




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 51447/2010

Date: 18August 2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
18/08/2014	
DATE	SIGNATURE

In the matter between:

KHANDA SEATING (PTY) LTD

Plaintiff

and

MPUMALANGA RUGBY UNION

Defendant

and

NKANGALA DISTRICT MUNICIPALITY

Third Party

JUDGMENT

PRETORIUS J.

[1] This is an action for the payment of R286 767.00 for the supply, delivery and installation of 90 Jumbo seats and 2640 KS-Buffalo plastic seats (*"the seats"*) to the defendant at the defendant's special instance and request (*"the agreement"*). Summons was issued against the defendant on 9 September 2010. The defendant issued a third party notice against the Nkangala District Municipality which the third party pleaded to on 1 November 2012.

[2] In this action for payment of R286,767.00 the only issue in dispute is whether the defence raised by the defendant that there was an express term of agreement that full payment for chairs delivered and installed would be made by the Nkangala District Municipality, the third party, to the plaintiff. Therefor the defendant joined the Nkangala District Municipality as the third party to the proceedings.

[3] It is common cause that the 90 Jumbo seats and 2640 KS-Buffalo plastic seats were ordered and installed at the Puma Stadium. The court has to decide whether the plaintiff has proved that the defendant is liable to pay the purchase price on a cash on delivery basis. The defendant's defence is that the express term was that the third party would pay for the chairs and that the third party was obliged to pay the purchase price to the plaintiff.

[4] Although the defendant pleaded that the citation of the plaintiff was incorrect, no further evidence in that regard was presented by the plaintiff. Mr Robson, the managing director of the plaintiff, gave evidence that he was in possession of the certificate of incorporation, the CM9 and the CM46 which proved the incorporation of the plaintiff. The court is satisfied that the plaintiff has been correctly cited.

[5] Mr Cyril Ashurst, the sales manager of the plaintiff, testified that he was the person dealing with the defendant during 2010. His evidence was that Mr Kruger, the CEO of the Mpumalanga Rugby Union, approached him in April 2010 to request the plaintiff to supply a quotation for the supply and installation of the 2630 seats at the Puma Rugby Stadium. Mr Kruger acted at all times as the representative of the Mpumalanga Rugby Union.

[6] The quotation was provided to Mr Kruger on 23 April 2010. Mr Ashurst's evidence that Mr Kruger did not indicate to him that that he was obtaining the quotation for a third party was confirmed by Mr Kruger under cross examination. Mr Kruger testified that he had not obtained authority from the third party to request this quotation.

[7] On 25 May 2010 Mr Ashurst received an order from Mr Kruger under cover of the defendant's letter head:

66

#002513 ORDER/BESTELLING

TO/AAN DATE
DATUM 25 05 2010

Khondh Seating (Pty) Ltd
P.O. Box 627, Crown Mines, Johannesburg
Tel (011) 474 3010 Fax (011) 474 3261

PLEASE SUPPLY: THE UNDERSIGNED DOES PER
TO BE ACCOMPANIED BY INVOICE/DELIVERY NOTE
BLANKS ABOVE DATED BY

VERSKAF ASB.: DIE ONDERGETEKENDE DOES PER
WAARBY AANGEVULD IS 'N FACTUUR/AFLEWERING
STROKE MET DOGTERENDE BESTELNUMMER

Order as per Quotation dated
23rd April 2010

Model K5 Buffalo Seat Stalls

Total: R212,950.00 EXCL VAT

ORDERED BY/BESTEL DEUR:
Nkangala Rugby Union / Union
Roosburg / R.O. Box 4574
Witbank 1035
013 - 858 2077
Fax 013 - 858 1032

SIGNATURE
MANTEBUNDA

- [8] The plaintiff was requested to amend this quotation of 23 April 2010 to include 10 extra seats and 90 Jumbo seats. According to Mr Kruger's evidence nobody instructed him or authorised him to place an amended order to include these chairs. Mr Ashurst supplied Mr Kruger, on behalf of the defendant, with the second quotation on 31 May 2010. There is no express term in any of these quotations that full payment for chairs delivered and installed by the plaintiff would be made by Nkangala District Municipality. There is no indication at all that a third party is involved.

