

SOUTH AFRICA / JUDGMENT

Circuit Environmental Engineering (Pty) Limited t/a Circuit Publishing v Pedal Power Association (5353/2003) [2007] ZAWCHC 88 (8 August 2007) [2007] ZAWCHC 88

COURT

Western Cape High Court, Cape Town

BEFORE

Motala

CASE / FILE NUMBER

5353/2003

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IN

THE HIGH COURT OF SOUTH AFRICA

(CAPE

OF GOOD HOPE PROVINCIAL DIVISION)

CASE:

5352/2003

In

the matter between:

CIRCUIT

ENVIRONMENTAL ENGINEERING

(PTY)

LIMITED T/A CIRCUIT PUBLISHING PLAINTIFF

Versus

PEDAL

POWER ASSOCIATION DEFENDANT

JUDGMENT

DELIVERED: 08 AUGUST 2007

MOTALA J

[1] Plaintiff, a company, claims payment of damages it suffered as a result of the alleged repudiation of a contract by defendant, a voluntary association of cyclists.

[2] Plaintiff avers that:-

(a) during September 2002, plaintiff, represented by Mr Ryan Beswick, submitted a written tender to defendant to publish a magazine

entitled "Life Cycle" for a period of three years;

(b) on 19 September 2002, defendant accepted the tender and a contract was thereby concluded resulting in plaintiff being appointed the publisher of the magazine for three years,

(c) during or about February or March 2003, defendant repudiated the contract by appointing another company, Touchline Media (Pty) Ltd ("Touchltne") to publish, the magazine;

(d) plaintiff accepted the repudiation and cancelled the contract.

[3] Defendant admits receipt of the tender and that it responded thereto. It avers, however,

(a) that its response did not constitute an unconditional acceptance of the tender, more particularly in that the tender was accepted subject to the following two conditions:

(I) that the October/November 2002 edition of the magazine be successfully published and distributed by 4 October 2002;

(ii) that a written contract be drawn up by defendant's attorney, Lawrence Whittaker, including escalation clauses and signed by the parties.

(b) that plaintiff lacks *locus standi* in that the tender was submitted by Ryan Beswick acting in his personal capacity, and not as the duly authorised representative of plaintiff.

[4] It is common cause that the November/December 2002 issue of the magazine was successfully published and distributed by Mr Beswick and that a written contract was never concluded.

[5] The basic dispute in regard to the contract is whether defendant's response to the tender resulted in the conclusion of a three year contract

In order to assess the cogency of the evidence on that issue, the history of the relationship between Mr Beswick and defendant prior to

the submission of the tender is of considerable importance.

During or about August or September 2001, in terms of an oral agreement, defendant appointed S.A. Cycling (Pty) Ltd, whose name was later changed to Purple Hat {Pty} Ltd, ("Purple Hat") and which was operated by Mr Beswick, to publish the magazine. The magazine was regularly published thereafter.

On 30 July 2002, defendant learned that Purple Hat would not be able to pay the printers of the magazine and that the August/September issue of the magazine would not be published. Defendant was obliged to pay about R30 000.00 to the printers in order to have the magazine published. Purple Hat was liquidated in August, 2002 and defendant was left without a publisher.

During the period between the conclusion of the oral agreement until the said liquidation, no less than seven written agreements were drafted by Mr Whittaker. None were signed as there were numerous provisions in the agreements drafted by Mr Whittaker which were unacceptable to Mr Beswick, especially a provision requiring him to be a surety for Purple Hat's obligations to defendant.

[6] Mr Beswick testified that he attended the annual general meeting of defendant on 12 September 2002. He asked Mr Frans Fouche, defendant's then chairman, whether he could submit a tender to publish the magazine again, Mr Fouche referred him to Mr Anthony Roberts who was then defendant's administrative manager. Subsequently Mr Beswick discussed the matter with Mr Roberts and told him that if he were given a three year contract he would ensure that the October/November 2002 issue, which was due in two weeks time, would be timely published. Mr Beswick thereafter submitted the tender to defendant.

