
SOUTH AFRICA / JUDGMENT

Bohica Business Consulting CC v Bathusi Investments (PTY) LTD (6229/2013) [2017] ZAGPPHC 1118 (8 December 2017) [2017] ZAGPPHC 1118

COURT

North Gauteng High Court, Pretoria

BEFORE

Brano

CASE / FILE NUMBER

6229/2013

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 6229/2013

In the matter between

BOHICA BUSINESS CONSULTING CC

Plaintiff

and

BATHUSI INVESTMENTS (PTY) LTD

Defendant

JUDGMENT

BRANO, AJ

Introduction

- [1] At the outset I must apologise for the time it took to render judgment in this matter. Shortly after the trial in this matter, on 2 June 2017, my laptop computer with partly written judgments and notes and my benchbook with my trial notes were stolen from my motorcar. I then had to request the typed record of the trial, through which I had to work in the absence of my own notes. This delay was exacerbated by the fact that there were several other reserved judgments with respect to which I faced the same predicament.
- [2] In this matter, the Plaintiff claims from the Defendant, on the basis of what it describes as a partly oral, partly written contract concluded between it, represented by Nasim Randeree ('Randeree') and one Buthelezi and Mhlongo, the amount of R648 911.67 with interest and costs.
- [3] This amount, on the Plaintiff's version, constitutes the outstanding balance on consulting services rendered to the Defendant in terms of _the aforesaid contract with respect to preparation of an application for a Route Operator's Licence (a form of gambling licence).

Brief

background

- [4] During the course of 2008 Buthelezi and Mhlongo formed the intention to apply for a Route Operators Licence in order to operate a gambling business. Eager to get the process underway, they consulted with and eventually contracted with the Plaintiff, represented by Ramderee, for the provision of advisory and facilitative services in the application process.
- [5] Their plan was to establish or acquire a company through which to run the business, but they had not yet done so. Instead, at that stage they negotiated and contracted on behalf of a company yet to be formed or acquired. In February 2009 after several rounds of initial meetings and negotiations during which draft proposals were submitted to Buthelezi and Mhlongo, Randeree on behalf of the Plaintiff submitted a detailed proposal in the form of an offer or quotation to them.
- [6] This proposal was discussed at a meeting during which, on Randeree's version, Buthelezi and Mhlongo agreed to accept the proposal and undertook to send a signed copy to him later. When within a few days Randeree had not received a signed copy, he simply signed the proposal himself and assumed that the, what on his version was a standing oral agreement, had been concluded, with its detailed terms in part reflected by the proposal as signed by him.
- [7] In terms of this purported agreement, the Plaintiff undertook to compile a final application for a Route Operator's Licence to the North West Gambling Board, on behalf of the Defendant (at that stage still a company to be formed or acquired by Buthelezi and Mhlongo).

- [8] At some stage after this Buthelezi and Mhlongo indeed proceeded to acquire the Defendant, an existing 'shelf company', registered already late in 2008 and at the time called Keldoron Properties 46 (Pty) Ltd (they later renamed it Bathusi Investments).
- [9] The Plaintiff proceeded to provide the service purportedly agreed upon to the Defendant: the application was indeed compiled and thereupon submitted by the Defendant, and was furthermore successful, as the Defendant was awarded the licence in quuestion on 27 May 2010.
- [10] In the course of this the Defendant twice paid the Plaintiff large sums for services rendered: R570 000.00 by 13 November 2009 and again 200 000 later on. The Plaintiff alleges that it is owed the amount claimed of R648 911.67 on invoices as the outstanding amount on a total agreed contract price of R1 150 000.00 plus VAT and the cost of disbursements.
- [11] The Plaintiff called one witness, Randeree to testify. The Defendant, although at various stages indicating that it would call Buthelezi and Mhlongo eventually elected to call neither, closing its case without leading any evidence.

[12] Against thhis background, what is at issue in this matter is the following:

[12.1] Wether a contract in the terms in part contained in a written proposal handed to Buthelezi and Mhlongo by Randeree in February 2009 was validly and bindingly concluded.

[12.2] Whether the Defendant can be held liable in terms of a contract concluded with Buthelezi and Mhlongo.

