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

(1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

…….. ……..
DATE SIGNATURE

Case No: 34560/17

In the matter between:

**605 CONSULTING SOLUTIONS (PTY) LTD** Plaintiff

and

**NATIONAL HEALTH LABORATORY SERVICE** Defendant

***Case Summary*: Contract – Cession – Claim for payment by purported cessionary against the debtor of the purported cedent – Whether the cession agreement is void *ab initio* due to the non-fulfilment of its suspensive conditions – Whether the purported cessionary acquired any right *vis-à-vis* the debtor to payment of the amounts that were owing to the purported cedent in terms of the contract between the debtor and the purported cedent, which contract restricted the free transferability of the rights that form the subject-matter of the purported cession - Whether the debtor is estopped or precluded from relying on the invalidity of the cession agreement or from denying the authority of its official who allegedly consented to the cession and made other representations relating to the cession to the purported cessionary. Action dismissed.**

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**JUDGMENT**

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**MEYER J**

[1] This action arises from a written Service Level Agreement (SLA) concluded between the defendant, National Health Laboratory Service

(NHLS), and a third party, Blue Future Internet and Surveillance (Pty) Ltd (Blue Future), and a Purchase Order Facility and Cession Agreement (the cession agreement) concluded between the plaintiff, 605 Consulting Solutions (Pty) Ltd (Consulting Solutions), and Blue Future. Consulting Solutions claims that it as cessionary became entitled to payment of the monies due to Blue Future in terms of the SLA and it seeks payment from NHLS of an amount of R17 383 062 (excluding VAT) plus interest and costs, alleging that NHLS had paid that amount to Blue Future during April 2017, despite its knowledge of and consent to the cession. NHLS denies any liability to Consulting Solutions, contending that the cession agreement is void *ab initio* due to the non-fulfilment of its suspensive conditions and because it was concluded in contravention of the SLA, which required its prior written consent to a cession. In reply, Consulting Solutions relies on estoppel, alleging that NHLS is precluded from relying on the invalidity of the cession agreement or from denying the authority of its official who consented to the cession.

[2] The parties, in terms of r 33 of the Uniform Rules of Court, agreed upon a written statement of facts in the form of a special case for adjudication. NHLS was established in terms of the National Health Laboratory Service Act, 37 of 2000 (NHLS Act). It is a state-owned juristic person that is to be managed according to the provisions of the NHLS Act as well as the NHLS Rules published in Government Gazette 30112, 24 July 2007, and the Public Finance Management Act, 1 of 1999 (PFMA). It is governed by an Executive Board and a Chief Executive Officer. Its objects are to provide: (a) cost-effective and efficient health laboratory services to all public sector health care providers, any other government institution inside and outside of the Republic that may require such services and any private health care provider that requests such services; (b) support health research; and (c) provide training for health science education (s 4).

[3] Clause 10 of the policy, which the Board in terms of s 51(1) of the PFMA adopted as the Supply Chain Management Policy of NHLS (the SCMP), includes the following presently relevant provisions:

'10.2.1 The CEO shall:

- Monitor and recommend to the Board, schedule reports on the implementation of the SCM policy and the performance of SCM;
- Approve demand management plans for NHLS requirements; and
- Appoint individual officials or bid committee members for the thresholds approved by the board;
- *Signing of award letters for bids recommended by the adjudication committees.*

. . .

10.2.3 The Head of Supply Chain directs SCM functions and will lead the execution of the following functions:-

- Consolidation of demand/procurement plans;
- Development of sourcing strategy;
- Development of spend analysis;
- Sourcing and acquisition processes;
- Negotiations;
- Supplier engagements;
- *Contract administration*.'

(Emphasis added.) The parties agreed that the SCMP had at all relevant times been publicly available to third parties and that Consulting Solutions had been aware of its contents.

[4] Following a procurement process for the provision, maintenance and support of end-user computer hardware, NHLS's Finance Committee recommended to its Board that Blue Future's bid be accepted. On 24 February 2016, the Board passed a resolution granting its chief executive officer, Ms Joyce Mogale, the authority to conclude the SLA with Blue Future. NHLS's Board resolved as follows:

'a) The award of the bid RFB 027/15-16 for the provisioning of maintenance and support of end user computer hardware for a period of three (3) years (Desktop, Laptops and Associated peripherals, on site labour and repair to Blue Future for the amount of R25, 985, 921.10 excl VAT be and is hereby approved;

b) The Chief Executive Officer be and is hereby authorised to sign all necessary documents for the implementation of the resolution (a) above.'