[7] The tender was considered at a meeting of the executive committee of defendant on 19 September 2002. The relevant portion of the minutes of the meeting, which were drafted by Mr Roberts, reads as follows:-

'After debate the tender was accepted subject to the October/November edition being successfully published, printed and distributed, and a formal contract being drawn up by Lawrence Whittaker, including any escalation clauses, and signed by both parties.'

[8] The decision of the executive committee was communicated telephonically to Mr Beswick on the 20th September, 2002 by Mr Roberts. He did so before drafting the minutes.

Mr Roberts was unable to recall the precise words he used during the conversation with Mr Beswick. He was adamant, however, that he would have read from the notes he had taken at the meeting, as it has always been his practice to do so during a long career of negotiating contracts as a purchasing manager. He later used the notes to draft the minutes. He has no doubt that he must have communicated the gist of what is set out in the extract of the

minutes quoted in paragraph 7 above.

Mr Roberts was a good witness.

[9] Mr Fouche confirmed that at defendant's annual general meeting, he was asked by Mr Beswick whether he could submit a tender to publish the magazine again. Because of the defendant's recent experience with Purple Hat he felt uncomfortable and referred Mr Beswick to Mr Roberts.

Mr Fouche presided at the meeting on 19 September, 2002. He testified that not everyone at the meeting was happy to have further dealings with Mr Beswick and that from the outset he was absolutely adamant that a written contract be concluded. He was emphatic that the requirement of a written contract was, in his words "a very, very big condition with many, many clauses and many, many ifs and buts" The furnishing of guarantees was of particular importance.

Mr Fouche confirmed that the extract of the meeting, quoted in paragraph 7 above, correctly reflected the decision taken at the meeting.

Mr Fouche confirmed that Mr Whittaker had not been asked to draft the contract. He could not explain that omission.

Mr Fouche denied that when Mr Beswick came to see him after he had learnt that the publishing contract had been awarded to Touchline, he agreed with Mr Beswick that he had a three year contract with defendant.

Mr Fouche was an excellent witness. Indeed, Adv Katzew, who appeared for plaintiff did not criticise him or his evidence in any respect whatsoever.

[10] Mr Lawrence Whittaker, an experienced attorney who acted at all times for defendant, testified as to Mr Beswick's refusal to sign any one of the seven draft agreements referred to in paragraph 5 above. Upon the refusal of Mr Beswick and his co-director to provide personal suretyships, Mr Whittaker, asked for Purple Hat's financial statements. Those were unsatisfactory. He then inserted a clause guaranteeing performance by Purple Hat. That clause was also unacceptable to Mr Beswick,

Mr Whittaker denied drafting, or even seeing a draft, of an addendum to a contract concluded by Mr Beswick with Primedia, another publisher.

He also denied that he told Mr Beswick, during a telephone conversation, that Mr Beswick should tell Mr Fouche that he had a contract with defendant and should hold defendant thereto.

Mr Whittaker confirmed that at no stage after the meeting of the executive committee on 19 September 2002 was he asked by either Mr Beswick or defendant to draft a written contract between the parties. In fact, he was asked by defendant to see Mr Dave Beilairs, a member of defendant's executive committee and Mr Ingpen, a representative of Touchline, in order to negotiate and to draft a written contract between defendant and Touchline to publish the magazine.

Mr Whittaker was a good witness.

- [11] Mr Beswick testified that he could not recall the exact words used by Mr Roberts during the telephonic discussion referred to in paragraph 8 above. He said that what Mr Roberts conveyed to him was that his tender had been accepted but that defendant required the September/October issue of the magazine to be published by 4 October' and "warried" a "wriHeh agreeTnen'f to be drawn up" by iVlr Whittaker.

Mr Beswick averred that Mr Roberts did not convey to him that acceptance of his tender was conditional upon the conclusion of a written contract. He testified that the previous agreement between defendant and Purple Hat, (which seems to be a reference to one or other of the seven draft agreements), was 20-40 pages long and contained many provisions which he could not set out in his tender but "obviously needed to be in a written document" after further negotiations.

He added that he had asked Mr Whittaker to draft a written agreement.

Mr Beswick emphasised that he would not have undertaken to publish the September/October issue of the magazine without a three year contract or a higher fee.