[9] No other terms of the agreement was amended apart from the quantity of seats and the price. There was no express term in this agreement implicating the third party as can be seen from the quotation which is addressed to the defendant and specifically for the attention of Mr Kruger. The document sets out:

"We thank you for your valued enquiry and herewith take much pleasure in submitting the following quotation.

Model KS-Buffer Seat Shells

For the manufacture and supply of approximately 2540 Khanda Seating Model KS-Buffer backless stadium seats, and 90 Model KS Jumbo seat shells, UV treated, colour fastness, vandal proof fixings and SABS approved.

No: 2540 @ R85.00 R215900.00

No: 90 @185.00 R16600.00

Installation R14500.00

Transport R4500.00

Total 251550.00

Optional extra:

For the manufacture supply and installation of 2630 Khanda Seating Model KS-Numbering system for the Model Buffer and model Jumbo seat shells.

No: 2630 @ R22.00 R57860.00

Vat: The above prices exclude Vat

Delivery: 6-8 weeks from receipt of an official order

Payment Terms: A deposit of 50% with the official order with final payment on completion

Validity: The above prices will remain valid for a period of 30 days from the date hereon"

[10] There is no indication on this document whatsoever that a third party would be liable for payment for this amended order. Mr Ashurst reiterated on numerous occasions, during evidence in chief and under cross examination, that he would never have submitted the quotation to the defendant if he had known that the third party would be liable for payment of the delivery and installation of these chairs. He would have addressed and submitted it to the third party.

[11] As far as he was concerned these new chairs were urgently needed for the rugby test match which would have taken place between South Africa and Italy on 22 June 2010. His evidence was that if he had known a third party was involved he would have invoiced the third party directly. The plaintiff invoiced the defendant on 22 June 2010 as, according to Mr Ashurst, the defendant had ordered the supply and installation of the chairs.

[12] Mr Ashurst denied that Mr Kruger had informed him that he was acting as an agent for the third party. According to him the defendant was the client throughout and Mr Kruger indicated that he was acting

for the defendant. At no stage did Mr Kruger, for the defendant, indicate that the wrong party was invoiced. At the function after the test had been played, Mr Kruger once more indicated that the plaintiff would receive payment from the defendant on the following Monday.

[13] Mr Robson, as managing director of the plaintiff, had personal knowledge of this transaction. Mr Robson's evidence was that he would have been the only person who could have authorised payment by a third party and there was never such a request. His evidence was that Mr Kruger phoned him personally and requested him to waive the 50% deposit that was required when placing the order. Mr Kruger never indicated to Mr Robson that a third party would be liable for payment. Mr Kruger denied requesting Mr Robson to waive the 50% deposit payment, but the court finds that this conversation did take place and that Mr Kruger's denial is disregarded.

[14] Although seats, such as these required for the stadium, normally took six to eight weeks to supply, the plaintiff supplied and installed the chairs within three weeks due to the fact that the test match would be played on 18 June 2010. Mr Kruger told Mr Robson that the defendant would pay in full after the test. At no stage did Mr Kruger ever mention that a third party would be liable for payment of the chairs.

[15] On 14 July 2010 an email was sent from the plaintiff's office to Mr Kruger which read:

"Hi Koos, Kan jy asseblief die bewys van betaling deur stuur want ek het nog nie die R286 767.00 in ons bank rekening gesien nie."

[16] Mr Robson testified that he only realized one to two years later that the defendant expected the third party to pay. According to Mr Kruger the defendant never complained that the wrong party was invoiced, nor requested the plaintiff to invoice the third party or to amend either the quotes or the invoice. Mr Kruger conceded that it would have been easy to amend the quotes and order to reflect the details of the third party, but failed to do so.