Was a contract concluded?

- [13] Mr Silver (acting with Mr Buthelezi) for the Defendant submitted that the proposal givento Buthelezi and Mhlongo by Randeree as an offer or quotation explicitly stated on its page 17: 'please sign and return to us as proof of acceptance'. To him this indicated that the proposal would constitute a binding contract only once signed by both

parties. Given that the proposal was never signed by either Buthelezi and Mhlongo or the Defendant and indeed never returned to the Plaintiff, no valid agreement came into being.

- [14] In response Mr West for the Plaintiff relied on two judgments in his submission that the contract came into being with its terms and conditions in part reflected by the written proposal despite the fact that the proposal was never signed by Buthelezi and Mhlongo. The first of these is the matter of Roberts v Martin [2005] ZAWCHC 12; 2005

- (4) SA 163 (C), where a written contract signed by only one party was nevertheless held valid, as it was received without it being gainsaid

by the non signing party and acted on by both parties.[1]

[15] The second is the matter of *Woods v Walters* 1921 AD 303, where it was held that where parties appear to have been agreed on the material terms of a contract, the onus to show that its

legal validity would wait until it is formally executed by signature on a written document lies upon the party that alleges that.[2]

[16] Against this background Mr West then pointed out that the only evidence before the court as to the validity of the contract is that of Randeree, who testified unequivocally that both Buthelezi and Mhlongo had accepted the terms and conditions of the proposal as part of the agreement between the parties and had agreed to return a signed copy to him.

[17] Buthelezi and Mhlongo could have but never did testify to put their version as to the conclusion of the contract before the court and to rebut Randeree's version. They also could have but did not rebut Randeree's evidence that the contract as set out in part in the proposal was acted on by both parties: that neither the defendant nor Buthelezi or Mhlongo ever queried the origin of services rendered, disbursements incurred or tax invoices rendered to the Defendant, all of which were in accordance with the terms and conditions of the purported agreement, the terms and conditions of which were in part set out in the written proposal.

[18] Mr West urged then this court to draw the inference that Buthelezi and Mhlongo's election not to testify on this point indicates that they could not rebut Randeree's testimony as to the conclusion of

the contract, so that his version should be accepted by this court, in particular as it pertains to the agreed contract fee of R1150 000.00 plus VAT and disbursements incurred in the process of rendering the agreed services.

[19] I must agree with Mr West. The only explanation for the fact that the

Plaintiff performed in full in terms of the agreement, in large part as set out in the written proposal and his conduct was never

repudiated by the Defendant or Buthelezi and Mhlongo (indeed he was twice paid large sums of money for services thus rendered) is that the contract indeed came into being as alleged by the Plaintiff. Buthelezi and Mhlongo's election not to testify to contradict this conclusion and the evidence of Randeree to this effect when they had the opportunity to do so only serves to confirm this conclusion. To this I must add that Randeree proved an excellent witness: despite Mr Silver's best efforts to the contrary under cross examination he was reliable and trustworthy.

[20] Accordingly I find that a contract came into being, the terms of which are in large part reflected in the written proposal handed to and discussed with Buthelezi and Mhlongo, despite the fact that this proposal as an offer or quotation was never signed by them and returned to the Defendant.

Can the Defendant, as opposed to Buthelezi and Mhlongo, be bound to the contract and liable in terms of it?

[21] The difficulty in this respect is that, at the time that the contract at issue was concluded (as I have found it was), although the Defendant (albeit under another name) already existed and was registered, Buthelezi and Mhlongo had not yet acquired it and, so it seems (the Plaintiff explicitly did not concede this as a matter of evidence) did not know of its existence.

[22] They did throughout explicitly represent to the Plaintiff that they were contracting on behalf of a company yet to be created or acquired

- in the written proposal (ie the written portion of the contract) this yet to be created or acquired 'principal' was throughout referred to as 'Newco (Pty) Ltd' in lieu of Buthelezi and Mhlongo at the time knowing who it would be.

[23] Can the Defendant, who only later, once acquired by Buthelezi and Mhlongo, 'stepped into their shoes', so to speak and who, at the time of conclusion of the contract, for the parties to that contract for

all intents and purposes did not yet exist be held bound to the contract and liable in terms of it.