Mr Beswick said that Mr Whittaker had either drawn up the addendum to the contract he had concluded with Primedia or had looked at it on his behalf.

He said also that after the alleged repudiation both Mr Whittaker and Mr Fouche assured him that he had a binding contract with defendant.

- [12] Counsel for the parties have referred to several authorities which considered whether an oral agreement or a provisional or an interim agreement, which the parties thereto agreed was to be reduced to writing was a binding agreement or lacked legal efficacy until the written agreement was concluded.

See for example:-

Goldblaft v Freemantfe 192Q AD 123 at 129; Oe Briun v Brink 1925 AD 63; OK Bazaars v Bioch 1929 WLD 37 at First National Bank v Avtioalou 2000(1) SA 989(c); Pitout v Northcape Livestock Co-operative Ltd 1977(4) SA 842(A) at 850-851; Lamburq (Edms) Bpk v BMW (Suid-Afrika)(Edms) Bpk 1997(4) SA 141 (SCA). Malcofus v Cooper Mothers 1974(4) SA 52(C) at 56D-57B; Cell C (Fty)fLtd v Zulu 2006(4) All SA 417 (SCA) at 421-d-e; CGEE Airshorn Equipment v GKN Sarley (PMLtti 1987(1) SA 81(A); MV Mavigator (No, 1) Wellness International Network Ltd v MV -iSfavigate-r-and-AR0th6r-2QQ4fS>-SA-1-OfCV:- South-African-Bua.gulaxi Association v Cape of Good Hope Bank 1987(4) SA 315(C).

A perusaf of the above authorities indicates thai the learned judges in each case were applying a well-established principle - that the court must determine the intention of the parties on the basis of the facts of each case.

[13] Mr Beswick was not a satisfactory witness, i cannot accept those portions of his evidence which conflict with the evidence of defendant's witnesses. Nevertheless, I accept, that he has at all times honestly believed that he had a three year contract, the period for which he had tendered. During the telephonic conversation with Mr Roberts, it is reasonably possible that he concluded that the tender, including, the three year provision, had been accepted by defendant.

[14] However, in my view, he was wrong in coming to that conclusion. The minutes of the meeting of defendant's executive committee on 19 September 2002, quoted in paragraph 7 above, are unambiguous -the tender was accepted subject to two conditions, one of which was that a formal contract be drawn up by Mr Whittaker and signed by the parties. Any" doubt as To the" 'effect "tnefeof Ts "eTfrnTriateft" by "ih'S evidence of Mr Fouche, who presided at the meeting that, because of the damage suffered by defendant as a result of Purple Hat's liquidation, it was essential that a written contract which included the provision of a suretyship or guarantees, be concluded.

It follows that a three year contract did not come into existence and plaintiff was entitled to conclude a contract with Touchline.

[15] In view of the above conclusion, it is not necessary to consider defendant's denial of plaintiffs locus standi.

[16] This matter was originally set down for hearing on 4 April 2006. The learned judge to whom the matter had been allocated refused to hear the matter on that day as plaintiff had neglected to comply with the provisions of Rule 62(4). Accordingly, defendant contends that the costs occasioned by the postponement should be borne by plaintiff-Plaintiff contends, however, that it would have succeeded

in an application for the matter to be postponed at defendant's expense as defendant had discovered several documents at a late stage

- only a few days before the trial date.

Mr Beswick was familiar with most but not all of those documents.

The above information was placed before me by the parties' attorneys after the conclusion of the trial. I am unable on the basis of that information to determine, with any degree of confidence, whether or not defendant would have succeeded in the said application. However, it is reasonably possible that the matter would have stood down, at least for a few hours, to enable defendant's legal representation to consider the documents they had not seen previously.

It is clear, however, that both parties have failed to comply timeously or adequately with the rules of Court, an occurrence which

increasingly hampers the efficient functioning of the courts.

In my view, faking all the factors into account, each party should bear its own costs in this respect.

[17] Plaintiffs claim is dismissed with costs, including the costs of two counsel save and except that each party shall bear its own costs occasioned by the postponement of this matter on 4~April 2006'.

A.M. MOTALA

Judge of the High Court

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