[17] Mr Kruger received the quote for the delivery and installation of the chairs from the plaintiff on 23 April 2010. He was anxious to have the chairs installed before the test on 18 June 2010. According to Mr Kruger he sent an e-mail with the quote to Perozz Engineering and to Mr Lucky Msoki of the Nkangala Municipality on 24 April 2010. Mr Kruger were in discussions with all the role players and according to him, everybody knew he was acting on behalf of the third party and on behalf of the defendant, although he admitted that he was not acting on behalf of the third party on 23 April 2010 when obtaining the quote.

[18] On 28 May 2010 he received the final amended quote and immediately forwarded it to Mr Msoki on 31 May 2010. He had no response from Mr Msoki, but nevertheless placed the order. At all times Mr Kruger expected the third party to pay. He agreed that when he discussed and received the quotation on 23 April 2010, he had no authority from the third party, nor any instruction from the third party to enter into negotiations or to obtain a quotation for the seats.

[19] He could not explain why he did not request the plaintiff to address the quotation and the invoice to the third party, although he was aware that the defendant was not going to pay, as according to him, it did not have the money to do so. The defendant would have received the payment from the third party and would then have paid the plaintiff. There is no explanation as to why payment had to take place in such a convoluted manner.

[20] Mr Kruger agreed that it was not part of the scope of work in upgrading the stadium to have the seats on the stadium replaced. On 7 July Mr Hartmann, on behalf of the plaintiff, sent an e-mail to Mr Kruger insisting that Mr Kruger pay in accordance with his undertaking – it was set out:

“Geagte Koos,

Ek is bevrees die tyd het aangebreek dat ek moet aandrang dat die Mpumalanga Rugby Unie ons betaling maak, soos jy onderneem het. Ons gaan nie betrokke raak met julle stryd met

die Raad nie. Jy kan ons betaling maak en dan terug eis van die Raad.

Ons het met jou gedeel Koos en ons het die bestelling van die Mpumalanga Rugby Unie ontvang.

Almal hier by Khanda Seating het agteroor gebuig om jou stoele betyds te installer teen 'n baie goeie prys, nou verwag ons dat jy ons dadelik betaal asseblief.” (Court’s emphasis)

[21] The contents of this e-mail once more confirms the plaintiff’s evidence that at all times the plaintiff was dealing with the defendant and not the third party. On 14 August 2010 a further email was sent to Mr Kruger requesting payment of the invoice, which had been addressed to the defendant. On 11 August 2010 a threatening email was sent to Mr Kruger, demanding payment:

“Dear Koos, CEO Pumas

After numerous attempts to get you to pay our invoice 1834 to the value of R286767.00 for the seats installed at the Puma Stadium, we are going to hand you over for collection. This unnecessary process will cost the Mpumalanga Rugby Union R59118.06 in additional costs for collection. This collection fee is broken down as follows:

- 18% of the outstanding amount (R51618.06)*
- Litigation fee of R7500.00 which includes summons, judgment, warrant of execution and article 65.*

Khanda Seating hereby issue you with a final notice to pay the R286767.00 by Friday 13/08/2010. If this amount is not in our bank on the said date you will be handed over for collection and the cost of the collection and litigation will be for your account."

[22] Mr Kruger requested a week's extension, which was granted, but failed to pay which resulted in the email of 17 August 2010 which set out:

"This serves to confirm what we discussed. You requested a week extension before we hand you over for collection. I indicated that we have sympathy with your problems getting money from your local council but that it is not Khanda Seatings problem as you requested by order 002913 from the Mpumalanga Rugby Union to have the seats installed. You were subsequently invoiced on a COD basis (not the Local Council). (You verbally assured the MD of Khanda Seating that the payment would be made on the day of installation which did not happen.)"

