IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:A352/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

20/2/2018 .....
DATE SIGNATURE

In the matter between:

KALEIDA PROJECT MANAGEMENT COMPANY (PTY) LTD APPLICANT

and

KALAGADI MANGANESE (PTY) LTD FIRST RESPONDENT
MDM ENGINEERING SECOND RESPONDENT

JUDGMENT

RANCHOD J:

[1] This is an appeal against the judgment of Mngqibisa-Thusi J dismissing a claim by the appellant as against the first respondent for payment of R9,216,900.00 based on an alleged acknowledgement of debt. The appeal is with the leave of the court *a quo*. The second respondent was cited merely as an interested party and no relief was sought against it save for costs in the event it opposed the application.

[2] During February 2011 the appellant tendered for a project for the 'supply and installation of a wagon tippler and side arm charger' to be used at the first respondent's Kalagadi Mines Sinter Plant. In terms of a Letter of Award (the LOA) the appellant was appointed on 28 June 2011 to carry out the project.

[3] However, the LOA provided for a condition precedent that the appointment of the appellant was conditional upon the parties entering into a final binding agreement by 30 July 2011 failing which the appointment would lapse. The value of the contract was to be R26,950,000.00.

[4] The first respondent submitted a draft of its contract (i.e. the 'final binding agreement' contemplated in the LOA) through its procurement manager to the appellant on 10 August 2011 for consideration. (It must be accepted that the first respondent had waived the deadline of 30 July 2011). It is common cause that the final binding agreement never came into being.

[5] Whilst the appellant and the first respondent were still negotiating the terms of the proposed agreement, the appellant commenced with the preparation of some preliminary technical drawings relating to the project. It then issued two invoices to the first respondent for a total amount of R9,261,900.00 for work done. The one invoice is dated 28 June 2011 (the same date as the date of the LOA) for R6,144,600.00 and another dated 23 September 2011 for R3,072,300.00. The invoices were for 'Completion of Design – GA and Foundation Loads' and '10% Invoice for delivery of CERTIFIED & CLIENT APPROVED Single Line Drawings of Hydraulics & Electronics complete' respectively.

[6] The first respondent refused to pay the invoiced amounts as a final binding agreement had not been concluded between the parties. The appellant sued the first respondent on the basis of an alleged partly oral and partly written agreement. It says the first respondent had acknowledged its indebtedness to it in several emails, particularly in two emails dated 30 and 31 August 2011.

[7] It is necessary to set out the contents of the several emails as they form the basis for the appellant's claim for the invoiced amounts.

[8] On 30 August 2011 Samantha Reddy a Finance Controller at the appellant sent an email to Xolile Kubheka the Financial Administrator of the first respondent in which she says –

> 'As per our conversation earlier, could you please send me the invoice numbers and amounts that are due to be paid for Kaleida Project Management Company (Pty) Ltd.'

8.2 Kubheka replies in an email a few minutes later –

> 'The amount scheduled for payment will be R9 216 900.'

8.3 In a further email from Kubheka to Reddy the next day at 1:49pm she says –

> 'According to my manager the payment will be made on the 6th September 2011.'

8.4 On 7 September 2011 at 9:04am Reddy sends an email to Kubheka-

> 'As per your emails below, please be advised that no payment has been received as yet. Could you please advise as (*sic*) when we will be receiving our payment.'

8.5 On the same day, at 11:54am Kubheka says in an email to Elaine Daniel of the appellant –

> 'I was in meeting the whole day trying to sort out the payment issue, I have given the reason to the guy who was here. We are really sorry for any inconvenience we have caused your company. The issue has been resolved and the payments are going to be processed today.'

[9] The first respondent denied that the emails constituted an acknowledgement of debt for several reasons. It said Kubheka was a junior employee to whom invoices were submitted for work done. She would then take the invoices to the technical team i.e. either the Chief Operations Officer

or the Project Manager to confirm that the work has indeed been done and if so, either of them would sign on the invoices to confirm that fact. The second respondent had signed a completion certificate regarding the work done by the appellant. The first respondent accepts that the preliminary work was done. However, in this case when reviewing the invoices, the Chief Financial Officer alerted the Chairperson of the first respondent that the appellant was not entitled to any payment at that stage as the main agreement had not been concluded.

[10] The first respondent also contended that the appellant did the preliminary work knowing it was on risk as long as the final agreement had not yet been concluded. Indeed, it did not enter into a final agreement due to its concerns about the appellant's financial ability to carry out the contract. In this regard, Mike Daniel of the appellant had informed Daphne Nkosi, a director of the first respondent in an email dated 26 July 2011 that the appellant was 'experiencing a short term cash flow constraint.' The first respondent was also aware of a letter dated 26 April 2011 by the appellant's auditors stating that the appellant's records 'reflect that the company is technically insolvent'. The first respondent was therefore concerned about the appellant's ability to execute the work if the contract was entered into and therefore wanted assurances in this regard before the final agreement could be signed.

[11] The first respondent submits that one is ineluctably drawn to the conclusion that the appellant was attempting to bolster its finances by seeking payment of the invoiced amounts in an apparent attempt to address concerns of the first respondent regarding the appellant's financial stability.

[12] In my view, there are two issues that are determinative of the appeal, i.e. the condition precedent and whether the emails constitute an acknowledgement of debt.

[13] The appellant was fully aware of the relevant part of clause 2 of the LOA which provides –

'2. **CONDITION PRECEDENT**

2.1 This LOA is conditional upon satisfaction, or waiver by Kalagadi Manganese, of the following condition precedents:

(a) The entering into a final binding agreement between Kalagadi and Kalaida Project Management Company for the execution of the contract works and/or services by no later than 30 July 2011 (the "**Deadline Date**") on the terms and conditions acceptable by Kalagadi Manganese.

