1**NOT REPORTABLE**

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG

AR218/08

In the matter between:

BYTES SYSTEMS INTERGRATION (PTY) LTD **APPELLANT**

and

EDWARD ALLAN MEEK **RESPONDENT**

JUDGMENT

Delivered on:

SISHI J:

[1] The Respondent instituted an action against the Appellant in the Magistrate's Court Durban wherein he successfully claimed commission in the amount of R74 840.58 due to him as a result of obtaining an order from Toyota S.A. Motors (Pty) Ltd, for services to be provided for by the Appellant and which order was obtained as a result of the Respondent's efforts.

[2] The Respondent was employed by the Appellant as a Business Development Manager with effect from 3 June 2002, which employment was terminated by the Respondent pursuant to a letter of resignation, bringing his contract to an

end with effect from 31 December 2004. The Respondent was, however, permitted by appellant to leave its employ on 15 December 2004.

[3] In terms of paragraph 4 of Plaintiff's particulars of claim the express, alternatively, implied, alternatively, tacit terms of the agreement of employment concluded by the parties were:

(a) The Plaintiff would canvass and solicit for orders, for products supplied by the Defendant;

(b) The Plaintiff would transmit orders received from customers to the Defendant;

(c) Payment would be made directly by customers to the Defendant;

(d) The Plaintiff would be paid by the Defendant a commission on orders executed by the Defendant and on renewal for the portion of the annual amount on increased repeats of such orders;

(e) Commission would be paid at the rate of six percent of the total of the gross profit of the order;

(f) The gross profit would be calculated as at the time of final invoice of the order;

(g) The Plaintiff would be entitled to be paid commission on orders executed prior to the termination of his agency. The Plaintiff in the court a quo is the Respondent herein and Appellant herein the defendant therein.

[4] Paragraph 5 of the Plaintiff's particulars of claim provide that on or about 22 October 2004, a contract was concluded between the Appellant and the Toyota SA Motors (Pty) Ltd. In terms of the policy, should the Respondent obtain orders, he would be paid a commission equal six percent of the total gross profit. Paragraph 9 of the Particulars of Claim provide that the Appellant remained obliged to continue to account and pay to the Respondent commission on orders placed through the Plaintiff (and repeat orders) prior to 31 December 2004, but executed by the Defendant up to and after that date. The Respondent admitted in evidence that the word "executed" in the context as pleaded, meant a concluded sale agreement.

[5] On 11 October 2004, the Respondent sent an e-mail to his colleagues saying:

> *"It has been a long road, however, we have finally arrived. I would like to thank everyone involved for your effort and commitment to winning this bid.*
>
> *The next steps are that we will receive a letter of commitment from Toyota, followed by a contract and order".*

The Respondent himself herein says that the letter of 22 October 2004 is a letter of commitment.

[6] In the letter dated 22 October 2004, Toyota SA (Pty) Ltd advised both the Appellant and the Respondent that the Defendant's tender had been successful. This letter reads as follows:

> *"Dear Eddie,*
>
> *This letter serves to inform you that CS Holdings have been successful in tendering for the provision of an asset tracking system at Toyota SA Motors. Based on both parties signing a written agreement, CS Holdings may commence with this projects. The agreement will be issued to you during the course of next week. Individual orders will only be issued at the agreed milestones".*

I may as well point out that CS Holdings is the former name of the Appellant.

[7] Evidence established that no agreement had been concluded until 20 January 2005 when the contract was signed by Toyota SA (Pty) Ltd. Appellant had signed this contract on 19 December 2004. However, the Respondent has pleaded that this contract was concluded on or about 22 October 2004.

[8] If the contract between the Appellant and Toyota SA had been signed by both parties during December 2004, the Respondent would have been entitled to and would have been paid his commission. It was not only the absence of the Toyota officials to sign the contract which caused the delay, but there had been material issues outstanding for resolution, such as the limitation of liability and agreed milestones for performance.

[9] The commission policy was not concluded in July 2004, the commission policy document circulated in July 2004, constituted only a variation of the original commission policy concluded between Appellant and Respondent in terms of his contract of employment during June 2002. In terms of the variation payment commission could only be made on the final invoice for a sale and not on part invoices or progress billing as it used to be.