[23] Mr Kruger did not testify in relation to the extension requested by him. Mr Kruger did not reply to any of these e-mails advising the plaintiff that the defendant was not liable for payment. It would be expected that a reasonable person would have informed the plaintiff that the defendant was not liable at all and that the plaintiff had to invoice and hold the third party liable. Mr Robson's evidence was clear that he would not have entered into an agreement with the defendant,

knowing that a third party was involved, without obtaining all the details of the third party from the defendant. Mr Ashurst's evidence was that had the plaintiff known that the third party was liable it would have invoiced the third party and not the defendant.

[24] The plaintiff at all times expected payment from the defendant. The evidence of Mr Ashurst and Mr Robson that they had not been aware of the third party before the chairs had been installed, is corroborated by the fact that the quotations, the order and the invoice were addressed to the defendant and not to the third party. Furthermore Mr Kruger's failure to correct the plaintiff's misapprehension by not responding to emails, corroborates the evidence of the plaintiff's two witnesses. This is even more so where he tried to convince the court that the fact that Mr Msoki or Perrozz Engineering did not reply to his emails, lead him to believe that the third party had granted the defendant authority to proceed. The court cannot accept that he had placed the order on behalf of the defendant without any authorization from the third party. It is so improbable that the defendant would have incurred a debt of more than R200 000.00 without explicit authorization that the court rejects Mr Kruger's evidence that he thought that he had authorization. The pleadings contradict his version in any event.

[25] At all times Mr Robson and Mr Ashurst were brought under the impression by Mr Kruger that the invoice would be paid the Monday after the test had been played.

[26] The plaintiff's version was unwavering under cross examination. It was vehemently denied throughout the proceedings that the plaintiff had any knowledge that the Nkangala District Municipality was involved.

[27] The disputes between the defendant and the third party are whether the defendant was mandated by the third party to act as the third party's agent and what the terms of the mandate were and whether the defendant acted according to the terms of the mandate. The court has to determine whether there was an agreement between the third party that the third party would indemnify or make payment to the defendant or the plaintiff for the payment of the invoice addressed to the defendant.

[28] The defendant alleged in its' pleadings that:

"The defendant will be entitled to an indemnification contemplated by rule 13(1) of the Uniform Rules of Court from the third party by virtue of the facts and circumstances set out herin below."

[29] The defendant is bound to these pleadings in the third party notice which results in the fact that the defendant must make out a cause of action which would be regarded as an indemnification.

[30] According to the defendant's pleadings the only agreement which existed between the third party and the defendant:

*"During May 2010, telephonically, the Mpumalanga Rugby Union, represented by J Kruger, and the Nkangala District Municipality Council, represented by Lucky Msoki, alternatively Tau Rampai, alternatively Mohau Matlawe agreed that **the defendant would obtain quotations for and on behalf of the Nkangala District Council for the supply and installation of seats at the Puma Stadium, owned by Emalahleni Municipality as part of an upgrading project of the said stadium. The upgrading of the said stadium was at all times funded by the Nkangala District Municipality and the Nkangala District Municipality was responsible for the making of all payments towards the upgrading project.**" (Court's emphasis)*

[31] The pleading does not accord with Mr Kruger's evidence that he had obtained the quote of 23 April 2010 and the amended quote without the authority of the third party.

[32] Mr Kruger conceded that, according to the defendant, his mandate was only to obtain quotations. This is confirmed where the defendant set out:

"In obtaining the quotations for the seating at the Puma Stadium, the Defendant acted as agent, duly authorized to obtain the said quotations on behalf of the Nkangala District Municipality."

[33] There is thus no indication on the pleadings that Mr Kruger was mandated to enter into an agreement with the plaintiff for the purchase of the chairs and the court accepts that he had no mandate to do so.

[34] Furthermore there is no allegation in the third party notice that the third party would indemnify the defendant or pay an amount to either the plaintiff or the defendant. The defendant alleged in the pleadings:

"In obtaining the quotations for the seating at the Puma Stadium, the Defendant acted as agent, duly authorized to obtain the said quotations on behalf of the Nkangala District Municipality."

