THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 214/12

In the matter between:

COMMAND PROTECTION SERVICES
(GAUTENG) (PTY) LTD t/a MAXI SECURITY **APPELLANT**

and

SOUTH AFRICAN POST OFFICE LIMITED **RESPONDENT**

Neutral citation: *Command Protection Services (Gauteng)(Pty) Ltd v South African Post Office Limited* (214/12) [2012] ZASCA 160 16 November 2012).

Coram: **Mthiyane DP, Brand, Cloete and Pillay JJA and Saldulker AJA**
Heard: **1 November 2012**
Delivered: **16 November 2012**

Summary: Acceptance of tender not unconditional – hence it did not bring about a valid and binding contract between the parties.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Poswa J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

BRAND JA (MTHIYANE DP, CLOETE and PILLAY JJA and SALDULKER AJA concurring):

[1] This appeal turns on the question whether or not a binding agreement came into existence between the parties on the terms alleged by the appellant. Proceedings commenced when the appellant, as the plaintiff, instituted an action against the respondent, as the defendant, in the North Gauteng High Court, Pretoria, for damages it allegedly sustained through the respondent's repudiation of an agreement between them. In broad outline the appellant contended that:

(a) on 28 July 2003 the parties concluded a written agreement in terms whereof the appellant undertook to provide guarding services for the respondent's post offices in three regions of the Republic;

(b) on 30 January 2004 the respondent wrote a letter to the appellant which constituted a repudiation of that agreement, which repudiation was accepted by the appellant;

(c) as a result of the respondent's breach of contract, the appellant suffered damages in the sum of about R14 million.

The respondent's answer to this claim consisted, in the main, of a denial that the agreement relied upon by the appellant ever came into existence.

[2] When the matter came before Poswa J in the court a quo, he was asked, by agreement between the parties, to order a separation of issues. In terms of the separation order he consequently granted, the issues relating to the contractual relationship between the parties were to be determined first while all other issues, including those relating to the quantum of the appellant's damages, stood over for later determination. At the end of the preliminary proceedings, Poswa J, in effect, decided all issues placed before him against the appellant. In consequence, he dismissed its action with costs. The appeal to this court against that judgment is with the leave of the court a quo.

[3] The exact nature of issues that arose on appeal will be best understood against the factual background that follows. It all started during October 2002 when the respondent caused an advertisement to be placed in national newspapers inviting tenders for the guarding of post offices in six specified regions of the country. Bidders were invited to apply for more than one region. Details of the services required, so the advertisement said, were stipulated in a document called the Post Office Request for Proposal, which could be obtained from the respondent.

[4] During November 2002 the appellant submitted tender documents corresponding to the terms of the Request for Proposal document, to provide guarding services in all six regions as advertised. These documents were annexed to the appellant's particulars of claim as PC2. Hence they were referred to throughout the proceedings by that description. I find it convenient to do the same. Clause 5 of annexure E to PC2 stipulated that 'acceptance of our proposal will be communicated to us by letter or order through the post' and that 'communication as envisaged above will constitute an agreement between the South African Post Office Limited and ourselves'. Subsequently, the appellant indeed received a letter of acceptance from the respondent dated 28 July 2003.

[5] In argument, counsel referred to the letter of acceptance – again emulating the description of the document in the appellant's particulars of claim – as PC3 and I

propose to do the same. As it happened, the issues that later arose, both in the court a quo and on appeal, turned mainly on the wording of PC3. In the circumstances, the contents of this document seem to warrant a full quotation. It was addressed to the appellant and it read:

'LETTER OF APPOINTMENT

It is with pleasure that we inform you that the Tender Board has awarded the above tender proposal to [you]. As a result you are appointed as the supplier of the above-mentioned service as per our tender proposal.

This appointment is subject to the following:

- BEE improvement; and
- The successful finalisation and signing of a formal contract.

A draft contract will be forwarded to you within (7) seven working days for your comment and to the effect mutually agreed on amendments and finalisation into a formal contract. You are kindly advised to acknowledge receipt of this letter of appointment and provide this office with the contact information of the person(s) responsible for the finalisation of the contract process.