[10] The Respondent admitted in evidence that the policy was created in order to stipulate a cut off point in order to avoid subsequent disputes concerning commission once an employee terminated his or her employment with Appellant. The policy had been applied in the same manner and consistently by the Appellant in the past in respect of the employees such as Messrs Blake and Lampel.

[11] In an e-mail dated 17 May 2005 addressed to the Respondent, Mr Hunter of the Appellant stated that the commission would only be calculated when the project is complete. He had not communicated to the Respondent that the entitlement to the commission was challenged. It was only on 3 October 2005, that the Appellant through its legal adviser, refuted that it was obliged to pay anything at all on the basis that the Respondent was no longer employed by the Appellant.

[12] It is common cause that there were no orders placed with the Appellant prior to the conclusion of the written contract and signature by both parties, and to this extent, Toyota employees expressed their frustration in the delay.

[13] The terms of the Appellant's commission policy were as follows:

- Commission will be paid at the rate of six percent of the total gross profit;

- The gross profit will be calculated at the time of the invoice;

- Commission is payable for a new SLA, and thereafter on renewal only for the portion of the annual amount that has increased, through escalation or value;

- Payment can only be made on a final invoice for a sale and not on part invoices or progress billing. If an advance or commission is required, this must be authorised by management and will be regarded as an advance on the final payment;

- If commission is to be split with another person, this must be agreed in writing prior to the order being received and be approved by management."

[14] This July 2004 commission policy document, according to the evidence, constituted only a variation of the original commission policy concluded

between the Appellant and Respondent in terms of his contract of employment during 2002. As indicated above, the Respondent accepted that the policy was created in order to stipulate a cut off point to avoid subsequent dispute concerning commission once an employee terminated his or her employment with Appellant.

[15] The main issue in this appeal is whether the Magistrate's finding that a contract between Appellant and Toyota S.A. was concluded on 22 October 2004 was correct.

[16] The Appellant argued that the findings of the court a quo are clearly inconsistent with the evidence before court and unsustainable, given the common cause facts before the court a quo, in particular, concerning the terms of the commission policy as alleged and proved by both parties, and the evidence concerning whether or not a valid binding contract had in fact been concluded in October 2004. Alternatively, whether or not a written contract had yet to be concluded in order for the sale to be considered as concluded and hence *"executed*".

[17] The Appellant submits that although the Magistrate stated the law correctly in relation to:

§ The fact that there had to be an unequivocal acceptance of an offer;

§ An agent was generally only said to have concluded his mandate on conclusion of the contract between the principal and third party; and

§ There had to be an agreement on the essential terms and conditions of a contract and an intention to be bound, notwithstanding subsequent negotiations and the conclusion of a written agreement, *animus contrahendi,* in order to find that the letter dated 22 October 2004 constituted an agreement.

the court a quo simply misdirected itself with regards to what in fact was common cause and not disputed, and thereafter applied the law incorrectly to the facts.

[18] The Appellant submitted that the court a quo erred in accepting that the letter dated 22 October 2004 was an unequivocal acceptance of an offer made by the Appellant in the form of a tender. The acceptance was clearly not unequivocal but contained the condition that a written contract signed by both parties needed to be concluded. This was accepted by the Respondent and his Counsel in argument and evidence. The Respondent's case was simply that the condition had been fulfilled, albeit in January 2005. The Appellant submits further that whether or not in a particular case an alleged initial agreement acquires contractual force or not, depends upon the intention of the parties, gathered from their conduct and terms of the agreement and

surrounding circumstances. The Appellant referred to the case of ***CGEE Alsthom Equipments et Enterprises Electriques, South African Division vs GKN Sankey (Pty) Ltd 1987 (1) SA 81 (A) at 92E.***

[19] The Magistrate's finding that the letter dated 22 October 2004 comprised an unequivocal acceptance of an offer in the form of a tender and that performance or conclusion of the contract was not delayed until the formal agreement was signed by both parties during January 2005, is untenable. Given the clear wording of the letter of the 22nd October 2004, the inclusion of the reference to performance only being possible after a binding agreement had been signed by both parties, together with the fact that no official orders were placed and that actual performance was in fact delayed until such time as both parties had signed the formal agreement, I take a view which is different from that taken by the Magistrate. Furthermore, the evidence was that there were material issues, such as the question of the liability of the Appellant vis-a-vis Toyota SA, as well as the agreed milestones for performance, which had not yet been agreed at the time and which required resolution, by way of further negotiation and agreement, before any final agreement could be formally concluded by the signature thereof by the contracting parties. The express terms of the letter dated 22 October 2004 and the subsequent conduct of the parties, demonstrate a clear intention not to confer contractual force upon their initial agreement and to be bound to performance in terms of a purely provisional contract, such as was concluded

during October 2004. Such initial agreement was merely a precursor to the final agreement, as subsequently concluded and signed.