[5] On 17 March 2016, NHLS, represented by its CEO, Ms Mogale, and Blue Future, represented by its CEO, Mr Pierre Petersen, concluded the SLA pursuant to the tender awarded by NHLS to Blue Future under tender number RFB 027/15-16, for the provision, maintenance and support of end-user computer hardware. The terms of the SLA, which are presently relevant, read thus:

'5.1 The Service Provider [Blue Future] will invoice the NHLS for services rendered per NHLS purchase orders and all invoices must be clearly marked as Tax Invoice, and show the Service Provider's VAT number, where applicable. All invoices must refer to a purchase order number and the contract number.

5.2 All Invoices, Prices and amounts for payments due must be stated and made in South African monetary currency, currently Rand, and must contain banking information of the Service Provider of a bank account based in South Africa.

. . .

28.1 The Service Provider is not permitted to cede, assign or sub-contract all or any part of the Agreement without the prior written consent of the NHLS, such permission being at the NHLS's discretion and on whatever terms and conditions the NHLS may think appropriate, including requiring the proposed assignee or Sub-Service Provider to be bound by any or all of the provisions of this Agreement.

. . .

30.1 This document constitutes the sole record of the Agreement between the Parties.

. . .

30.5 Na addition to, variation or agreed cancellation of this Agreement shall be of any force or effect unless in writing and signed by or on behalf of the Parties.

30.6 Failure or neglect by a Party to, at any time, enforce any of the provisions of this Agreement shall not, in any manner, be construed to be a waiver of any of that Party's rights in that regard and in terms of this Agreement. Such failure or neglect shall not, in any manner, affect the continued, unaltered validity of this Agreement, or prejudice the right of that Party to institute subsequent action.'

[6] On 5 November 2016, and unbeknown to NHLS, Consulting Solutions, represented by Mr Phikolomzi Ignatius Mpambani, and Blue Future, represented by its CEO, Mr Petersen, concluded the cession agreement in terms whereof Consulting Solutions agreed to advance funds to Blue Future in

order for it to action the purchase orders for goods and services procured from NHLS (clauses 2.1 and 1.1.3). Clause 7 of the cession agreement reads:

'7. CESSION OF PURCHASE ORDERS

7.1 The Company [Blue Future] hereby cedes on an out and basis, with effect from the Effective Date, all its rights, title and interest in and to the Purchase Order/s unto and in favour of the Funder [Consulting Solutions] on the terms and conditions contained in this Agreement.

7.2 The Funder is hereby authorised and empowered irrevocably and *in rem suam* to take all such steps and to do all such things as it in its sole discretion deem necessary to take possession of, control, or otherwise protect or deal with the ceded Purchase Order/s, provided the Funder shall not be obliged to take such steps or do anything by virtue hereof.'

'Effective Date', in terms of clause 1.1.9 'means the Signature Date or such earlier or later date on which the Parties may agree in writing' and clause 1.1.16 defines the 'Signature Date' as 'the date of signature of this Agreement by the last Party to sign it', which occurred on 5 November 2016.

[7] The cession agreement was subject to the suspensive conditions listed in clause 5.1 thereof. They were-

'. . . that, on or before the Effective Date:

5.1.1 the Purchase Order/s are obtained in a manner and form which is satisfactory to the Funder in its sole discretion;

5.1.2 written confirmation and acceptance of the cession by NHLS of all rights and entitlements accruing to the Company for servicing the Purchase Order/s in a manner and form which is satisfactory to the Funder in its sole discretion; and

5.1.3 each Party obtains a resolution of its board of directors authorising it to enter into and implement this Agreement.'

The time limit for the fulfilment of the suspensive conditions was, in terms of clause 5.1 read with clauses 1.1.9 and 1.1.16, 5 November 2016 'or such earlier or later date on which the parties may agree in writing'. It is not suggested that the parties agreed to any earlier or later date. A consequence of the non-fulfilment or non-waver of the suspensive conditions, in terms of clause 5.3, is that the cession 'shall be deemed *pro non scripto* and void *ab initio*'.