Yours sincerely

[Signed on behalf of the appellant]

Accepted and signed on behalf of the respondent]'

[6] On 30 July 2003 a meeting took place in Pretoria, attended by representatives of both parties. It is common cause that at that meeting the appellant's representatives were told that, though it had tendered for all six regions advertised, it had been awarded the tender in respect of three of these regions only, namely the Western Cape, the Northern Region and the Central Region. It is also common cause that it was agreed at that meeting that, since the respondent's contract with its previous service provider would terminate on 31 August 2003, the appellant would provide the guarding services in the three regions mentioned as of 1 September 2003. Shortly after the meeting, the respondent provided the appellant with a draft contract. Though it was envisaged at the meeting that the contract would soon be finalised, this did not happen. Four further drafts were to follow. The last of these was only provided to the appellant in December 2003. All these drafts were

prepared by the respondent's attorney. They were all lengthy documents, covering over 50 pages and their provisions differ in numerous respects from the provisions of the respondent's original tender. A further common feature of these drafts was a clause devoted entirely to the issue of BEE, which is the well-known abbreviation for black economic empowerment. This topic is covered in clause 39 of both the first and final draft. In both drafts this clause provides, inter alia, that the appellant would maintain a BEE component of at least 40 per cent throughout the contract period and that the respondent reserved the right to monitor compliance with this requirement at six monthly intervals.

[7] In the meantime, and while the parties were negotiating the terms of the consecutive drafts, the appellant started providing guarding services for the respondent in the Western Cape, the Northern Cape and the Central Region as was contemplated at the meeting of 30 July 2003. As it happened, however, the drafts never metamorphosed into a formal agreement. The reason flows from a letter written by the respondent's chief executive officer to the appellant on 30 January 2004. This letter was subsequently relied upon by the appellant in its particulars of claim as a repudiation of the contract between the parties. Its contents warrant citation as it encapsulates the respondent's version of the relationship between the parties at the time. The relevant part of this letter stated:

'1. As you are aware the South African Post Office ("the Post Office") conditionally appointed your company to render guarding security services in 3 operational regions as delineated by the Post Office for its purposes. This appointment was on a month-to-month basis from 01 September 2003, subject to and until finalisation of negotiations and conclusion of the written agreement as contemplated in paragraph 3 hereof.

2. Prior to such appointment, the Post Office had published an invitation for tenders to which your company had submitted its response ("the tender response").

3. It was a term and condition of the appointment that your company and the Post Office (collectively referred to as "the parties") would conclude and sign a written agreement within a reasonable period from the date of award of the said tender to your company.

4. . . .

5. Regrettably, whilst negotiations towards conclusion of a written agreement were in progress, your company engaged in conduct that has materially and seriously undermined the trust and utmost good faith relationship between the parties. Examples of such conduct (and this is by no means an exhaustive list of incidents) are:-

. . .

6. . . .

7. . . . The incidents constitute a clear breach of the basis of the existing relationship between the parties. The Post Office therefore hereby exercises its rights and gives your company notice that:-

7.1 it will not continue with any contractual negotiations with your company as envisaged in the award of the tender to your company; and

7.2 the month-to-month contractual relationship between the parties will come to an end on 29 February 2004 on which date your company must vacate all premises of the Post Office.

8. . . .'

[8] According to the appellant's particulars of claim, the contract upon which it founded its case came about when the respondent accepted the offer contained in PC2, in terms of its letter of 28 July 2003, PC3, which was in turn accepted on behalf of the appellant, as appears from the wording at the foot of PC3. With regard to the statement in PC3 that 'this appointment is subject to . . .

- BEE improvement; and
- The successful finalisation and signing of a formal contract', the appellant pertinently pleaded that these provisions did not constitute suspensive conditions. In addition, various alternative allegations were made in the appellant's particulars of claim, which would arise in the event of the court finding – contrary to the appellant's main allegation – that the provisions of PC3 referred to did in fact constitute suspensive conditions. These related to fulfilment of the suspensive conditions, waiver, estoppel and fictional fulfilment. In its plea the respondent, in turn, contended that the provisions of the letter referred to indeed constituted suspensive conditions which had not been fulfilled. The appellant's alternative allegations relating to waiver, estoppel and fictional fulfilment were essentially met in the plea by bald denials.

[9] Much of the evidence led during the course of the trial had relevance to these alternative allegations. On appeal, counsel for the appellant, however, made it clear from the outset that these alternative contentions were no longer pursued. Ultimately the outcome of the appeal thus turns on one question only: whether on a proper interpretation of PC3, it constituted an unconditional acceptance of the appellant's offer contained in the tender document.