[20] Paragraphs 2 and 4 of the letter dated 22 October 2004 are important in determining the issues before this Court. These paragraphs read, *inter alia*, that: "b*ased on the parties signing original agreement CS Holdings may commence with this project*". Paragraph 2 clearly provides that the project will only commence once both parties had signed a written agreement. Paragraph 4, *"individual order numbers will only be issued at the agreed milestones".*

[21] The main issue is whether an agreement was concluded by virtue of the e-mail dated 22 October 2004. The evidence and argument presented by the Respondent's Counsel at the hearing of the matter was certainly not that there was, in existence, some form of provisional executable agreement prior to January 2005. In the pleadings the Respondent alleged that on or about 22 October 2004, a contract was concluded between the Defendant and Toyota SA (Pty) Ltd. The Appellant denied this and averred that this was a letter of intent or a letter of commitment. The Appellant has argued, correctly in my view, that the answer to the question whether an agreement was concluded by the letter of 22 October 2004 is to be found in the last paragraph of the e-mail from the Respondent. The last paragraph thereof reads as follows: "*the next steps are that we will receive a letter of commitment from Toyota*

followed by a contract and an order." This e-mail was sent by the Respondent to the officials of the Appellant on 11 October 2004. The letter of commitment from Toyota was received on 22 October 2004.

[22] Counsel for the Respondent submitted that the contract was concluded prior to 31 December 2004. She further submitted that the tender had been accepted. However, such acceptance failed to provide the terms of the agreement allegedly concluded on 22 October 2004. Counsel invited to the Court to apply the principles as set out in the Alsthom case *supra*.

She submitted that in the Alsthom case, supra, it was held that the words "… *we have pleasure in informing you that the order … has been awarded to yourselves"* were susceptible only of the meaning that the Respondent's tender had been accepted and that it constituted an unqualified acceptance of the Respondent's tender, and that despite the existence of outstanding matters, that agreement had been intended by the parties to constitute a binding contract. She drew attention to the fact that Corbett JA stated as follows at page 90:

As Watermeyer ACJ remarked in Reid Brothers (South Africa Ltd) v Fischer Bearings company Ltd 1943 AD 232 at 241, '… *a binding contract is as a rule constituted by the acceptance of an offer'* ".

[23] Counsel for the Appellant submitted that what happened in Alsthom's case, *supra*, was completely distinguishable from what the situation was in this case. She submitted that similarly there was a clear tender in that case. From the judgment one can understand or infer that there was evidence led in that matter as to what the terms of the tender were. In other words, the tender was capable of being accepted, thereby giving rise to the conclusion of a contract. The letter or the telefax in that matter confirmed acceptance, thereby accepting the business. It said subject to officiation, which was the word used in that contract. But what was important in that case was that the letter was precipitated because the Plaintiff needed to be able to place orders to start performing the contract. He needed to give himself time to order steel, which was part of the goods that were dealt with in that tender. There the Court of Appeal held that the intention of the parties, to be gathered from their conduct, the terms of their agreement and the surrounding circumstances, was decisive of whether or not the initial agreement acquired contractual force. In the present case, not only did the letter clearly state that the project can only commence once both parties have signed a formal written agreement, but it was further specified that only thereafter would order numbers be issued at the agreed milestones. Such milestones, in turn, was an issue yet to be agreed. It was clear that there would be no execution of any orders prior thereto. The contents of the letter could therefore hardly be clearer and the conduct of the parties is consistent only with the fact that there was no binding agreement at that stage. All of that is compounded by the fact that there was no evidence before the court a quo of what the terms of the tender were and whether or not such unspecified terms were comprehensive

enough to create a binding contract, even had the parties so intended. This lacuna was further exacerbated by the fact that the agreement, as eventually signed on 20 January 2005, was also not before the court.