[8] Blue Future purported to obtain NHLS's written consent to the cession. To this end NHLS's Head of Supply Chain Management, Mr Graham Motsepe, appended his signature and NHLS's stamp on the last page of the cession agreement on 11 November 2016, and, on 15 November 2016, delivered to Blue Future and to Consulting Solutions a letter, which was addressed to Blue Future and signed by him in his capacity as NHLS's Head of Supply Chain Management. Therein he stated:

'Dear Mr Peterson

Please be advised that we acknowledge your arrangement between Bluefuture Internet and Surveillance (PTY) LTD and 605 Consulting Solutions (PTY) LTD. Please note that all payments will be paid to 605 Consulting Solution (PTY) LTD until such time that all the payment of R60 000 000.00 is settled and the cession agreement will be cancelled.'

[9] Pursuant to the conclusion of the SLA, NHLS issued a purchase order to Blue Future, dated 18 November 2016, for various items in the total sum of R17 383 062, excluding VAT (the purchase order). From 16 November 2016 to 9 December 2016, Consulting Solutions, acting on the truth of the representations referred to in the preceding paragraph, paid an amount of R19 627 278.41 to Blue Future to enable it to action the purchase order. Blue Future supplied the goods ordered in terms of the purchase order to NHLS and subsequently issued a tax invoice to NHLS, dated 15 December 2016, for the total sum of R19 816 690.68 (inclusive of VAT), which amount NHLS paid to Blue Future on 31 March 2017. On 27 January 2017, NHLS terminated the SLA upon giving 14 days' notice as provided in clause 21 thereof. Due to Mr Motsepe's alleged unauthorised conduct in appending his signature and NHLS's stamp on the last page of the cession agreement and in furnishing Blue Future and Consulting Solutions with the letter dated 15 November 2016, NHLS instituted disciplinary proceedings against him. However, he resigned on the eve of the hearing.

[10] I first turn to NHLS's contention that the cession agreement is void *ab initio* due to the non-fulfilment and non-waiver of its suspensive conditions, and, because it was concluded in contravention of the SLA. The parties, in terms of their stated case, agreed that the cession agreement was subject to

the conditions listed in clause 5.1 thereof, and that those conditions were suspensive in nature. There is not a suggestion that the suspensive conditions were either fulfilled or waived by Consulting Solutions and Blue Future. On the contrary, it is common cause that NHLS did not in writing confirm and accept the cession within the period stipulated for the fulfilment or waiver of the suspensive conditions (clause 5.1.2 of the cession agreement) and it appears that Consulting Solutions concedes the non-fulfilment and non-waiver of the suspensive conditions, but, instead relies on the conduct of Mr Motsepe, to which I return.

[11] It is trite that a suspensive condition of a contract suspends the operation of all or some of the obligations flowing from that contract pending the occurrence or non-occurrence of a specific uncertain future event. If the condition is not fulfilled, and if the parties have not agreed otherwise, the contract normally falls away and is rendered void *ab initio* and unenforceable (See *Mia v Vermaak Holdings (Pty) Ltd* [2010] 1 All SA 280 (SCA), para 1; *Southern Era Resources Ltd v Farndell NO* 2010 (4) SA 200 (SCA) para 11; *Paradyskloof Golf Estate (Pty) Ltd v Municipality of Stellenbosch* 2011 (2) SA 525 (SCA), para 17; *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd* 2013 (2) SA 133 (SCA), para 10.) Here, Consulting Solutions and Blue Future expressly agreed that the consequence of the non-fulfilment or non-waiver of the suspensive conditions would be that the cession agreement 'shall be deemed *pro non scripto* and void *ab initio*'. Furthermore, the fulfilment or waiver of a suspensive condition after the time limit imposed for its fulfilment does not give rise to a binding obligation. (See *Dirk Fourie Trust v Gerber* 1986 (1) SA 763 (A) at 773F-G; *Trans-Natal Steenkoolkorporasie Bpk v Lombaard* 1988 (3) SA 625 (A) at *De Villiers v BOE Bank Ltd* 2004 (3) SA 1 (SCA), para 74.) I find, therefore, that the cession agreement had fallen away and was rendered void *ab initio* and unenforceable due to the non-fulfilment and non-waiver of the suspensive conditions by 5 November 2016.