[10] The way in which the appellant introduced the debate in its particulars of claim, raised the concept of suspensive conditions. As explained by Botha J in *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 695C-E, a suspensive condition of a contract, properly so called, 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 fulfilled, the obligations under the contract become enforceable. If the condition is not fulfilled, the agreement becomes unenforceable (see also eg *Jurgens Eiendomsagente v Share* 1990 (4) SA 664 (A) at 674E-J; De Wet & Van Wyk *Kontraktereg & Handelsreg* 5 ed Vol 1 at 146-154; RH Christie *The Law of Contract* 6 ed (2011) at 137 and 145).

[11] It is clear that, thus understood, the stipulation in PC3 which rendered 'this appointment subject to the successful finalisation and signing of a formal contract' could never have been intended as a suspensive condition in the true sense. If a formal contract were to be finalised and signed, this would not result in the agreement constituted by the respondent's acceptance of PC2, becoming operative. What would happen in that event is that a new agreement, being the one constituted by the 'formal contract', would come into operation. At the same time it is equally clear to me that the respondent's case was never that the stipulation under consideration constituted a suspensive condition in the real sense. Right from the outset the respondent's case was that PC3 was not an unconditional acceptance of the appellant's tender contained in PC2; that, on the contrary, the acceptance was especially made subject to two conditions; that these conditions were never fulfilled; and that in consequence the contract between the parties relied upon by the

appellant, with the terms reflected in PC2, never came into existence. By the same token, the appellant's case was from the beginning that PC3 constituted an unconditional acceptance of its offer contained in PC2 with the result that a contract came into existence on those terms.

[12] The dispute thus arising is not novel. It frequently happens, particularly in complicated transactions, that the parties reach agreement by tender (or offer) and acceptance while there are clearly some outstanding issues that require further negotiation and agreement. Our case law recognises that in these situations there are two possibilities. The first is that the agreement reached by the acceptance of the offer lacked *animus contrahendi* because it was conditional upon consensus being reached, after further negotiation, on the outstanding issues. In that event the law will recognise no contractual relationship, the offer and acceptance notwithstanding, unless and until the outstanding issues have been settled by agreement. The second possibility is that the parties intended that the acceptance of the offer would give rise to a binding contract and that the outstanding issues would merely be left for later negotiation. If in this event the parties should fail to reach agreement on the outstanding issues, the original contract would prevail (see eg *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92A-E; *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A) at 567A-C).

[13] Illustrations of cases that were held by this court to be manifestations of the first possibility are to be found in *Namibian Minerals Corporation* and in *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) while the facts in *Alsthom Equipment* and in *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) were held to demonstrate the second (see also *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 820I-821E). The criterion as to whether the facts of a particular case indicate the one or the other was succinctly summarised thus by Corbett JA in *Alsthom Equipments* at 92E:

'Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances.'

[14] Proceeding from the premise of this criterion, the appellant's argument started with a reference to the terms of PC2 and PC3. With regard to the tender, PC2, it emphasised the stipulation in clause 5 of annexure E that 'Acceptance of our proposal will be communicated to us by letter or order through the post' and that 'communication as envisaged above will constitute an agreement between [the parties]'. Since this document originally emanated from the respondent in draft form, so the argument went, this is a strong indication that both parties intended that the sending of a letter of acceptance would result in a final and binding agreement between the parties. With reference to the letter of acceptance, PC3, the appellant's argument relied on the following. The letter is headed 'Letter of Appointment', it informs the appellant 'with pleasure' that the Tender Board has awarded [past tense] the above tender proposal to [you]', 'and that as a result you are appointed [present tense] as the supplier of the above-mentioned service as per our tender proposal'. What was not said, so the appellant pointed out, was that an agreement would only come into operation on formalisation and signature of a final contract.

[15] Having regard to the terms of both documents, so the appellant's argument proceeded, this is not a situation where one is faced with trying to cobble together the terms of an agreement from, for example, oral communications and items of correspondence. Annexure PC2 constitutes a detailed written contractual offer, made up to a large extent of contractual terms emanating from the documents provided by the respondent itself. There is therefore no improbability about the parties having concluded an agreement on the particular terms; there is more than sufficient detail set out in the documents for the parties to implement their agreement.