[24] In *Alsthom's* case, supra, unlike the present matter, what happened there was that the letter of acceptance was permissive of the arrangement that performance would be allowed to start before the formal agreement was reduced to writing. The facts of the *Alsthom* case are therefore clearly distinguishable from the facts of the present case.

[25] Counsel for the Respondent submitted that the terms of the contract between Toyota and Appellant were not relevant in the circumstances. According to her, the mandate had been duly obtained, despite the fact that it was clear that no orders could be placed consequent upon the so-called agreement of 22 October 2004. It is in fact common cause that no orders were placed until after the written agreement was signed on 20 January 2005.

[26] The response by Toyota was clear. It said that, in order to commence the course of business, it required a written agreement, duly signed by the parties thereto. What had, *inter alia*, to be included in such written agreement were the milestones, which still had to be agreed. It appears from further correspondence prior to the signature of the contract that there was also a

further sticking point, this being relevant to the issue of liability, which needed to be resolved before the contract was eventually signed.

[27] Where parties are *ad litem* as to the material terms or conditions of a contract, the onus of proving that agreement existed that the legal validity of the contract should be suspended or postponed until after due execution of a written document, lies upon the party who alleges it.

(See First National Bank Ltd v Avtjoglou 2000 (1) SA 989 CPD at 995 (E); Build a Brick & Another v Eskom 1996 (1) SA 115 (OPD)

In First National Bank Ltd, *supra*, at page 995 E-G Maya AJ (as she then was) stated:

> "*It is trite that where the parties are shown to have been ad litem as to the material conditions of the contract, the onus of proving an agreement that legal validity would be postponed until the due execution of a written document lies upon the party who alleges it. Wood v Walters 1921 AD 303 at 305-6; Goldblatt v Freemantle 1920 AD 123 at 128*
>
> *Defendant states in the letter that: "I do however require a signed returned copy duly signed by a bank before paying the first R2 000 as agreed." In my view, this statement demonstrates that defendant did not hold himself bound by the agreement until plaintiff had also signed it and furnished him with a copy thereof. The contrary is untenable*."

In the present matter it is clear that appellant and Toyota, as the parties were *ad idem* regarding certain of the material terms of their agreement, save in respect of those relating to milestones and liability, which were material to the conclusion of the final written contract, as eventually signed. The onus is therefore on the Appellant to prove that legal validity should be postponed until the execution of a legal document in the form of the contract, as eventually signed during January 2005. Considering all the material placed before the court, I am satisfied that Appellant has discharged this onus.

[28] Consequently, the letter of 22 October 2004 cannot in my view be construed as a final agreement between the parties upon which orders could be placed within the ambit of the policy on the commission which governed the relationship between Appellant and Respondent.

In the alternative, Counsel for the Respondent submitted that in the event of it being found that the letter of 22 October 2004 was not intended to be construed by Appellant and Toyota as an enforceable contract, then it is the submission of the Respondent that a binding agreement had in fact come into existence when the contractual offer, in the form of the written contract, had been presented to the Appellant and it accepted such offer by signing it. It is not disputed that this was during December 2004, prior to the termination of the Respondent's employment.

[29] The Respondent submitted further that the mere fact that the agreement had not been signed by the Toyota prior to the Respondent's termination of his employment did not mean that there was no binding contract between the Appellant and Toyota. It could not have been intended that the Respondent would forfeit his commission merely as a result of the failure of Toyota to sign he agreement timeously.

Miss Smart, for the Respondent, referred to the case of ***Roberts and Another v Martin 2005 (4) SA 163 C*** where is was held that where a party has made a written offer and it was unequivocally accepted and signed by the offeree, but not signed by the offeror, and the offeror has continued to act in accordance with the terms embodied in the offer, there was no reason why the offeror could not be bound by the contract. Miss Smart submitted that in order to determine the intention of the party to a contract, one has to look at the behaviour and the surrounding circumstances.

[30] The interpretation of a contract starts firstly, with the wording of the document. If its ambiguous, one looks to other aids to interpretation, one of which may ultimately be the conduct of the parties. But if the wording of the contract is unequivocal, one does not need to consider the conduct of the parties. The letter of 22 October 2004 is clear and unambiguous. The terms of that letter could never have constituted a binding agreement between the parties which would entitle the Respondent to be paid commission in terms of the policy.