[12] NHLS further argues that the cession agreement was concluded in contravention of the restriction upon the free transferability of Blue Future's

rights flowing from the SLA. Blue Future's contractual rights flowing from the SLA were not freely transferable but were subject to the *pactum de non cedendo* stipulated in clause 28.1 thereof. In the result, Blue Future's rights flowing from the SLA could not be transferred without NHLS's 'prior written consent' to the cession, not even to a *bona fide* cessionary who was ignorant of the restriction upon free transferability. (See François du Bois et al *Wille's Principles of South African Law* 9th Ed at 844.) The purported cession could not have been completed or effective without compliance with the requirement of the prior written consent of NHLS to the cession. (See *Britz NO v Sniegocki* 1989 (4) SA 372 (D) at 382F-383E.)

[13] NHLS did not give its prior written consent to the cession. There is, in my view, no merit in Consulting Solutions's argument that the stamp and signature which Mr Motsepe appended to the last page of the cession agreement on 11 November 2016, and the letter which he delivered to Blue Future and to Consulting Solutions on 15 November 2016, constituted the required prior written consent of NHLS to the cession. First, by 11 and by 15 November 2016 the cession agreement had already fallen away and had been rendered void *ab initio* and unenforceable due to the non-fulfilment and non-waiver of the suspensive conditions by 5 November 2016. Second, Blue Future's rights flowing from the SLA could not be transferred without NHLS's 'prior' written consent, unless NHLS and Blue Future concluded a written amendment of the SLA, signed on behalf of both entities. Mr Motsepe's letter dated 15 November 2016 does not comply with the SLA's requirements for its variation.

[14] In *SA Sentrale Ko-Op Graanmatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A), the lessor claimed cancellation of a lease agreement, because the lessee, contrary to the provisions of the lease agreement, ceded his rights thereunder to someone else without the consent of the lessor, and for the eviction of the lessee and the cessionary. There, clauses 11 and 19 of the lease agreement provided that '[t]he tenant shall not have the right to sub-let the said business premises or any portion thereof nor shall he have the right to cede this agreement to any person whomsoever without, in either event,

the written consent of the owner first being had and obtained' and that '[a]ny variation of the terms of this agreement as may agreed upon between the parties shall be in writing otherwise the same shall be of no force or effect'. The lessee admitted the cession, but alleged an oral agreement in terms of which the parties agreed to the cession on condition that the lessee guaranteed the payment of rental by the cessionary. It pleaded that '[i]t was an implied term of the said agreement that the plaintiff [lessor] would waive written consent to the said cession and delegation as required by clause 11 of the said lease, as well as the requirements of clause 19'. Steyn CJ held that the real tenor of the lessee's plea amounted to an alleged tacit amendment of the lease agreement; the alleged oral agreement incorporated a tacit term that a cession without the lessor's written consent would not amount to a breach of the lease agreement, despite the provisions of clauses 11 and 19 thereof. The question, therefore, was whether the parties, notwithstanding the provisions of clauses 11 and 19, concluded a valid oral agreement whereby the lease agreement could be amended that oral consent to the cession would be sufficient (pp 764G-765G). Steyn CJ found that a clause in a written contract stating that no variation of the agreement shall be of any force or effect unless reduced to writing and signed by the parties is valid and effective, and an oral variation is void. A non-variation clause that does not entrench itself against variation, however, may itself be cancelled or varied by informal agreement.

[15] The Supreme Court of Appeal has for decades confirmed the validity of a non-variation clause, such as the one in question. (*See SH v GF and others* 2013 (6) SA 621 (SCA), para16.) Here, the non-variation clause is part of the SLA, and its wording is wide enough to entrench itself. (See Van Huyssteen Lubbe Reinecke *Contract General Principles* 5th Ed para 5.7.) No part of the SLA, including the non-variation clause itself, may be varied in any way other than in writing and signed on behalf of NHLS and Blue Future. In any event, Consulting Solutions does not rely on any formal or informal amendment of the SLA. It follows that Consulting Solutions did not acquire any right *vis-à-vis* NHLS to payment of the amounts which were owing by NHLS to Blue Future in terms of the SLA because Blue Future's rights flowing

from the SLA were not capable of being ceded without the prior written consent of NHLS.