2.2 Waiver

(a) The Condition Precedent exists solely for the protection of Kalagadi Manganese and only Kalagadi Manganese can waive such condition, which waiver shall only be in writing.

2.3 Effect of Failure of Conditions

(a) If a Condition Precedent is not satisfied prior to the Deadline Date then this LOA shall *ipso facto* terminate unless extended in writing by Kalagadi Manganese.

(b) If this LOA terminates as aforesaid, no party has any further rights against or obligations to the others, except for any party's rights and obligations accrued at the date of termination, if any.'

[14] As the parties did not enter into a final binding agreement the LOA had terminated as per clause 2.3(a).

[15] No doubt the appellant was aware of this hence the reliance on an alleged acknowledgement of debt. An acknowledgment of debt, commonly referred to as an 'AOD', is a document which contains an unequivocal admission of liability by the debtor. The debtor acknowledges that he or she owes a particular sum of money to the creditor and undertakes to repay the amount owing on terms agreed to between the parties. It may contain incidental terms such as an acceleration clause. An acknowledgment of debt

is a liquid document, i.e. one which proves a debt without any extraneous evidence.

[16] In the context of provisional sentence the document relied upon must be a liquid document. A liquid document is one which contains a clear and unequivocal acknowledgment of debt regarding the amount alleged to be due and payable[1]. In the Constitutional Court case of *Twee Jonge Gezellen*[2] it was stated that -

> 'In principle, . . .a document is liquid if it demonstrates, by its terms, an unconditional acknowledgement of indebtedness in a fixed or ascertainable amount of money due to the plaintiff. Many different sorts of documents have been found to qualify as "liquid" in terms of this definition, ...They include acknowledgments of debt, ...'

[17] Courts have consistently insisted on a clear and unequivocal acknowledgment of indebtedness before regarding a document as sufficiently liquid in the context of obtaining provisional sentence thereon[3].

[18] It is evident from a reading of the emails in question that whilst Kubheka speaks of a 'scheduled date for payment' and thereafter that 'payment will be made on 6 September 2011' and still later that 'payments are going to be processed today,' there is nothing in the emails to show an unequivocal acknowledgment of debt by the first respondent. In Leyland SA v Booysen and Clark Motors[4] it was held –

> 'It was essential for the plaintiff's cause of action (in addition to averring liquid indebtedness under the acknowledgment of debt) to place reliance on the provision of the acknowledgment of debt governing *payability* and to allege facts establishing that the condition precedent to payability has occurred.'

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[1] Harrowsmith v Ceres Flats (Pty) Ltd 1979(2) SA 722 (T)
[2] Twee Jonge Gezellen v Land and Agricultural Development Bank 2011(3) SA 1 CC at 8 para [15]

[3] Harrowsmith v Ceres Flats (Pty) Ltd 1979(2) SA 722 (T) at 743F-G.
[4] 1984(3) 480 at 483A-C.

[19] It follows that where payability is referred to but not an unequivocal undertaking to pay, the emails cannot be regarded as being an acknowledgement of debt as the emails cannot be construed as a clear acknowledgment of money due to the appellant by the first respondent. All that Ms Kubheka, a junior employee of the first respondent was doing is responding to a query about when accounts would be paid.

[20] The fact that the first respondent's project manager had certified that certain work had been completed does not avail the appellant either. As the court *a quo* correctly found, the certificate of completion 'does not impute on the first respondent an acknowledgment of indebtedness if one takes into account the terms and conditions as contained in the letter of award.'

[21] The attempt by the appellant to separate the contents of the emails from the clear provisions of the LOA must fail. Clause 2.1 of the LOA makes it clear that it was subject to the conclusion of the main agreement between the parties. It follows, and the learned Judge in my view correctly found, that the applicant took the risk of rendering the services knowing that it would not be paid unless the main agreement was concluded.

[22] It was also, with respect, correctly found by the court *a quo* that the appellant did not prove that an acknowledgment of debt arose in pursuance of a partly oral and partly written agreement – the latter allegedly being evidenced by the emails. The appellant did foresee or should have foreseen a dispute of facts regarding an alleged partly oral agreement yet chose to utilise motion proceedings.

[23] The first respondent says the appellant knew when it rendered partial services (for which the invoices were issued) that it was doing so on risk. In an email dated 10 August 2011 the appellant's Gerald De Wet wrote to Aaron Maroeshe of the first respondent in which he says, *inter alia*, -

> 'Thanks for the contract I have worked through it. . . . We are currently working at risk on this project and are consequently very uncomfortable with

the position we find ourselves in and are about to suspend all further work on this project until the commercial issues have been satisfactory dealt with.'

[24] The appellant was clearly aware that it was working on risk while the final agreement had not been concluded.

[25] In all these circumstances, the attempt by the appellant to rely on the aforesaid emails as an acknowledgment of debt is without merit.

[26] I would dismiss the appeal with costs.

N. RANCHOD
JUDGE OF THE HIGH COURT

I agree and it is so ordered

M MAVUNDLA
JUDGE OF THE HIGH COURT

I agree

LM MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant	: Adv. J.O Williams (SC)
	Adv. H Groenewald
Instructed by	: Van Der Elst Attorneys Inc.
Counsel on behalf of First Respondent:	Adv. M Sikhakhane (SC)
Instructed by	: Edward Nathan Sonnenbergs
Date heard	: 11 October 2017
Date delivered	: 20 February 2018