[35] Counsel for the third party applied for absolution from the instance after the defendant had completed its' case. In **Mazibuko v Santam Insurance and Another 1982 (3) SA 125 (AD)** Corbett JA held at p 135 E – F:

"In such a case, which is in effect a tripartite suit between three adversaries, it is, in my opinion, in the interests of justice that the case should be decided on the evidence which all the parties might choose to place before the Court, provided, as I say, that the plaintiff, when presenting his case, has laid the necessary foundation of showing, prima facie, that one or other or both of the defendants are legally liable. To hold otherwise would, in many instances, defeat the object of the Rule which permits a plaintiff who is uncertain as to the legal responsibility of two defendants to sue them both in the alternative and, in the further alternative, jointly and severally." (Court's emphasis)

[36] In the present matter the same principles must apply. Therefore I did not grant absolution of the instance.

[37] The evidence of both witnesses for the third party, Mr Msoki and Mr Ntikele, was that Mr Msoki had no authority to accept quotes on behalf of the third party. Their evidence was that Mr Kruger had no authority to request quotes from the plaintiff or anybody else. According to the defendant's pleadings Mr Kruger only had a mandate to obtain quotes and not to enter into agreements on behalf of the third party. The defendant had not pleaded implied terms or a discretion extending to ordering the chairs. The defendant has the onus to prove the agreement entered into with the third party. The express terms and

conditions of the contract has to be pleaded. In this instance no implied terms was pleaded. There was no pleading where it was set out that the defendant could enter into any agreement on behalf of the third party.

[38] The defendant contends that he was an agent for the third party.

The plaintiff's witnesses were adamant that at all times Mr Kruger represented the Mpumulanga Rugby Union and at no stage did he indicate that he was acting as an agent for the third party. In this instance Mr Kruger had no authority at all to act on behalf of the third party.

[39] Agency can only occur where the principal contractually authorize the agent to perform a juristic act. In **RH Christie and GB Brandfield, Christie's Law of Contract 6th edition** the learned authors agreed with Greenberg J where he had found in **Goldfoot v Myerson 1926 TPD 242** at 247:

"contain some indication that it is made for the benefit of a third party, so as to warn the promissor of the possibility of adoption by the third party and of the obligations resulting from such adoption. If this view is correct, a mere unexpressed intention on the part of one of the contractors as in the present case, is insufficient to subject the contract to the principle of adoption."

[40] This is exactly what had taken place in the present instance.

[41] The facts of the present case are exactly the same as at no stage did the defendant indicate to the plaintiff that a third party is involved. At no stage did the evidence show that the third party had accepted the quote from the plaintiff. It is clear from the e-mails that the possibility that the third party may pay was only conveyed to the plaintiff after the seats had been installed and the test had been played.

[42] The defendant has to fail on his own pleadings where the defendant had indicated that Mr Koos Kruger only had authority to obtain quotes and never had any authority to enter into any agreement regarding the supply of the chairs. If the court finds that he had authorization to obtain quotes for the chairs, that would not include that he could accept the quotes and enter into a agreement with the plaintiff. The *dictum* in **Coetzer v Mosenthals Ltd 1963 (4) SA 22 (A)** differs from the present situation as the court cannot find that the third party was aware that Mr Kruger, on behalf of the defendant was obtaining, accepting and amending quotes on the third party's behalf.

[43] There is no allegation in the pleadings that there was a further agreement between the defendant and the third party and no agreement to expand the original quote.

