on the last day of February 2015, and the plaintiff amended its particulars of claim on the 5<sup>th</sup> May 2021 claiming what it terms "exist costs" as alluded by the plaintiff 's expert. In *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd*<sup>8</sup> at 532H emphasized that from a procedural substantive point of view prescription starts to run from the time of amendment and introduction of a new cause action. Plaintiffs witnesses confirmed that the 60-day period lapsed on the 28<sup>th</sup> February 2015 whilst other plaintiff 's witnesses told the court that it lapsed on 1<sup>st</sup> March 2015, and the present claim was initiated more than three years after the plaintiff amended its particulars of claim.

[78] The plaintiff contended that it rendered service to the defendant, well after the lapse of the LOA, between March 2015 and July 2015 and claimed payment

for costs incurred as result. It is clear to the court that by September 2015, the plaintiff was aware, alternatively, ought to have been aware of the facts giving rise to its claim against the defendant.

[79] By the time the plaintiff amended its particulars of claim the period of 3 years had passed.

#### TACIT EXTENSION OF THE LOA

[80] Mr. Naidoo stated in his discovered affidavit that "the 60-day period expired on the 3<sup>rd</sup> March 2015 and it follows that date onwards, none of the parties were bound by the terms of LOA". He further stated that after the expiry of 60-day period" Cargo was no longer under obligation to continue to provide transportation services to Transnet.' The notion of tacit extension of the 60-day period stand to fail, as the Mr. Naidoo, told the court that he always believed that the LOA had terminated on the 3<sup>rd</sup> March 2015 and was no longer

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<sup>8</sup> [1990] ZASCA 136, 1991 (1) SA 525 (A)



binding on the parties. According to Mr. Maclachlan, the confirmation of service to the defendant, beyond the expiry of 60-day period was based on good faith and did not mean that the LOA had been extended. Mr. Mabena 's testimony which was uncontested was that all the contracts 's alterations and amendments should be reduced in writing and concluded by the person with the necessary authority and his testimony in that regard was also not disputed. He told the court that the handwritten inscription on the LOA and as such the insertion was invalidly made by Mr. Naidoo. Summing up both parties' evidence, the court must consider the objective interpretation and meaning the provisions of the RFP and the LOA, and it must further consider whether the RFP and the LOA should be read separately to the exclusion of the other. Mr. Mabena, being the author of both the RFP and LOA, told the court that both documents are intertwined and could not be read separately from each other. This piece of evidence was not contested. The LOA clearly states that should negotiations between the parties break down for any reason, the service provider may immediately invoice the defendant for all reasonable actual costs incurred prior to the date and such amount become due and payable by the defendant. The ordinary meaning of actually incurred is "an expense or a loss to be deductible, it must be actually incurred" "expenditure 'actually incurred during the performance of the project, and for the costs to be deemed eligible, should have a monetary value."

[81] Actual is defined as "existing in fact, real, now, current (Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd <sup>14</sup>), at 117 C-E. There is no dispute by both parties about to the meaning of actual costs, however the dispute is whether the cost incurred by Tengwa are supposed to be paid by the defendant. All the plaintiff 's witnesses conceded to the court that the only costs that they were testifying were the costs incurred by Tengwa Africa and not by the plaintiff. They further conceded that the defendant and Tengwa Africa are two separate entities with separate juristic personalities. Mr. Naidoo conceded that the plaintiff subcontracted 100% of its work to Tengwa, which did not submit triple BEE certificate to the defendant, and further conceded that the subcontracting of the service was invalid as envisaged by the RFP. He further told the court that there was no relationship between Tengwa Africa and the defendant. Mr. Mabena told the court that he only became aware of Tengwa Africa when the matter was heard in court and that peace of testimony was not disputed. In the event Tengwa Africa incurred actual costs, it should those costs should be claim from the plaintiff not the defendant as confirmed and stated by all the plaintiffs witnesses.

[82] In Tradevest 041 (Pty) LTD t/a Tradevest Logistics v Banzi Trade 40 CC<sup>15</sup> the court held at par 73 that:

"it is trite that a contracting party which claims damages arising from breach of contract must prove that it actually suffered damages or loss.

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<sup>14</sup> 1993 (4) SA 110 (A)

<sup>15</sup> [2021] 4 All SA 552 (WCC)

In order to succeed in that regard, the injured party would ordinarily be permitted to prove its damages by comparing the extent of its patrimony as a consequence of the breach with the position it would otherwise have been in had the breach not occurred. "

My emphasis is that the Tengwa Africa should claim from the plaintiff. It is my considered view that the plaintiff failed to prove its case on a balance of probabilities and as a result the following order is made:

## THE ORDER

The Plaintiffs claim is dismissed, and,

1. The Plaintiff is ordered to pay costs, as on party and party scale including counsel's fees.



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MAUBANE AJ  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

PLAINTIFF'S ATTORNEYS: MR ANTON HAMMAN

DEFENDANT'S COUNSEL: ADV KUTUMELA

MR DANIEL

DEFENDANT'S ATTORNEYS: NYATSANZA

ADV JO

SEL: WILLIAMS

MS RETHABILE MOKGATLE