[16] Barring the last part of PC3, which follows upon the proviso 'this appointment is subject to', I think the appellant's arguments based on the terms of PC2 and 3 would be virtually unassailable. In fact it would closely resemble the facts of *Alsthom Equipments* (compare the statement by Corbett JA at 93B-D). As it happens, however, my very difficulty with the argument arises from that last part. I shall presently revert to that difficulty. But first I proceed to trace the progression of the appellant's further argument based on the subsequent conduct of the parties. In this regard the appellant referred: (a) to the agreement between the parties, at their meeting of 30 July 2003, that the appellant would provide guarding services from 1 September 2003; and (b) the fact that the appellant pointed out, the appellant indeed provided those services, despite the parties' lack of success in finalising a formal contract. The inherent probabilities are, so the appellant argued, that these services were rendered in terms of the agreement constituted by PC2 and 3. The position taken by the respondent in correspondence and in its plea, namely, that what was provided was merely a service on a month-to-month basis, pending the finalisation of the formal contract, so the appellant maintained, was not borne out by the evidence of either Mr Vilakazi or Mr Els, who were the only witnesses who testified on behalf of the respondent.

[17] Further evidence relied upon by the appellant derived from the testimony of the respondent's witness, Mr Els. According to this evidence it was the practice of the respondent at the time to attempt, after the relevant appointment had been made, to try to negotiate discounts on the successful tenderer's price. Such an alteration would plainly constitute an amendment to the terms of the appointment agreement hence this practice would explain, so the appellant argued, the reference to 'mutually agreed on amendments' in PC3. What is more, so the argument proceeded, this reference to 'mutually agreed on amendments' lends further support to the contention that the parties regarded PC3 as resulting in a valid and binding agreement: if no agreement came into existence by virtue of PC3, there would be no basis for any reference to 'mutually agreed on amendments'. In this event, the

parties would simply be free to negotiate whatever terms might ultimately be agreed upon, if agreement were ever to be reached.

[18] This brings me to my difficulty with the appellant's argument, which, as I have said, arises mainly from the last part of PC3. For the sake of the closer analysis I intend, it bears repetition. It reads:

'This appointment is subject to the following:

- BEE improvement; and
- The successful finalisation and signing of a formal contract.

A draft contract will be forwarded to you within 7 (seven) working days for your comment and to . . . effect mutually agreed on amendments and finalisation into a formal contract. You are kindly advised to acknowledge receipt of this letter of appointment and provide this office with the contact information of the person(s) responsible for the finalisation of the contract process.'

[19] The expression 'subject to' is generally understood in the contractual context, to introduce a some or other condition (see eg *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) at 1188A-C). Thus understood, the introduction to the last part immediately gives rise to the impression that PC3 was not an unconditional acceptance of the tender in PC2, as contended for by the appellant; that although the tender, PC2, expressly dictated an unconditional acceptance of its terms, PC3 did not adhere to that demand. Instead, it presented the appellant with a conditional acceptance or counter-offer which the latter then formally accepted at the foot of the letter.

[20] Underneath 'subject to' PC3 then requires 'BEE improvement'. It is clear to me that these words are not sufficiently certain to constitute a provision of a contract, whether in the form of a condition or a term. Though it indicates that the respondent was not satisfied with the appellant's existing BEE status, it is not clear in what respect and to what extent that status would have to improve in order to meet the appellant's requirements. This was therefore clearly a topic on which the respondent called for further negotiation and agreement. It is true, as the appellant argued, that

the reference to ‘BEE improvement’ could notionally be understood to reflect an intent that PC3 would give rise to a binding contract while this solitary issue stood over for later negotiation and agreement. From the respondent’s perspective this would mean, however, that if the parties should fail to reach agreement on this issue, the respondent would nonetheless be bound to a two year contract without its BEE requirements ever being satisfied. I find this postulation highly unlikely. It would hardly be compatible with the fact that PC3 underscored the appellant’s BEE improvement as the one topic on which the respondent regarded negotiation and agreement as essential. Moreover, the notion that the respondent regarded the BEE issue as one of lesser importance that could subsequently be dealt with in isolation, is refuted by the draft agreements that were subsequently prepared on its behalf where the BEE clearly took centre stage. A far more likely inference, in my view, is that the respondent intended – and that it was so accepted by the appellant – that there would be no binding agreement until the BEE requirements that the appellant would have to meet, had been agreed upon.