[44] Mr Kruger could not testify clearly as to the terms of the agreement between him and the third party. He gave three versions to the court, namely he was authorized to obtain the quotes (which corresponds with the pleadings), that he was orally authorised to accept the quotes at the end of May 2010 and thirdly he accepted that the third party had accepted the quote as he had sent it to Mr Msoki. Mr Kruger conceded that he had no authority to expand the order to include 90 jumbo seats. The only conclusion must be that he had amended the quote on behalf of the defendant and accepted the amended quote on behalf of the defendant. It is reiterated that Mr Kruger had no authority, according to his evidence to obtain the first quote and to expand it, which resulted in the second quote. On his own evidence he did not have the authority to obtain quotes on behalf of the third party.

[45] Mr Kruger was not a satisfactory witness as he was vague and incoherent and elusive when questioned as to the terms of the agreement between the defendant and the third party. He could not answer all the questions and his versions contradicted the averments set out in the pleadings.

[46] At no stage did the defendant apply to have the third party notice amended. There is no cause of action on the pleadings as the third party did not allege the complete cause of action, valid in law, in the third party notice.

[47] Both the third party's witnesses' evidence was quite clear that Mr Msoki did not have the authority to provide permission, on behalf of the third party to request quotes, accept quotes or to amend quotes to include additional work. The undisputed evidence was that all expenditure above R200 000.00 had to be put out to tender, which would have applied in the present instance.

[48] The defendant was not able to prove that Mr Msoki was entitled to grant authority on behalf of the third party to the defendant and to bind the third party to the agreement. No elements of estoppel are present or alleged. This further confirms that the defendant did not act as the third party's agent.

[49] The plaintiff's witnesses supported the evidence of the third party, although the plaintiff's claim is against the defendant. Mr Kruger had at no stage prior to the institution of the action relied on his contention that he had acted as an agent for a third party when dealing with the plaintiff.

[50] The court finds that the plaintiff's witnesses, Mr Robson and Mr Ashurst were reliable and honest witnesses, who did not embellish, but were forthright in answering all questions. The same must be said of the third party's witnesses, Mr Msoki and Mr Ntikele.

[51] It is common cause that Mr Kruger's evidence was that he had been "desperate" to have the seating in place for the test match on 18 June 2014.

[52] Mr Ashurst was adamant that if Mr Kruger had disclosed that the third party was involved, he would have changed the quote and the invoice to reflect the third party. The evidence of the plaintiff, that on the evening after the test Mr Kruger still reiterated that payment would be made on the following Monday, is accepted.

[53] The court cannot accept Mr Kruger's evidence as being honest and reliable in this regard. The court finds that Mr Kruger's evidence and the documents, - the quotes and the invoices - are contradictory. It is further clear that the pleadings were only amended to depend on agency as a defence in June 2014, although summons had already been issued in 9 September 2010.

[54] The pleadings by the defendant are contradictory as in answer for a request for further particulars from the plaintiff it is set out that the agency agreement was concluded in May 2010 and on a similar question by the third party the defendant's version was

"Ad paragraph 1.1.2

Lucky Msoki authorised the defendant's Koos Kruger during April 2010 to order and have installed the seats at the Atlantic Sport facility"

[55] A further mistake, according to Mr Kruger, is that the defendant set out:

"The defendant did not disclose to the plaintiff that Lucky Msoki authorised the defendant to order and have the seats installed at the Mpumalanga Rugby Stadium"

[56] Mr Kruger contradicted the further particulars where it was stated:

"The defendant and Perozz Consulting Engineers, who was the third party's appointed engineers for purpose of the upgrading contract of the Atlantic Stadium with project number 6901/09, accepted the quotation. The defendant acted on the authority granted by Mr Lucky Msoki of the third party."

as his evidence was that Mr Msoki and not an engineer from Perozz Consulting had told him to accept the quote. His evidence that he had indicated to the plaintiff's representatives that the defendant had

ordered the seating, without having the means to pay a deposit or to pay for the seating and the plaintiff was still satisfied to accept the order from him contradicts the evidence of both Mr Robson and Mr Ashurst. The court has to find that this evidence by Mr Kruger is totally improbable and is rejected.