[16] This brings me to the defences of estoppel raised by Consulting Solutions. It contends that NHLS is precluded from denying Mr Motsepe's authority to have consented to the cession on its behalf, as was required in terms of clause 28.1 of the SLA, or from relying on the invalidity of the cession agreement. By having adopted the SCMP, it argues, the NHLS Board vested Mr Motsepe with the actual authority, express or implied, or the ostensible or apparent authority (the authority of an agent as it appears to others) to represent it in matters relating to contract administration, which includes the granting of consents that may be required in terms of the provisions of a contract, such as consenting to the cession of Blue Future's rights arising from the SLA, and the making of representations in the nature of those made by him in appending NHLS's stamp and his signature on the cession agreement on 11 November 2016 and in the letter dated 15 November 2016. At the very least, it argues, the SCMP by its terms created an aura of authority sufficient to clothe Mr Motsepe with ostensible authority to have granted consent to the cession on behalf of NHLS and to have made the representations on 11 and 15 November 2016: It identified Mr Motsepe as a very senior official within NHLS; the person responsible for dealing with all 'queries, requests for interpretations, resolutions of problems and special situations…' in respect of the SCMP; and one of only three positions (the other two being the Chief Executive Officer and the Chief Financial Officer) with roles and responsibilities expressly defined in the SCMP.

[17] According to Consulting Solutions, the signature and stamp which Mr Motsepe appended to the cession agreement on 11 November 2016, represented to it that NHLS was aware of the terms of the cession agreement and would not regard it as invalid despite its apparent invalidity and the letter dated 15 November 2016, which he had furnished to it and to Blue Future, confirmed NHLS's knowledge of the cession agreement; it consented to the cession; acknowledged NHLS's obligation to pay Consulting Solutions directly all money that becomes due to Blue Future; and confirmed that the cession

agreement would only be cancelled once the Blue Future's debt owing to Consulting Solutions had been settled in full. According to Consulting Solutions it relied on NHLS's representations; it acted to its prejudice in the reasonable belief that the representations were correct by paying Blue Future the amount of R19 627 278.41; and it would not have advanced any money to Blue Future if it had been aware of the falsity of NHLS's representations.

[18] In *Hely-Hutchinson v Brayhead Ltd and Another* [1967] 3 All ER 98 at 101-102, Lord Denning said:

'I need not consider at length the law on the authority of an agent, actual, apparent or ostensible. That has been done in the judgments of this court in the case of *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd*. It is there shown that actual authority may be express or implied. It is *express* when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.

Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his *actual* authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the "holding-out". Thus, if he orders goods worth £1,000 and signs himself "Managing Director for and on behalf of the company", the company is bound to the other party who does not know of the £500 limitation (see *British Thomson-*

*Houston Co Ltd v Federated European Bank Ltd,* which was quoted for this purpose by Pearson LJ in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* ([1964] 1 All ER 642, [1964] 2 QB at p 499)). Even if the other party happens himself to be a director of the company, nevertheless the company may be bound by the ostensible authority. Suppose the managing director orders £1,000 worth of goods from a new director who has just joined the company and does not know of the £500 limitation, not having studied the minute book, the company may yet be bound. That is the sort of case envisaged by Lord Simonds in *Morris v Kanssen* ([1946] 1 All ER 586 at pp 592, 593, [1946] AC 459 at p 475), and considered by Roskill J in the present case ([1967] 2 All ER at 25) .

(Footnotes omitted. This statement of English law was imported into our law in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) at paras 24 and 25 and the other cases that followed it. *See*: *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA); *South African Broadcasting Corporation v Coop and Others* 2006 (2) SA 217 (SCA); *Northern Metropolitan Local Council v Company Unique Finance* [2012] 3 All SA 498 (SCA) at para [27].)

[19] In *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC), the Constitutional Court (*per* Jafta J) held that:

'[46] The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable from estoppel which is not authority at all. Moreover, estoppel and apparent authority have different elements, barring one that is common to both. The common element is the representation which may take the form of words or conduct.

[47] A closer examination of the original statement on apparent authority by Lord Denning, quoted below, reveals that the presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required. The means by which that appearance is represented need not be directed at any person. In other words the principal need not make the representation to the person claiming that the agent had apparent authority. The statement indicates the absence of the elements of estoppel. It does not mention prejudice at all. That statement of English law was

imported as is into our law in *NBS Bank* [*NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) ([2002] 2 All SA 262)] and other cases that followed it.'

(Footnote omitted.)