[21] The second stipulation under ‘subject to’ requires the ‘successful finalisation . . . of a formal contract’. ‘Finalisation’ envisages a process, which in the context can only signify further negotiation, while the reference to ‘successful’ suggests an awareness that the process might not be successful. In the context, ‘successful’ can only mean resulting in a formal contract. Conversely stated, the requirement can only mean that unless and until the further negotiations that were contemplated resulted in a formal agreement, there would be no contractual relationship between the parties. This inference, I believe, is underscored by the last two sentences of PC3. The penultimate sentence envisages that a draft agreement would be prepared by the respondent; that the draft would be forwarded to the appellant; that the appellant would then have the opportunity to suggest amendments to the draft; and that, if agreement could be reached on the amendment proposed, this would lead to the finalisation of a formal agreement. In the last sentence the appellant is asked to nominate its representatives during the finalisation process. As I see it this means, in short, that as yet there was no binding contract. The contract would only come into

existence upon the successful finalisation of the contract process, after inter-action between representatives of the parties.

[22] I believe my interpretation of PC3 is borne out by the subsequent conduct of the parties. The appellant nominated one of its senior employees, Mr Steve Bolton, as its representative in the proposed contract negotiations. The respondent's attorney, Mr Vilakazi, prepared the first draft contract. The draft was then forwarded to the appellant and negotiations ensued which in turn led to the preparation of further drafts by Mr Vilakazi. From all this it should be plain that I do not agree with the interpretation of 'mutually agreed on amendments' in the penultimate sentence of PC3 which was contended for by the appellant in argument. It will be remembered that this contention proposes that the expression must be understood to refer to an amendment to the terms of the agreement constituted by PC2 and PC3. I do not agree with this proposal. As I see it, the expression is clearly used in the context of the draft contract which was contemplated. It can therefore only refer to amendments to the draft which, if agreed upon, would become part of the proposed contract.

[23] Lastly there is the reliance by the appellant on the agreement by the parties at their meeting of 30 July 2003, that the appellant would provide guarding services as from 1 September 2003 and the undisputed evidence that effect was given to that agreement. The argument which the appellants sought to build on this evidence was that it constituted confirmation of an agreement embodied by PC2 and PC3. I think there are several answers to this argument. In the first place, the agreement at the meeting of 30 July 2003 was clearly reached at a stage when the parties both anticipated that a formal agreement would be finalised by 1 September 2003. It therefore lends no support to the inference that a binding agreement already existed on 30 July 2003.

[24] In the second place there is evidence which seems to indicate that the appellant rendered the guarding services from 1 September 2003 on terms

pertinently agreed upon at a meeting of 12 August 2003 and that these terms were substantially different from those reflected in PC2 and PC3. That, of course, would put paid to the whole argument. But, be that as it may, the wording of PC3, as I have said, leaves little, if any, room for doubt that final agreement had not yet been reached. In that light the most likely inference is that the appellant rendered the guarding services from 1 September 2003 pursuant to a collateral agreement and not in terms of an agreement reflected in PC2 and PC3. Whether this collateral agreement was impliedly on a month-to-month basis as suggested by the respondent, or on some other basis, is therefore of no consequence.

[25] The conclusion I arrive at is therefore that PC3 did not constitute an unconditional acceptance of the tender contained in PC2; but that it was intended by the respondent and accepted by the appellant as a counter-offer. The agreement that came into existence when the appellant accepted this counter-offer was an agreement to negotiate. Whether that agreement would be enforceable in the light of decisions such as *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), is one we do not have to consider. That is not the agreement that the appellant relied upon. The agreement the appellant relied upon is one that, in my view, never came into existence. I therefore agree with the outcome of the litigation in the court a quo, albeit for reasons that are materially different.

[26] For these reasons the appeal is dismissed with costs, including the costs of two counsel.

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F D J BRAND

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	J A NEWDIGATE SC N DE JAGER
Instructed by:	GROSS PAPADOPULO & ASSOCIATES PRETORIA
Correspondents:	LOVIUS BLOCK ATTORNEYS BLOEMFONTEIN
For Respondent:	J P VORSTER SC R P A RAMAWELA
Instructed by:	M VILAKAZI TAU ATTORNEYS PRETORIA
Correspondents:	THE STATE ATTORNEY BLOEMFONTEIN