[57] Mr Msoki and Mr Ntikele's evidence was given in a straight forward manner. The court accepts that Mr Msoki did not give permission to the defendant to place the order. It is evident that on 23 April 2010 on Mr Kruger's own version he was not authorized to obtain a quote.

[58] Mr Ntikele's evidence is important as he confirms that there had been a request for new seating at the meeting on 17 March 2010, which had been refused. At that meeting Mr Kruger indicated that he would engage with Loftus to enquire about second hand chairs and that he would revert to the third party. At no stage did Mr Kruger come back in relation to the Loftus chairs. The only seats that were authorised were the 20 seats in the lapa/VIP section according to the scope of work. The installation of these chairs had nothing to do with the present matter. Once more it was confirmed that any expenditure above R200 000.00 would have to go out on tender.

[59] The court takes cognisance of the fact that the quotes and the invoice were all addressed to and by the Mpumalanga Rugby Union and not to the third party. This confirms the version of the third party. The evidence of the single witness for the defendant must be rejected in the light of the overwhelming evidence of the witnesses of the plaintiff and the third party to the contrary, as well as the improbability of his evidence and the contradictions as discussed above.

[60] In **Koster Ko-operatiewe Landboumaatskappy Bpk. V Suid-Afrikaanse Spoorwee en Hawens 1974 (4) SA 420 (W)** Coetzee J confirmed the *dictum* as set out in **National Employers Mutual General Insurance Association v Gany 1931 AD 187** at p426 and stated:

"Waar daar immers geen waarskynlikheid bestaan nie en die twee weergawes mekaar uitwis, word niks tog ooit bewys (wat ookal die bewysmaatstaf mag wees) tensy mens "absolute reliance" kan plaas op die getuienis van die litigant wat die bewyslas dra nie. Dit is net in ander taal gestel wat alreeds bevat word in die eerste sin van sy dictum, naamlik

"... that the story of the litigant upon whom the onus rests is true and the other is false ""

[61] If I apply the principles set out in the above *dicta* and consider all the evidence carefully I must reject Mr Kruger's evidence as unreliable and untrue and his evidence is rejected.

[62] In both instances, the main claim and the proceedings against the third party, I find that the defendant's witness was unreliable, whilst the witnesses for the plaintiff and third party were honest in all respects. I find that that at the time when Mr Kruger requested the quotes and received the invoice, he was acting on behalf of the defendant and not on behalf of a third party. The court finds that at no stage had Mr Kruger indicated to the plaintiff that he was acting on behalf of the third party. The plaintiff and the third party had proved on a balance of probabilities that the defendant had requested the quote, amended the quote and ordered from the plaintiff. Mr Kruger represented the defendant at all times.

[63] Therefor the defendant is liable for payment as set out in the particulars of claim.

[64] I make the following order:

1. Payment in the amount of R286 767.00;
2. Interest on the aforesaid amount at a rate of 15.5% per annum from the date of payment;
3. Cost of suit

In respect of the case between the Defendant and the Third party

1. Defendant's case is dismissed;
2. The defendant is ordered to pay the cost of the third party,

relating to both the third party procedure and the trial, which cost shall include (but not be limited to) the following:

- 2.1 The fees of a senior-junior counsel in respect of perusal, preparation, consultations and the trial;
- 2.2 The following persons are declared necessary witnesses and the costs will include their reasonable travel and subsistence cost (if any) for the duration of the trial:
 - 2.2.1 R F Ntekele;
 - 2.2.2 T M Msoki;
 - 2.2.3 Tau Rampai; and
 - 2.2.4 Mohau Matlawe



Judge C Pretorius

Case number	: 51447/2010
Heard on	: 18 August 2014
For the Plaintiff	: Adv Raff
Instructed by	: Baker & McKenzie
For the Defendant	: Adv Sullivan
Instructed by	: Harvey Nortje Wagner & Motimele
For the Third Party	: Adv Groenewald

Instructed by : Terblanche-Pistorius Inc

Date of Judgment : August 2014