[31] Furthermore, what is clear from the pleadings is that the Plaintiff (Respondent in the appeal) would be paid by the Defendant (the Appellant) a commission on orders executed by the Defendant and upon renewal of such orders, for that portion by which the annual amount increased on repeat of such orders. In the present matter, the contract was only signed on 20 January 2005. It is also common cause that no orders were executed by the Defendant prior to the termination of his employment and/or prior to the signing of the agreement (paragraph 4(d) of the plea). Furthermore, in paragraph 4(g) of the plea the Defendant pleaded that the Plaintiff would be entitled to be paid commission on orders executed prior to the termination of his agency. It is common cause that no such orders were executed prior to the termination of his agency in terms of the contract which was signed by Toyota on 20 January 2005. Plaintiff's contract of employment ended on 31 December 2004, prior to the signing of the contract by Toyota.

[32] In paragraph 9 of the pleadings the Respondent (Plaintiff) also averred that the Defendant (Appellant) would remain obliged to continue to account and pay to the Plaintiff his commission on orders placed through the Plaintiff, or on repeat orders placed prior to 31 December 2004 but executed by the Defendant (Appellant) up to and after that date. However, it is common cause that in terms of the agreement which was signed by Toyota on 20 January 2005, no orders were placed in terms of that agreement prior to such signature.

[33] In my view the Magistrate clearly misdirected himself in concluding that the letter dated 22 October 2004 constituted an agreement between the parties which entitled the Respondent to be paid commission. He also misdirected himself in finding that the validity of the said contract, as eventually concluded following upon the letter dated 22 October 2004 and as signed by Toyota on 20 January 2005, did not depend upon the signature thereof by the parties thereto, for its legal efficacy.

[34] In my view the Magistrate therefore erred in finding, notwithstanding the fact that agents normally only become entitled to their commission upon conclusion of their mandates, which generally are based upon the conclusion of valid and enforceable contracts between their principals and the third parties, that the Respondent had in fact and in law duly performed his obligations. The Magistrate should have found that a valid and binding contract had not come into existence on 22 October 2004 and alternatively that the contract submitted by Toyota SA to Appellant on 14 December 2004 for signature was not, in the absence of Toyota having signed it, an offer upon the signature of which by the Appellant any valid and binding contract was created. This is so particularly in the light of the fact that the contract document did not serve in evidence before the court a quo, and not withstanding the fact that the letter dated 22 October 2004 made provision for both parties to sign the written agreement before the project could be commenced.

[35] Counsel for the Appellant submitted, correctly in my view, that the findings of the court a quo are clearly inconsistent with the evidence before court and unsustainable, given the common cause facts before the court a quo. In particular, concerning the terms of the commission policy as allegedly approved by both parties and the evidence concerning whether or not a valid and binding contract had in fact been concluded in October 2004, alternatively whether or not a written contract had yet to be concluded before the sales could be considered as concluded and hence executed. In my view the alternative justification for the Magistrate's finding, namely that the written contract produced by Toyota SA comprised an offer which was concluded and accepted by Appellant during December 2004, is untenable. This is so given the express terms on the letter dated 22 October 2004, requiring that both parties should sign the agreement, as well as the absence of any evidence led on the agreement, which would no doubt have contained a term that the contract would only be concluded upon signature by both parties. It was not the Respondent's case that an agreement had in fact been concluded in December 2004 as ultimately found by the court a quo. There is simply no evidence to support this alternative justification.

[36] Consequently the misdirections committed by the Magistrate in the court a quo and as they are set out above, justify the setting aside of his decision in this matter. In my respectful view the Magistrate misdirected himself in regard to the evidence before him and mis-applied the law in relation to such

evidence. The appeal should therefore be upheld and the decision of the court a quo be set aside.

In the result I propose that the following order be made:

1. The appeal is upheld, with costs.

2. The judgment of the court a quo is set aside and substituted with the following:

> "The Plaintiff's claim is dismissed, with costs."

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SISHI J

I agree and it is so ordered.

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Van Zyl J

Date of Hearing	:	8 September 2008
Date of Judgment	:	June 2009
Appellant's Attorneys	:	Strauss Daly Inc c/o Botha & Olivier Inc 239 Chapel Street Pietermaritzburg 3201
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