[24] Mr West sought not to rely, as one would have expected, on the law of agent and principal to establish a link between the Defendant and the contract.

[25] Instead, he placed all his stock in the doctrine of ratification, ie that the Defendant had, through his conduct implicitly ratified the contract entered into without authority on its behalf by Buthelezi and Mhlongo, or failing that at least could be estopped from denying that it had so ratified it.

[26] In amplification of this Mr West pointed out that Buthelezi and Mhlongo at the time of conclusion of the contract did not act on behalf of an undisclosed principal that is, they did not hide the fact that they intended to act on behalf of an as yet unnamed other. Instead, they openly professed to be acting on behalf of a principal

for which they could not have had the authority to act, given that for their purposes this principal at the time did not yet exist (it existed, but they did not yet know of it and had not yet acquired it). That is why they purported to act on behalf of the fictional

'Newco'.

[27] Had they acted on behalf of an undisclosed principal, the doctrine of ratification could not apply.[3] However, their acting on behalf of a principal without authority to do so, although in the absence of authority it created no rights or obligations *mero motu* for the Defendant, did place them squarely within the purview of ratification: Ratification is precisely the act of a principal *ex post facto* agreeing to be bound by an agreement entered into on its behalf without authority.[4]

- [28] Relying on *Wilmot Motors (Pty) Ltd v Tucker's Fresh Meat Supply Ltd* 1969 (4) SA 474 (T) Mr West then proceeded to point out that ratification may occur either expressly or implicitly, through conduct and that a failure to repudiate a contract may be read as acquiescence in its terms and so tacit ratification.
- [29] Finally, Mr West pointed out that a person may also be estopped from denying that he had ratified an unauthorised contract.[5]
- [30] On this basis he then concluded that the uncontroverted evidence of Randeree as to performance on the contract being accepted by the Defendant and payment being made by it on its terms clearly indicates at least tacit ratification and failing that, that the Defendant, so having made a representation of ratification to the Plaintiff on which the Plaintiff then relied to its detriment, can at the very least be estopped from now denying that it had ratified the contract.
- [31] I find Mr West's submissions in this respect persuasive. One would have to look far to find clearer evidence of ratification by conduct than two payments for services rendered to the tune of a total of

R770 000.00. Were the Defendant to retort (it did not do so) that this conduct was in terms of another, ad hoc arrangement where it paid the Plaintiff for services as and when they were rendered rather than in terms of the contract, it would be bound on the basis of estoppel, as its conduct represented to the Plaintiff that it had ratified the contract, inducing in the Plaintiff further performance in terms of the contract to its detriment.

- [32] That this conclusion is correct is underscored by the fact that Mr Silver offered no substantive rejoinder to the Plaintiff's allegations (set out explicitly in its replication) regarding ratification and estoppel but limited himself instead to arguing that the Plaintiff had not pleaded ratification as cause of action in his particulars of claim, so that he could not now rely on it.

- [33] This formal retort does not hold up, for two reasons. First, ratification is not the cause of action that the Plaintiff relies on

- its cause of action, squarely pleaded in the particulars of claim, remains the contract. Ratification is pleaded in the replication not as itself a cause of action, but to establish that the contract as

cause of action existed. Second, ratification is extensively canvassed in the replication, as is the Defendant being estopped from

denying it.

- [34] Accordingly and for these reasons, judgment is granted in favour of the Plaintiff.

It is ordered that:

1. The Defendant pay the Plaintiff the amount of R648 911.67 together with interest at a rate of 15.5% per annum from the date of service of summons until final payment.
2. The Defendant pay the costs of suit.

JFD Brand

Acting Judge of the High Court

Appearances:

For the Plaintiff: Mr HP West

For the Defendant: Mr MD Silver

Mr BN Buthelezi

[1] At 168 169.

[2] At 305 306.

[3] Durity Alpha {Pty} Ltd v Vagg 1991

(2) SA 840 (A).

[4] The Law of South Africa , First Review, Volume 1, para 102

[5] Here with reference to Law of South Africa, First Review, Volume 1, para 111.

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