[20] Applying these principles here, it is clear that there is no merit in Consulting Solutions's contentions that the NHLS Board, through its adoption of the SCMP wherein it is stated that NHLS's Head of Supply Chain Management 'will lead the execution' of the 'contract administration' function, vested that official with actual authority, express or implied, or created an aura of authority sufficient to clothe him, Mr Motsepe, with ostensible authority to grant the required consent on behalf of NHLS to Blue Future in terms of clause 28.1 of the SLA, for it to cede its rights or certain of its rights to Consulting Solutions, or to have made the alleged representations to Consulting Solutions that NHLS knew of the cession agreement, was aware of its terms, consented to the cession, would not regard it as invalid despite its apparent invalidity, acknowledged its obligation to pay Consulting Solutions all monies that become due to Blue Future and confirmed that the cession agreement would only be cancelled once Blue Future's debt owing to Consulting Solutions had been settled in full.

[21] Contract administration involves the management of a contract – overseeing or supervising the proper implementation thereof - once it has been concluded. It does not entail the authority to conclude a contract or to vary its terms. Consent to the cession, in terms of clause 28.1 of the SLA, could be given at NHLS's discretion on whatever terms and conditions it may deem appropriate. In consenting to the cession after the cession agreement had been concluded between Blue Future and Consulting Solutions and had lapsed and become void *ab initio* due to non-fulfilment and non-waiver of the suspensive conditions, Mr Motsepe was not overseeing or supervising the implementation of the SLA. Instead, he purported to represent NHLS in agreeing to an informal variation of the clause 28.1 of the SLA that required the 'prior' consent of NHLS to any such cession. He purported to represent it in the creation of contractual rights and obligations and in binding NHLS to a financial obligation *vis-à-vis* Consulting Solutions, which it did not have

previously. Mr Motsepe had no authority to 'acknowledge' and to 'consent' on behalf of NHLS to the purported cession agreement, much less *after* it had been concluded and had already fallen away and rendered void *ab initio* and unenforceable.

[22] The authority to conclude, and implicitly to vary, the SLA on behalf of NHLS, was delegated by the NHLS Board to its CEO, Ms Mogale, and not to Mr Motsepe, in terms of clause 10.2.1 of the SCMP, which the Board in terms of s 51(1) of the PFMA adopted, and in terms of the NHLS Board resolution on 24 February 2016. The NHLS Board, through its adoption of the SCMP, proclaimed to the world that its CEO – and not its Head of Supply Chain Management - is authorised to sign award letters for bids recommended by the adjudication committees, which authority also vests the CEO with the implied authority and ostensible authority to conclude agreements, such as the SLA, and to concluded variations of such agreements. The CEO is also vested with such implied authority and ostensible authority because of the office she holds.

[23] My findings that the cession agreement had fallen away and was rendered void *ab initio* and unenforceable due to the non-fulfilment and non-waiver of the suspensive conditions by 5 November 2016, that Consulting Solutions did not acquire any right *vis-à-vis* NHLS to payment of the amounts which were owing by NHLS to Blue Future in terms of the SLA because Blue Future's rights flowing from the SLA were not capable of being ceded without the prior written consent of NHLS, which never occurred, and that the defences that NHLS is estopped or precluded from denying Mr Motsepe's authority to have consented to the cession on NHLS's behalf or from relying on the invalidity of the cession agreement are unmeritorious, are dispositive of the relief claimed by Consulting Solutions and render it unnecessary to deal with the other contentions raised, such as that Mr Motsepe's acknowledgement of and consent to the cession were in violation of certain provisions of the NHLS Act and of the PFMA and that neither estoppel nor ostensible authority can be invoked to give effect to what is not permitted by law.

[24] In the result the following order is made:

The plaintiff's action is dismissed with costs, including those of one senior and one junior counsel.

**P.A. MEYER**
**JUDGE OF THE HIGH COURT**

| | |
|---|---|
| Date of hearing: | 8 March 2019 |
| Date of judgment: | 8 August 2019 |
| Plaintiff's counsel: | Adv M Seape (assisted by Adv B Mkhize) |
| Instructed by: | Cliffe Decker Hofmeyr Inc., Sandown, Sandton |
| Defendant's counsel: | Adv PG Seleka SC (assisted by Adv T Manchu) |
| Instructed by: | Hogan Lovells (South Africa) Inc., Sandton |